Chapter Eight
Choice of Law Rules Governing Marriage and Divorce

- Most of the issues in family relations belong to the personal sphere and therefore concern (personal) status matters governed by personal law.
- laws governing personal status are designed in a way they reflect relevant factors such as cultural ties or habits, ethnic origin or other background like economic circumstances, temperament and morality of the person, etc.
- Generally the applicable law on status is the law of the place where the transaction or the person has more contact when compared to the laws of other places.

- What can be the connecting factor employed for personal status matters in general and family matters in particular?
- The major leading principles are **nationality**(Continental) **and domicile** (common law).
- Some states employ "residence "or" habitual (principal) residence" in place of domicile
- Other may use "most intimate and most tense connection" of a person with a given legal system for the purpose of regulating one's personal status.

- **Which connecting factor should be used in Ethiopia? Nationality, Domicile or Residence?**
- Regarding the interstate problems of family nature, simply, **nationality cannot be applicable**. Both parties are either virtually always Ethiopians or they are looking for a state law.
- Even for the choice of family laws of an international nature, for we do not have a national family law, aside other substantive and practical reasons, adopting nationality as a connecting factor is not proper.
- Many scholars like Araya Kebede, **Prefer domicile** as connecting factor in Ethiopia to deal with issues of status. While others like Samuel Teshale, Habitual Residence as connecting factor.

- why we prefer domicile rather than habitual or principal residence or simply (ordinary) residence?
- Three main justifications:
  - Until replaced by new law the rules of domicile in civil code are still applicable.
  - Habitual residence and to greater extent simple residence are prone to forum shopping.
  - the application of the law of domicile ensures a certain amount of stability to a greater extent or degree than that of residence.

- Those who oppose domicile as connecting factor argue:
  - The domicile provisions of the civil code were meant to apply to only international conflicts not inter state conflict.
  - The current procl.25/96 uses permanent residence as connecting factor for interstate disputes
  - Issue of proving intention to live in certain place permanently is painstaking.
  - Habitual residence avoids the problem of intention without loosing the fact of permanence.

Issue of Interstate conflict of Family cases in Ethiopia

- **Relevance of the Issue**
- Under the FDRE constitution the powers of the federal government are enumerated while residual power vested in states.
- Federal government does not have a clear mandate on family law.
- Regional governments with residual power to enact on many private laws including family.
- Family law fall under private law category with many public policy implications. i.e. equality of women and protection to children.
- So federal or state family law ? Diverse or Uniform family law?

- In Favor of a unified federal family law:
  - To enforce uniformly the constitutional right of equality of women and protection to children
  - States may be influenced by cultural matters and perpetuate in equality.
- In favor of Diverse state family law:
  - The need for the federation is to protect diversity in relevant sensitive issues ,family is one. Unified family law defeat purpose of federation.
  - Federal family law is unconstitutional since no list in enumerated power.
- Tigray Regional state took the initiative by enacting Tigray Family Law in 1990 E.C and the debate in favor of unified family law lost ground.

- Currently all the nine regional states and the two chartered cities have separate family laws.
- These laws generally similar , E.g. Three Recognized forms of marriage, effects of marriage etc…
- But different on some important matters. E.g. Age of marriage, consanguinity and affinity, irregular union, bigamy, etc
- So, the urgent need to have rules governing interstate conflict of family laws.

Marriage

I. Formal validity of Marriage

- Formal validity of marriage is generally governed by the law of the place of celebration.
- “A marriage valid where celebrated is valid every where.”
- This is true even in a state of common domicile of the parties where stricter or different rules concerning formalities, in so far as they do not contravene public policies, are in force.
- However, if the law of the matrimonial domicile prescribes compliance with certain formalities to be very essential, amounting to policy requirements, failure to meet those requirements may preclude the recognition of the marriage celebrated out of the state.

- In Ethiopia interstate conflict of marriage , problem of formal validity does not seem to arise because of similarity in the family laws of states. Three recognized forms of marriage (i.e., religious, civil, and customary).
- Formal validity of marriage celebrated in another state with a bit different formal requirement does not usually affect substantive requirements of the forum/domiciliary state. Unless found to be contrary to public policy. See Art.5 Revised family code and Harari Family code, Art 15 of SNNPR family code.

- But in intra state conflict formal validity still relevant.
- If a marriage was not celebrated in compliance with the *lex loci celebrationis* and therefore was invalid as to form under that law, but complies with the spauses personal law's formal requirement the marriage still valid. Because state of personal law (domicile or nationality) has paramount interest than place of celebration.
- The general trend, as to choice of law rules of formal validity of marriage is that the rule is not that much strict. It seems that any state does not have very important interest in the formal requirements of a marriage. More importantly what is to be taken care of is, under the guise of formality, any basic value of the matrimonial domicile should not be infringed.

- Even though many state laws are similar on formal validity what if one state enacts special formality that reflects important policy of that state?
- Theoretical scenario of Abebe Mulatu. The HIV Test case.
- Suppose State X enacts a marriage law that requires future spouses to have blood test for HIV/AIDS before celebrating their marriage. W and H concluded their marriage in State Y where blood testing is not a prerequisite. They are now domiciliaries of State X. Will State X invalidate the marriage on grounds of the non-fulfillment of its formal requirements?

- Here, the doctrine “marriage valid where celebrated is valid everywhere” does not seem to work. It is important to consider whether such type of formal requirements(?) like blood test for HIV/AIDS have some policy implications.
- One may argue in the affirmative in that, for example, State X, the domicile, may want to make sure that her next generation (at least who are born in wedlock) is AIDS free. Although this does not seem to meet the whole problem, it gives its contribution to tackle the endemic, incidentally.
- Finally, the validity of the marriage will not be recognized until the formal requirement in question (of state X) is fulfilled. Meeting the formal requirements of state Y is not enough.

- **II. Essential (Substantive) Validity**
- Normally, marriage is a natural right that cannot arbitrarily be denied. However, it is not an absolute right.
- State has interest in regulating the family the basic unity of society. Certain requirements imposed on the creation maintenance and dissolution of marriage.
- States differ in the essential conditions of marriage and peoples of diverse origin intermarry. Capacity, consanguinity, prohibited relations to marry, effects of marriage, grounds of divorce, etc could be different.
- Conflict of laws obviously arises.

- **1. Matrimonial Domicile Test**
- **The capacity to marry is the personal status laws of the prospective spouses' common domicile or intended matrimonial domicile** at the time of the conclusion of the marriage which is in accord with due process.
- **2. Dual or ante nuptial domicile test**
- If spouses have a capacity to marry each other by the laws of **their respective domiciles during the ceremony, the marriage is to be held valid.**
- **3. Doctrine of lex loci lelebration (For both formal and essential validity)**
- "a marriage good where contracted is good everywhere, and *vice versa*."

- **Which test should be used in Ethiopia?**
- Many states adhere to the law of common domicile of the spouses. Because if either the law of respective domiciles or the place of celebration is employed in which the parties might not live either in either's domicile or the place of celebration, there might be a possibility for the contravention of the intrinsic conditions, and thereby possibly public policies, of the place the parties made their matrimonial home/domicile.
- Generally, any marriage between any parties, whether domiciliaries or not, will not be concluded there if the essential validity of the laws of the forum are violated.
- This is the case even when they could do so (get married) by their own present personal laws.
- Equally a marriage celebrated in another state but violating the essential legal requirements of the forum state should not be upheld.

- **Effect of contravention of Essential validity Void or voidable?**
- If the essential validity contravened cannot pass(change) through time the marriage is ***void ab innitio*** **and subject to attack at any time**.
- Eg. Consanguinity or Affinity. Art.32 RFC.
- If essential validity contravened is transient i.e can change through passage of time, the marriage is **voidable and can be attacked only at the time the contravention persists**.
- eg,. Age, Bigamy etc see Art.31 and 33 of RFC.

- **Characterization as to Formal and Essential Validity**
- There could be conflict as to the categorization or classification of elements into formal or essential category.
- The inclusion or exclusion of an element into either category might have an impact as to the final result of the validity or otherwise of the marriage.
- So what are the criteria to be employed to the effect of the classification? What is the standard utilized to distinguish between matters of form and substance? Whose standard should be used?

- Generally, matters that are **irrelevant to the enjoyment of the marriage are formal** and do not have that much force to affect substantially the effect of the marriage.
- For one thing, the personal law of the parties leaves the determination of formalities to the law of the place of celebration and disregards its prescriptions as to form but reserves to itself the determination of the intrinsic conditions of marriage.
- Besides, it is important for the essential requirements of the place of celebration is to be disregarded (in case the parties manage to get their license though they violate its intrinsic conditions) and only the essential conditions of the matrimonial domicile, if different controls.

- **Public Policy and Marriage**
- Policies that are of permanent nature are expressed through the laws of the concerned state. Constitution, Proclamations etc…
- The family is entitled to protection by society and the state for it is the natural and fundamental unit of the society. FDRE Constitution(Art. 34(3)).
- Marriage, as the foundation of the family and society around which many of the social institutions are built; which is also the most important of the domestic relations or family matters, is a consensual transaction with a distinctive character of permanence.
- In view of its importance as a social institution with all its virtues, and the advantages resulting there from, it is favored by different policies.
- Moreover, it is said that marriage is basic to morality and civilization and therefore is of vital interest to society and the state.
- Besides, the immediate parties (the spouses) and the children – the fruits of the relationship – have an interest in it.

- **Why do we recognize foreign marriages?**
- Marriage once the relationship is assumed to have been freely entered so long as the present status of the marriage is in accord with certain values and public morals reflected in our family codes it can be recognized.
- But why?
- The main aim lies on the preservation of the **“justified expectations” of the parties** at the expense of some local but not that much significant values, that are however, not strong enough to destruct the moral standards or/and very essential conditions of the local law.
- More over, human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern.

- **Effects of Marriage (Personal and pequinary)**
- The effects or incidents of marriage in those the rights and duties of the spouses are, as a rule, governed by the **common personal status of the spouses during the lifetime of the marriage.**
- In most instances, this law is the **common matrimonial domicile of the spouses**.
- Exception: Pecuniary effect of marriage may be agreed up on by the parties. They may select the applicable law without contravening fundamental provisions of law.

- According to the U.S experience, the effects of marriage on pecuniary matters are governed by the parties' ***current*** **matrimonial domicile** as ordinarily having the most significant contacts.
- However, if the parties acquired property in different states overtime, the **law of the state where the property was acquired** controls. But this is true only to the portion of the property acquired in a given state.

- **What is the effect on the incidents of marriage, such as pecuniary matters, where such marriage was valid in the parties' former domicile but invalid for the forum or present matrimonial domicile found it contrary to its “strong public policy”?**
- As Cavers has put the U.S experience on this score, it is conventionally treated that some of the incidents of the status ("marriage") such as the rights, powers, privileges, and immunities that are attached to the parties by the "marriage" relationship are denied.
- However, the present matrimonial domicile should gives effect to some of the incidents of the marriage.
- E.g. California which forbids its domiciliaries to have more than one wife accords the widows of such a bigamous marriage to receive from their deceased husband’s California estate a widow’s share as tenants in common.

- **Irregular Union**
- Normally it is not a marriage relation and does not give parties status of a husband and wife.
- Law regulates Irregular union for purpose of some pecuniary effects of the relationship.
- There seems to be some difference among the family laws on pecuniary effects. Between the 1960 Civil code, the TFC and other Family codes.
- Under art 712 of civil code irregular union shall not create any community of property between the parties.
- Revised Family code (Art.102), The Oromiya Family Code (art.?), the SNNPR(Art116) and Harari Family codes (Art. 105) it creates community of property if the union lasted not less than three years.
- Tigray Family Code Art.130(a) common property shall be created if the union lasts for ten years or more.

- Conflict of laws problems around the divorce part of family law revolves around problems of mainly **judicial jurisdiction** and **enforcement and recognition** rather than on choice of law problems.
- So, it is not surprising that in both international and interstate relations there are no many developed choice of law rules regarding divorce.
- **I. Grounds of Divorce**
- There are staggering diversities amongst the family laws regarding **Grounds of divorce**, at least between the 1960 CC on the one hand and the new family laws on the other hand, choice of law to find the applicable law in case a suit for divorce is instituted is essential.
- Explained, while divorce in the 1960 CC is fully based on fault, it is not so in the others. The Tigray Family Law only requires, as it seems, the existence of **incompatibility**. "When they reach the stage where they can no longer live together." Art.102 of TFC.

II. Effects of Divorce

- Some diversity exists on this matter. Eg. On restitution of personal gifts between spouse on divorce. Art.691 of the 1960 Civil code and Art.121 of TFC. While under Civil code gifts given between spouses due to marriage are restitutable on divorce , they can’t be so under TFC. This could lead to diffrence in out come.
- Other Family laws are silent on this issue.

- **Choice of Law on substantive issues of Divorce.**
- There are two choices of law views: the Common Law and the Civil Law.
- In the U.S as well as in the Common Wealth the rule is well established that the divorce **court applies its own law** to the substantive requirements of divorce that seems sufficient and reasonable so long as the principle prevailed that the parties' matrimonial domicile is the basis of jurisdiction.
- The second view has a startling point in almost all laws of the civil law orbit –**the parties common personal law applies**. This is most of the time the last (or the predominantly lived) **common domicile of the spouses**.

- **Which position should be taken in Ethiopia?**
- The rule that the "law of the matrimonial domicile of the parties' control" seems proper. Because:
- This is the law that is believed to have been accustomed to by the parties.
- This is the law the spouses are said to have predominantly connected with or the law of the parties their matrimonial life is predominantly lived.
- Therefore, it will not be unfair for either of them to be judged according to the law of the place they were living in. Hence, due process of law is respected.

- End of class But continued Controversy on conflict of laws!!!

- Thank You