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Habitual Residence as a Personal Connecting Factor in Private International Law: Significance and Future Direction

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Abstract

The notion of 'Habitual residence' is playing a significant role in determining applicable law in the conflict of law issues as one of the most persuasive personal connecting factors. This factor is being widely addressed in the European countries in their respective courts in many cases involving foreign element. This study mainly focuses on the clarification and understanding of the term 'habitual residence' in considering the case laws as it is the less addressed issue in the Asian context. It further, analyses the growth and implications of habitual residence in the international, regional, and domestic legal regime in the European continent and beyond. The aim of this study is to address in depth this vital personal connecting factor for clear understanding of the term to the researchers, policy makers and law students. The possible outcome of this paper is that the learners will receive an apparent idea about habitual residence and its application in the conflict of law cases. This is a doctrinal research following the qualitative phenomena, therefore, relevant books, articles have been consulted and analysed.

Keywords: Habitual Residence, Conflict of Laws, Private International Law, Connecting Factor, Jurisdiction.

1. Introduction

People, in the globalized world, are now more frequent to mobile internationally and make diverse connections with different places or countries. A number of reasons behind these interchanging of places are for instance, contractual employment, study, business etc. In the course of staying in a foreign country one must maintain a residence status under a contract for which he or she emanate to this new jurisdiction or by acquiring a new domicile or one can establish a matrimonial relationship or launch office for business. By doing all these activities a person tied up with personal, commercial and other connections in the new country as well as connection with his or her country of birth. In the field of private International law these connections are known as "connecting factors".[1] These connecting factors, in case of conflict of laws arise, are considered when courts grabbed a claim contains a foreign element. In addition, these connecting factors assist the courts to enumerate that how many factors are available to the person with the place in order to apply the choice of law rules or select *lex causae* or forum convenience. There are three main types of connecting factors have been discussed by the proponents private international law such as domicile, nationality and residence. The Habitual residence is a new liberal concept that developed from the Hague Convention 1980. In order to

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[1] Maebh Harding, *Conflict of Laws* (5th edition, Routledge, Abingdon, 2014), 15

determine the jurisdiction of the court habitual residence is the most convenience and less complex connecting factors in private International law. In this study researchers tries to evaluate the significance of Habitual residence in resolving personal transnational problems and examine the case laws of common and civil law system. The researchers further investigate the position of habitual residence under International Convention.

2. Implications of Personal Connecting Factors

The underlying objective of connecting factors in Private International Law is to determine the closest connection of an individual with a specific jurisdiction in certain situation which leads to assert the jurisdiction of a court and exercise of choice of law question. Private international law, therefore, entails three main functions for settling a choice of law problem. First of all, the court, when a case arise before it involving a foreign element, has to examine and ascertain the conditions regarding connecting factors of the parties and their cause of action under which the court is competent to entertain problem. The court, in second stage, has to deal with the classification of cause of actions for the allocation of correct legal category. Finally, it has settled a choice of law question by selecting a legal system that will administrate the dispute.[2] However, Agrawal pointed out another function, is that the conflict of law rules should consider the circumstances in which a foreign judgement can be accepted as influential to the dispute.[3]

The choice of law rules govern the litigations relating to the issues of person's birth, death, marriage, divorce, succession, bankruptcy, contract and so on. These rules, to resolute the conflict of laws question, lead to realistic and appropriate laws depending on the connecting factors of the individual. In this regard most of the legal system deals with these personal matters differently and according to their own perspective.[4] Nevertheless, the ascertainments of the connecting factors are required to testify the criterion of appropriateness. Again the test of appropriateness depends on the laws of particular jurisdiction and it is also varies in different areas of law. Therefore, it is logical that the position of a person under a conflict of law process should be wholly or in part determined by the courts of their own country and by own laws. Nonetheless, it will depend on the person's closest substantial connection with the law of the country to which he primarily belonged.[5]

As far as personal law is concern, connecting factors lead to the proper law, most appropriate to govern and control individual's contracts. Connecting factors are further lead to ensure jurisdiction of the court by applying it and influence to recognise a foreign judgment by an appropriate court to apply. Habitual residence, therefore, played a significant role in the Hague Convention of Private International law. It was perceived as, substitute to nationality and

[2]Abdul Ghafur Hamid, "Stages of a Conflict of Laws Action", Lecture Materials, International Islamic University Malaysia, 2017,P.2

[3]K.B. Agrawal and Vandana Singh, *Private International Law in India*, (Wolters Kluwer, the Netherland, 2010), 66

[4]Peter North and J.J. Facett, *Cheshire and North's Private International law*, (Butterworth, 13th edition, London,1999), 5

[5]Jonathon Hall and C.M.V. Clarkson, *The Conflict of Laws*, (Oxford University Press, 3rd edition, United States, 2006), 18-19

complexities of intention, origin, dependency and prolepsis in domicile, one of the most effective and less difficult method to select a conflict of laws problem.[6] During the last four decades it has been recognised and accepted by many jurisdictions under common law system. For instance, in Britain it was found an increasing trend in the legislations. The habitual residence is as a personal connecting factor for the areas concerning matrimonial jurisdiction, recognition of foreign divorce, and succession. In further, Irish legal system, by the Succession Act, 1965, also adopted habitual residence as connecting factor.[7] Furthermore, other European countries correspondingly assumed the concept into their own legislation. Gravson, a British authority, observed that habitual residence "appears to be the most appropriate available concept to meet the demand of a fluid modern society".[8] It has some advantages of the habitual residence which like it remedies the adverse effects of abduction and it is conformity with the spirit of Private International Law, c. it is prevent the wrongful retention or removal of child.[9]

3. Genesis and Evaluation of the Concept of Habitual Residence

Habitual residence is a relatively new concept as connecting factors for the determination of applicable law to solve problems within the Private International law. The concept had emerged by the influence of Hague Conferences in the form of diplomatic session started from 1893. The common objectives of those conferences were to eliminate the impediments in respect of private relations and commercial transactions through bilateral and multilateral treaties in accordance with forthright principles which are acceptable to parties. It has another objective to make a progressive unification and harmonization among the laws and principles of private international law.[10] In the context of Russian revolution which produced a numerous number of stateless and mass migrations resulted countless nationality cases? The Hague Conference tried to solve those problems and amended the convention to cover stateless and multiple nationality cases. In this regard Karl Neumeyer of Germany suggested that the "habitual residence" can be preferable over domicile as a more factual and manageable criterion to solve the above problem.[11]

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[6] "Consultation paper on Domicile and Habitual residence", Law Reform Commission, United Kingdom, http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm

[7] Domicile and Matrimonial Proceedings Act 1973 (c. 45), Recognition of Divorces and Legal Separations Act 1971, section 2 (c. 53), Wills Act 1963, section 1 (c. 44) (formal validity of wills).

[8] Ronald Harry Graveson, *Conflict of Laws: Private International Law*, (Sweet & Maxwell, 7th ed., London, 1974), 194

[9] Zaleha Kamarudin, *The Hague Children's Convention and Muslim Countries, Expert's Roundtable Discussion on the Hague Children's Conventions*, 25th October 2017,conference paper, International Islamic University Malaysia.

[10] Hans van Loon, "The Hague Conference on Private International Law", *Hague justice Journal*, Vol. 2, No 2, 2007, http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2(2)/Article%20van%20Loon-EN.pdf

[11] Kurt H. Nadelmann, "Habitual Residence and Nationality as Tests at the Hague: The 1968 Convention on Recognition of Divorces", 47 Tex. L. Rev. 766, 778 (1969), http://heinonline.org

However, the term 'habitual residence' first used in article 3 and 6 of the Convention Relating to Settlement of the Conflict of the Laws Concerning Marriage in 1902[12] which was replaced by the Marriage Convention of 1978. The provisions explored about the *lex loci celebrationis* that marriage should be celebrated by the spouses in a state of which one of them has its nationality and fulfil the substantive requirements of the domestic law or habitual residence. In addition, contracting state has a right of derogation form applying the requirements for those spouses who is neither a national of that State nor habitually resides there.

Thereafter, the notion secured its place in numerous provisions of many EU national and International regulations and treaties. For instance, Article 2 and 3 of the Divorce Convention of 1902 replaced by the Divorce Convention of 1970 incorporated the term of "habitual residence". Under the convention Divorce and legal separation shall be accepted by all member states when a plaintiff or defendant has a habitual residence in the state of origin. Plaintiff has to fulfil two other conditions that the period of habitual residence should not be less than one year before the date of proceedings and the spouses last habitually resided there.[13] Thereafter, in article 2 of the Convention Relating to the Conflict of the Laws with Regard to the Effect of Marriage on the Rights and Duties of the Spouses in their Personal Relationship and with Regard to their Estate in 1905 which was substituted by Matrimonial Property Regimes Convention in 1978,[14] By virtue of this convention it is clear that it will apply to spouse having a nationality, or habitual residence and the law applicable to matrimonial property where spouses are free to choose the law of the state in which either spouse has his habitual residence at the time of selection.

On the other hand article 5, 6, and 7 of the Convention relating to the settlement of guardianship of minors 1902 replaced by the Protection of Minors Convention of 1961 and now by the Convention on the Protection of Children of 1996 enhanced the concept of habitual residence one steps ahead. In terms of jurisdiction under this convention, the states have jurisdiction to take action for the protection of child's person and property to which the child has his habitual residence. In addition, if the child has got a new habitual residence in other contracting state, authority of providing new habitual residence has jurisdiction. The convention further, move forward and talked about the refugee children or children whose habitual residence cannot be established that since they are internationally displaced, the jurisdiction will remain with the contracting state where they are at present. In addition, a contracting state where he had a habitual residence holds its jurisdiction in the case of wrongful removal or retention of a child until he acquired another habitual residence in another contracting state.[15] Similarly, article 5, 6,

[12]Rafał Mańko, "Habitual residence as connecting factor in EU civil justice measures, Library Briefing", *Library of the European Parliament*, 22/01/2013, http://www.europarl.europa.

[13] Article 2 and 3 of the Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions concerning divorce and separation (replaced by the Divorce Convention of 1970)

[14] Article 2 "The Convention applies even if the nationality or the habitual residence of the spouses or the law to be applied by virtue of the following Articles is not that of a Contracting State".

[15] Article 5, 6 & 7 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, https://www.hcch.net/en/instruments/conventions/full-text/?cid=70

10, 11, and 13 of the Convention relation to civil rights and similar measures of protection in 1905 substituted by the Protection of Adults Convention of 2000.[16] Article 32 of the convention relating to civil procedure 1905 substituted by the Convention on Civil Procedure of 1954 and finally replaced by Access to Justice Convention of 2000,[17] article 1 of the Convention Relating to the Status of Refugees 1951 and Article 3, 4, 5, 8, 14, 15, 25, and 31, of the Convention of on the Civil Aspects of International Child Abduction 1980 also mention the term of habitual residence.

Thereafter, used as principle or secondary connecting factor in European Union Regulations regarding conflict of laws. Article 19 of the Rome I regulation expressed about the habitual residence of natural person and artificial person like body corporate in the case of contractual obligation. It stated that "the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business". And again "for the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract". Although the regulation has not defined clearly but should be determined by factual criteria that is where the person resides actually and more permanent basis and which is the centre of his intended residence, family life, work and so on.[18] Beside this para 19, 21,25, 28 and 39 of the preamble and article 4, 5, 6, 7, 10, dealt with the applicable laws in the absence of choice, contract of carriage, consumer contract, insurance contract, consent and material validity respectively.[19]

Article 23 referenced habitual residency in the same way as Rome I did, while paragraphs 20, 33 of the preamble, and articles 4, 5, 10, and 12 specified the term that can be treated as a personal connecting factor for the purpose in question under the Rome II Regulation.[20] Similarly, the word "habitual residence" was used and applied in Articles 3, 6, 7, 14, and 19 of the Rome III Regulation.[21] The term was also included in the Regulation on jurisdiction and the recognition

[16] Article 5, 6, 10, 11, &13, Convention of 13 January 2000 on the International Protection of Adults, https://www.hcch.net/en/instruments/conventions/full-text/?cid=71

[17] Article 32 Convention of 17 July 1905 relating to civil procedure (replaced by, and the Service Convention 1 March of 1965, the Evidence Convention of 1970 and the Access to Justice Convention of 2000, https://www.hcch.net/en/instruments/conventions/full-text/?cid=33

[18] Xandra E. Kramer, "The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued", *Nederlands International Privaatrecht* (NIPR) 2008, no. 4, p. 414-424, https://www.academia.edu/1555125/

[19] Regulation (EC) No 593/2008 of The European Parliament and of the Council of 17 June 2008, http://webarchive.nationalarchives.gov.uk/20110201153849/http://www.justice.gov.uk/publications/docs/guidance-law-contractual-obligations-romei.pdf

[20] Regulation on the law applicable to non-contractual obligations (Rome II); Regulation (EC) No 864/2007 of The European Parliament and of The Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *Official Journal of the European Union*, L 199/40, 31.7.2007

[21] Regulation on the law applicable to divorce and separation ("Rome III"); Council of Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, http://www.eurprocedure.be/

and enforcement of judgments in matrimonial matters and matters of parental responsibility[22], as well as the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations.[23] Nonetheless, most EU regulations thereafter incorporate the phrase as connecting factors for determining conflict of laws, such as Matrimonial Property Regimes, Insolvency Regulation, the European Arrest Warrant, Staff Regulations of EU officials, and so on.

4. Definition of Habitual Residence

Habitual Residence as a new connecting factor has emerged over the last forty years. At the beginning the concept was enhanced by the Hague Conference on Private International Law as a compromise between the domicile and nationality of common and civil law system respectively. During the time when uniform rules were introduced for the matter relating to divorce, separation and annulment, habitual residence was taken as main connecting factor for chose of law question. Although the term Habitual Residence has not been defined in the Regulations clearly except few indications. However, the concept gradually developed through case laws in different jurisdiction especially the Europe in EU Regulations and England in English Laws. We would like to focus on decisions of both jurisdictions in the matter of habitual residence.

4.1. Definition in the Europe Union

The meaning of habitual residence in the EU regulations is a place where the person has established his permanent or habitual canter of Interests. The determination of habitual residence is based on subject matter of the cases. In the EU zone the aim and scheme of community legislation has to be considered in ascertaining the habitual residence. Therefore, in the case of employment rights the place (habitual residence) employment has taken into consideration whereas in the case relating to habitual residence of children, the best interest of the children has given utmost priority.[24] At present most of the EU Regulations have adopted habitual residence as a main connecting factor determining governing law or choice of law. The term has been given an autonomous and uniform meaning and used in the EU legislation through a number of cases of Court of Justice of the European Union (CJEU). We are now mentioned some of the leading cases containing the meaning of habitual residence.

[22] Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Access to European Union Law, *Official Journal L 338* , 23/12/2003 P. 0001 - 0029; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R2201

[23] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the European Union, L 7/1,10.1.2009, http://eur-lex.europa.eu/legal-content

[24] Maebh Harding, *Conflict of Laws*, Op. Cit. 26

4.1.1. *Magdalena Fernandez Vs Commission*[25]

In this case the European Court of Justice (ECJ) observed that a person's habitual residence is the place which the person has established as the permanent or habitual centre of his interests. Therefore, any change of temporary nature would not affect the status of habitual residence. The case was for the realization of expatriation allowance to the employees for additional expense and inconvenience of taking up employment with the communities under Article 69 of the Staff Regulations where they obliged to change their residence and move to the country of employment and to integrate themselves in their new environment. Therefore, this case determines the habitual residence of applicant in consideration of the place of employment as a centre of interest.

The Court ruled that the idea of habitual residence, as consistently construed in Community case-law, is an issue of fact, and that the actual place of residence of the individual involved must be considered. The court determined that the petitioner had regularly resided in Belgium from 1 November 1980 to 30 October 1985. His nine-month absence in Belgium has resulted in an irregular absence from the country of work. As a result, the appeal court determined that denying his usual residence in Belgium due to such irregular absence is insufficient for the purposes of Article 4(1)(a) of Annex VII to the Staff Regulations. As a result, the applicant requested that the Commission provide him compensation for expatriation in the form of an *ad personam* allowance equivalent to 12% of his total basic income owing to his change of domicile.

The court observed that in order to determine the payment, the meaning of habitual residence as referred to in Article 4(1) (a) of Annex VII to the Staff Regulations must be understood. Under the Article, condition for awarding the allowance is related to the habitual residence of the applicant. Habitual residence is the place where the person concerned has established a permanent or habitual centre of his interests with the intention that it should remain so. Nevertheless, court opined that for the purpose of ascertain such residence, all the factual circumstances which constitute it must take into account before takes up of his post to other jurisdiction. The Court also stated that a brief and irregular absence from the country of employment does not imply that the official concerned has relocated the centre of his interests and cannot be regarded as terminating his habitual residence in that State for the purposes of the Staff Regulations.

From this case we find two basic elements for habitual residence

a. It should be permanent or habitual centre of any once interests
b. Intention to be remain there permanently or habitually
c. Temporary absence will not affect the habitual residence status
d. The reference period is nine month which is not enough to loos habitual residence

[25]*Pedro Magdalena Fernández v Commission of the European Communities*C-452/93P,[1994] ECR I-4295 [22], http://curia.europa.eu/

4.1.2*Hermann Witte v European Parliament Official*

In a similar case, it was held in *Hermann Witte v European Parliament Official* that irregular and brief absences from the country of employment will not be sufficient to deprive the official's habitual residence in the country of employment if he has no intention to establish the permanent centre of his interest in another state under the Stuff Regulation. Moreover, the court ruled that "an official who is not and has never been a national of the state in whose territory the place where he is employed in situated can claim the expatriation allowance only if he has neither habitually resided nor carried on his main occupation within the European territory of the state".[26] In this case reference period is five years and three or four months when the applicant employed in Germany from 1976 to 1981. However at the same time applicant established his matrimonial home in Luxembourg which proved his intention and centre of interest in Luxembourg.

4.2. Definition under English Law

The typical use of the phrase "habitual residence" in English law refers to a factual or situational actuality. In the *Kapur v. Kapur* decision, the term "habitual residence" was defined as a voluntary habitation with a degree of established purpose for a significant amount of time. As a matter of fact English definition of habitual residence is used in those cases which related with the Hague Convention on the Civil Aspects of International Child Abduction powered by the Child Abduction and Custody Act 1985. These cases are fall outside the Brussels II bis regulation, however, by virtue of article 61 the effect shall be continue stated that "the agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation". Nevertheless, the Child Abduction Convention applies to a child who was a habitually resident within a contracting state immediately before anything happen. Article 4 of the convention stated that "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years".[27] Therefore, it is clear that before making any order regarding to a conflict of law problem in relation to a child under the Child abduction Convention, court has to determine whether concern child has any habitual residence or not in a contraction State.

English law has taken the meaning of "ordinary of residence" under the Children Act 1989 as "habitual residence". It was decided in the case of *Re LM (A Child)* that 'ordinary residence' is broadly synonymous to 'habitual residence'.[28] English law on habitual residence actually comes from the decision of the following cases *Akbarali v Brent London Borough Council, Abdullah v Shropshire County Council, Shabpar v Barnet London Borough Council, Jitendra Shah v Barnet*

[26]*Hermann Witte v European Parliament*, Case 188/83,Judgment of the Court (Third Chamber) of 9 October 1984, European Court Reports 1984 -03465, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61983CJ0188

[27] Article 4 of Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

[28] Re LM (A Child) [2013] EWHC 646 (Fam)

London Borough Council, Barnet London Borough Council v Nilish Shah where these cases discussed the meaning of "ordinary residence" in the context of local authority education grants.[29]The term "habitual residence" in relation to family law, however, has its roots in the *Shaha v. Bernet Borough Council* case. In that case, Lord Scarman noted that "ordinarily resident" refers to a man's place of residence in a specific location or nation that he has chosen voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.[30] The same meaning taken by the English law in 'habitual residence' in *Kapur v Kapur* case that "habitual residence means a voluntary residence, with a degree of settled purpose".

4.2.1. *Re A Abduction: Habitual Residence Case 1996*[31]

English law was adhered to by the English Court in determining habitual residence. The English Court determined that the applicant's family had habitually resided in Iceland throughout his deployment there and not in Michigan in the aforementioned case concerning the unlawful removal of a kid from Iceland and the subsequent return of the child's custody to Michigan in the United States. Whereas Michigan Circuit Court orders that the habitual residence of the family is Michigan under the same State law. Under Michigan law habitual residence does not left even if there was no presence there because the presence of the family in Iceland was a part of an overseas Military posting.

The fact in brief is the applicant (husband) came to England in 1988 and married in 1989 with an English lady. They lived together in England until 1993 with three minor children. Thereafter, applicant was posted to Iceland and before relocation there he along his family visited two month short vacation in Michigan. Before filing a divorce petition in 1995 to the Michigan Circuit Court the family still living in Iceland. In the application he seeks an order for returning the children to US. English judge Cazalet J. in this case observed that the term habitual residence in the Child Abduction and Custody Act 1989 required psychical existence under English law. In this same line when the family was settled in Iceland there was no habitual residence in Michigan. The court further held that a child's habitual residence in necessarily the same as that of its parents. The applicant argued that because of the compulsive element of his overseas postings he had retained his and his family original habitual residence in Michigan. The court rejected the argument on the ground that the as terms of the service he had accepted that he would be posted to different countries which is voluntary. And in fact his family were habitually resident in Iceland from 1993 and at the time of proceeding Iceland was not party to the Hague Convention.

[29] [1983] 2 AC 309, [1983] 2 WLR 16, [1983] 1 All ER 226, HL (Shah)

[30] Shah v Barnet London Borough Council [1983] 1 All ER 226 (HL)

[31] Re A. (Minors) (Abduction: Habitual Residence) [1996] 1 WLR 25

4.2.2*Re Abduction: Habitual Residence: Consent*

In a similar situation in the case of *Re A Abduction: Habitual Residence: Consent* [32]where the applicant filed a petition under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for the return of his daughter, aged four, who had been living with her mother in Wales for a year. Shortly the fact is the applicant was a father of US citizen got married with an English lady. At the time of marriage she had an immigrant visa to remain in the USA for a period of up to 90 days at any one time. Because of this visa problem the mother and child had left the USA. In USA the family lived five times between September 2003 and October 2004. The mother and father separated in December 2004, whereupon the father returned to the USA leaving the mother and child in Wales. Father claimed that their habitual residence is US and the mother wrongfully retained the child.

The court determined that a person establishes habitual residency when they willingly relocate to a certain nation for a predetermined period of time, whether permanent or temporary, or even temporarily. The court determined that the petitioner in this case travelled to the United States in 2003 with the clear goal of settling there permanently. That goal persisted until the mother decided in December 2004 that she had no desire to go back to the United States. The mother had been living in the United States regularly before her absences from the country did not affect it. The mother contended that rather than being guests with no right to stay, neither she nor the kid had been habitually residents in the USA at the relevant period. Alternatively, though, she regularly resided in Wales as well as the USA. In addition, she contended that the father had granted permission for the kid to be kept in Wales and that ordering the child's return to the United States would put her in an untenable situation and put her at serious risk of bodily or psychological damage. Regarding the permission, the court determined that in order for the court to use its discretion under Article 13 of the Hague Convention, it must be explicit, unambiguous, and informed. The father had agreed to the child remaining in Wales with her mother.

5. Habitual Residence Test

Although the term ‘habitually resident’ has not defined clearly in the English or EU legislation. Nevertheless, the case laws of both jurisdictions developed the term having various factors in determining the habitual residence. These case laws have shown the factors that have to be considering before assessing a habitual residence status. Those key grounds area. the length and continuity of residence, b. the person’s future intentions, c. their employment prospects, d. their reasons for coming to the UK, e. where the person’s ‘centre of interest’ lies. In further, with regard to ‘intention’ or ‘settle intention’ to reside, and an ‘appreciable period of time’, case laws have provides a guideline on what constitute the above phrases to be meaningful to prove a habitual residence. However, the leading cases summarised that these phrases exclusively depend on the facts and circumstances of each individual case along with other factors. In further, there is no minimum time frame to establish one’s habitual residence. Therefore, it could even be a matter of weeks. The decision of Social Security Commissioner suggested that a period

[32] Re A (Abduction: Habitual Residence: Consent) [2006] 2 FLR 1 21/12/2005

of one to three months is likely to be appropriate to demonstrate a person's habitual residence. In this regard individual required to provide persuasive reason for serving a long period of residence.[33] In 2004 when European Union broadened its scope, the legislation governing entitlement to benefits was amended and stated that "no person can be habitually resident in the Common Travel Area[34] unless they also have a right to reside there. This change brought two stages of habitual residence test: Firstly, an initial test to determine whether the person has a 'right to reside', and secondly, the original Habitual Residence Test.

Thus any person who does not have a right to reside automatically fails the Habitual Residence Test. In further, the test of habitual residence was change in 2006 according to the new Rights of Residence Directive.[35] The new Directive came together with the EC Directives of free movement and new rights of residence for European Economic Area (EEA) nationals. The most significant change was the introduction of a right of residence for the first three months for everyone, including economically inactive people. Amendments to the Habitual Residence Test ensured, however, that persons who have a right to reside solely on the basis of the new three-month right of residence will not satisfy the first stage of the test. The amendments retained the basic structure of the Habitual Residence Test post 1 May 2004.[36]

The habitual residence test was introduced in UK by the Conservative party in 1994. Draft regulation introduced "habitual residence test" as a condition for entitlement to Income Support, Housing Benefit, and Council Tax Benefit were put to the Social Security Advisory Committee (SSAC) for consideration.[37] Thereafter, Labour Government in 1997 reviewed the Habitual Residence Test and included in its wide-ranging review of the social security system. The proposed changes were a. people coming back to the UK from any country and re-establishing their ties here should be treated as habitually resident as soon as they return, b. people deported to the UK would be treated as habitually resident. So would people brought here from a place of civil unrest, c. the Benefits Agency would only apply the test during the first two years of a person was in the UK, instead of the first five years, d. the Government would make further administrative changes.[38]

As regards the application of the test it is applied to those people who have been resident in the Common Travel Area (CTA) including British citizens for two years or less, and who claim any one of the following benefits/services such as a. income Support, b. income-based jobseeker's allowance, c. income-related employment and support allowance, d. pension credit, e. housing benefit, f. council tax Benefit, and g. access to local authority housing. In order to determine one's habitual residence there is no definitive list of factors, therefore, the Department for Work

[33] Steven Kennedy, "The Habitual Residence Test", SN/SP/416, 18 May 2011, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00416#fullreport

[34] The Common Travel Area (CTA) is an open borders area comprising the United Kingdom of Great Britain and Northern Ireland, Ireland, the Isle of Man, and the Channel Islands.

[35] Rights of Residence Directive, 2004/38/EC

[36] Steven Kennedy, Op. Cit. 2011, p.5.

[37] The draft Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 199

[38] Steven Kennedy, Op. Cit. 2011, p.6.

and Pensions (DWP) or local authority will look at each case individually and consider all the relevant facts in the light of the case law before coming to a decision. The decision about whether or not someone is habitually resident has to be made on the balance of probabilities, and the onus of proof lies with the DWP or local authority decision maker.

The factors that the European case laws have established mentioned in the beginning of this point. However, the Authority of Housing and Council Tax Benefit focuses some of the main points arising from judgments of European Courts relating to Habitual Residence: Here are some of the key points from existing European case law:

a. There is no set definition of habitual residence
b. Each case must be looked at on its own merits
c. The facts and nature of a person's residence
d. Habitual residence implies someone has made or is making a settled home
e. There is no requirement for someone to only have one home but the home in concerned considering must be genuine for the time being
f. The length, continuity and general nature of where someone lives is more important than his or her future intentions
g. A person should have lived somewhere for an appreciable period of time but how long this is must not be defined. It might have a different meaning in different cases
h. The claimant should be able to show a stable pattern of residence.[39]

The Housing and Council Tax Benefit training module outlines the areas decision makers would need to explore when interviewing claimants to determine whether they are habitually resident:[40] Authority should ask the questions to the applicant under the following issues.

1. **Length and continuity of residence:** the relevant questions with regard to the matter are: (a) where have you lived during the last 5 years? , (b) If you have lived in more than one country, how long did you spend in the different countries? (c) Have you ever lived in the UK before? If so, how long for and how did you support yourself?
2. **Employment:** the questions are divided into four sections are:

I. When the claimant has a job the questions are:

a. What is the job title? b. How long have they been employed? c. whether there is a fixed-term contract; and d. what is the schedule of a typical working week?

II. When the claimant has worked in the past questions are:

a. how many different jobs they have had? b. how long each lasted? c. what are the reasons for leaving; and d. what steps they are taking to find new employment?

III. When the claimant is a work seeker the questions are:

a. Whether they have been offered a job, b. what enquiries they made about job availability in the UK? c. whether their job prospects are better in the UK than the country just left, d.

[39] Department for Work and Pensions, HB & CTB Training Module 3.4, Version 3.0

[40] Department for Work and Pensions, HB & CTB Training Module 3.4, Version 3.0, Para 4.85, https://www.gov.uk/government/publications/housing-benefit-subsidy-guidance-manual-2015-to-2016

what steps they have taken to find work? e. whether they have registered with a Job Centre; and f. what qualifications they have appropriate to working in the UK?

IV. When the claimant worked before coming to the UK quire will be:

a. What was their last job? b. why they left the job? c. whether the job is still available and d. what prospect there is of finding similar work in the UK?

3. **Reasons for coming to the UK:** If the applicant came to the UK to look for work the questions will be: a. what preparations were made before coming to the UK? b. whether they had established that work would be available here, c. what are their intentions for financial support in the meantime?

4. **Future Intentions:** regarding future intention in terms of settling permanent residence the question will be: a. how long are they intending to stay? b. Will they still have links with any other countries? c. If so, how often and for how long are they planning to visit that country?

5. **Centre of Interest:** For determining the centre of interest, answer to the following questions will assists to bring up a conclusion. a. Where are all their belongings/personal possessions? b. If not in the UK, how do they plan to transport them over? c. Do they have family already living in the UK? d. what are the detail about a partner or children who aren't living with them right now? e. Do they have relatives in the UK? f. Do they own property anywhere? g. Have they made any substantial purchases since arriving in the UK?

5.1. Commissioner Case Test:[41]

In this case commissioner observed that in most significant factors for habitual residence are general natures of actual residence rather that intention. He further held that "an appreciable period of time" along with a settled intention will be necessary to establish habitual residence. However, there is no definition of what constitutes an "appreciable period of time". Therefore, appreciable time will be determined considering the fact and circumstances of each individual case. Finally, the decision suggested that for an English citizen it might be sufficient for habitual residence that he reside in UK for three to six months and for others "whose main roots and family ties are overseas" twelve months or more might be required".

5.2. The Swaddling Case Test [42]

We now want to examine the manner and degree to which the requirements for habitual residency have been taken into account in the present case. The case examined the duration and purpose of determining habitual residency. The case included the fact that English national Robin Swaddling had established his regular abode and was employed in France. He went back to his home nation of the UK in search of employment. He lived in the UK with his family. He

[41] Commissioner's decision CIS/1067/1995

[42] [1999] ECR 1-1075[29], http://curia.europa.eu/juris/showPdf

made a public declaration upon his return that he would never look for employment overseas. He requested the income advantage that Regulation No. 1408/71's Article 10a mentions. His application was turned down because he had not lived in the UK for a significant amount of time. According to the court, these individuals shouldn't always need to finish a "appreciable period of residence" in order to be eligible for certain benefits. Furthermore, the coordination of the social security systems across Europe is covered under the aforementioned rule.[43]Commissioner Mesher concluded by stating that such individuals could not have their benefits withheld simply for failing to fulfil a "appreciable period" of residency. Although the duration of stay is still a "relevant factor," other conditions can indicate that the individual should be considered a habitual resident when they first arrive in the state in question. For example, his family's presence there amply demonstrated his determined desire, which was judged sufficient to qualify as a habitual residence, and his statement clearly communicated his goal.

5.3. The Nessa Case Test

In this case, an elderly Bangladeshi woman with residency rights in the UK submitted an application for income assistance. Her spouse lived in the UK from 1962 until his death in 1974, while the woman spent her whole life in Bangladesh. The first reason for rejecting her application was because she did not regularly dwell in the United Kingdom. She filed an appeal, and the appellate panel determined that since she entered the country willingly with the goal of settling there, she was a habitual resident. The adjudication officer persuaded the commissioner that the tribunal ought to inquire as to whether or not she had lived there for a significant amount of time. Her appeal was denied by the court of appeals, which held that an individual cannot be considered a habitual resident of any nation until they had established and resided there for a significant amount of time.

6. Factors in Habitual Residence

6.1. Habitual Residence of Parents

Throughout the above discussion it is clear that there is no specific tool to determine habitual residence of a person in which include parents. Habitual residence depends on the each and every individual case and varies case to case with diverse circumstances. However, two main legal systems for instance common law holds that residence and settled purpose or intention while English law holds the view that voluntary residence and appreciable period of time with degree of settled purpose shall be taken into account in determining habitual residence of a person or parents. We have discussed in the above with case studies and shown how the determining factors varies case to case and beside these main aspects there are other factors are also should consider in order settling a habitual residence problem of the parent or an individual.

[43] European Community Regulation 1408/71

6.2. Habitual Residence of Children

In this part, we will look at the idea of habitual residence as defined by the 1980 Hague Convention on Civil Aspects of International Child Abduction. In addition to the convention, relevant examples will be addressed side by side. The phrase "habitual residence" is not defined in the Hague Convention, but it does specify the extent of applicability, stating that it will apply to children who were habitually resided in a Contracting State immediately before any breakdown of custody or access rights. When a kid reaches the age of 16, the Convention no longer applies to him or her.[44]The "rights of custody" include the rights relating to the care of the child's person and, in particular, the right to determine the child's place of residence, whereas the "rights of access" include the right to take a child to a place other than the child's habitual residence for a limited period of time. Due to a lack of a precise definition of the notion, the court was both domestically and globally indifferent in its interpretation, unable to establish a unifying meaning of the word. As a result, some courts advise that "habitual residence" should simply be read as a matter of fact to be answered by reference to all of the facts of any specific instance. Although the farmers of the convention recognized the need for uniform international interpretation of the convention, uniformity is required if the Convention is to effectively achieve its stated goals of, among other things, discouraging forum shopping and protecting a child's well-being.[45]

A session of Hague Conference in 1956 after Second World War in order to improve the fate of the old conventions on personal status but no decision was brought from the session regarding support of minor children. However, a Convention on the Law Applicable to Support of Minor Children was produced at the 1956 session[46] which stated that the law of the habitual residence of the child is made the applicable law, but Contracting States are free, under stated conditions, to substitute another law.[47] That was the first open break with the principle of nationality had taken place, and habitual residence was chosen over domicile in a matter involving dependents. Use of habitual residence as a test has since become routine at The Hague. The Child Abduction Convention emphasis on the increasing child abduction by the parents and provides a simple summary-return mechanism to be administered by the courts of member states to the child's habitual residence.

As previously stated, due to the lack of a standardized definition, each court applies its own interpretation. In the United States, there is a sharp gap between federal circuit courts that favor the parents' most recent shared subjective goals in assessing "habitual residence" and those that

[44] Article 4 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

[45] Stephen I. Winter, "Home is Where the Heart Is: Determining Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction", 33 Wash. U. J. L. & Pol'y 351, 386 (2010), http://heinonline.org

[46] Convention of Oct. 24, 1956, on the Law Applicable to Obligations to Support Minor Children arts. 1-2, in 5 As. J. ComnP. L. 656 (1956).)

[47] Kurt H. Nadelmann, "Habitual Residence and Nationality As Tests at the Hague: The 1968 Convention on Recognition of Divorces", 47 Tex. L. Rev. 766, 778 (1969), http://heinonline.org

stress objective signs of a child's acclimatization. [48]In this section, we reviewed various cases in which two crucial tests were used to identify a child's regular residence. In the instance of In re Bate, the Common Law Court recognized the "shared Purpose" of both parents as the purpose of the child's habitual residence.[49]

7. The Future Role of Habitual Residence

In this part, we would like to emphasize that it is still difficult to establish a precise strategy to determining a child's habitual residence. Although different court provide extensive guideline in this regard. The Supreme Court in the case of Re A,[50] Re KL[51] and Re LC[52] followed the previous decision of the different courts in different cases that the it is very clear that habitual residence is a question of fact to be decided with reference to all of the circumstances of the case. It is now become granted by the court known as simplicity of factual approach i. e. consider the fact and making a conclusion. The Supreme Court has now recognized that determining habitual resident status is a matter of fact that must be resolved based on an appraisal of all of the facts of the case. One significant problem, parental purpose, has received little attention in the instances that will be assigned to that element when doing the overall factual examination. It is strongly argued that the right approach to diverse parental intentions is still an open question.

Although the residence, settled intention, appreciable period of time is a question of fact, nevertheless, the key question as we mentioned before which was presented by The Housing and Council Tax Benefit training module is useful to reach the conclusion quickly. Along with these instruction and the guideline given by the various courts in various leading cases should be consolidated and apply those wherever relevant. In fact it is very difficult to set such rules as because the dissimilarity of the circumstances. However, due to globalization and massive movement of the people from one place to another it is in need to identify the specific issues and therefore, bring all the decision of the made on the matter and find out the commonness and uncommonness set by set. It will not be impossible to make a condition or form for national and transnational marriage where the conflict of laws rules should be stated and the couple at the time of marriage sign it an in case of dispute they follow the agreement they made. In future under the Hague conference authority should take to make the process easy to return a child to the parent in question set some other rules relating to best interest of the child not taking the fact itself but to consider the future of the child as well as the ability to provide best protection and care in favour of the parent should also to be considered.

[48] Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 Fordham L. Rev. 3325, 3370 (2009), http://heinonline.org

[49] In Re Bate case (1989) CA 122/89

[50] Re A (children) (jurisdiction: return of child) [2013] UKSC 60, [2013] 3 FCR 559,

[51] Re KL (a child) (abduction: habitual residence: inherent jurisdiction) [2013] UKSC 75, [2014] 1 FCR 69,

[52] Re LC (children) (abduction: habitual residence: state of mind of child) [2014] UKSC 1, [2014] 1 FCR 491

8. Conclusion

In concluding remark the authors may say that in order to determine a conflict of law problem connecting factors are plying vital role in the field of Private international law especially the habitual residence as personal connecting factor. Thorough study of the case laws both English and Civil law jurisdiction particularly in European commission cases, one common understanding is fund that habitual residence of a person or a child is subject to the circumstances and facts along with other supporting factors that varies case to case. On the other hand the very objective of the convention is to protect the child from wrongful removal or retain by either of the parent and make easy to return the child where he had his habitual residence based on best interest of the child. This convention has been accepted by 82 countries[53] which indicated that all concerned state are facing problem in this regard and wish to have a easier and viable ways and means to resolve the problem. Therefore in order to achieve the common objective of having solution states as well as Hague Conference is responsible to formulate an uniform rules for habitual residence test, broaden the scope and making easy means considering from the very beginning of the forming relationship of husband and with especially in transnational marriage. Beside this state parties should take more practical policy to support these marriage in order to keeping their happy marital tie and avoid unnecessary, costly and adverse breaking the relation which is the key driving force to retain their child with them. In further, the key issues like centre of interest, intention to settlement, appreciable period of time can be settled down through acquiring gentle interrogation as the key question mentioned by The Housing and Council Tax Benefit Training Module which we discussed earlier. Researchers do believe that in the context of realty of the current globalized world states will become more flexible to adopt easy ways and means to solve a conflict of laws problem by using habitual residence as a personal connecting factor.

[53]Christophe Bernasconi, "The HCCH, its Children's Conventions and the Malta Process-An Update, Expert's Roundtable Discussion on the Hague Children's Conventions", 25th October 2017,conference paper, International Islamic University Malaysia.