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**CONFLICT OF LAW RULES IN MARRIAGE:  
AN APPROACH BASED ON THE CO-ORDINATION OF THE  
RELEVANT POLICY CONSIDERATIONS**

Thesis Submitted For The Degree Of Doctorate of Philosophy in Law (Ph.D.)

By

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Under the Supervision of

Dr. Elizabeth B. CRAWFORD

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For **Yahia and Ouiza**,  
my wonderful and loving parents,

&

In memory of the late academic, **Salim Klelcha**,  
whose generosity of heart and spirit will be sadly missed by all those who knew him.

“It has long been proved by means of history that the modes of thought current at a given time and which were developed in connection with earlier work, are not always conducive to further progress, but often enough stand in the way of such progress.”

**ERNST MACH**

As quoted in Cook, W. W., *The logical and Legal Bases of the Conflict of Laws* [1942]

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### List of Abbreviations

<b>Am. Jo. Comp. L.</b>	American Journal of Comparative Law
<b>Anglo-Amer. Law Rev.</b>	Anglo-American Law Review
<b>Ann. Suisse Dr. Int.</b>	Annuaire Suisse de Droit International
<b>B.D.I.L.</b>	British Digest of International Law
<b>B.YB.I.L.</b>	British Yearbook of International Law
<b>C.L.J.</b>	Cambridge Law Journal
<b>Can. Bar Rev.</b>	Canadian Bar Review
<b>Dalh. L.J.</b>	Dalhousie Law Journal
<b>F.L.R.</b>	Federal Law Review
<b>Fam. Law</b>	Family Law
<b>Harv.L.Rev.</b>	Harvard Law Review
<b>I.C.L.Q.</b>	International and Comparative Law Quarterly
<b>I.L.Q.</b>	International Law Quarterly
<b>Int. Ency. Comp. L.</b>	International Encyclopedia of Comparative Law
<b>J. Dr. Int.or Clunet</b>	Journal du Droit International
<b>J.O.R.A</b>	Journal Officiel de la Republique Algérienne
<b>Jour. Comp. Leg.</b>	Journal of Comparative Legislation
<b>Jur. Rev.</b>	Juridical Review
<b>Juris-Class. Dr. Int.</b>	Juris-classeur de Droit International
<b>L.Q.R.</b>	Law Quarterly Review
<b>M.L.R.</b>	Modern Law Review
<b>Mich. Law Rev.</b>	Michigan Law Review
<b>N.I.L.Q.</b>	Northern Ireland Legal Quarterly
<b>New L.J.</b>	New Law Journal
<b>Nouv. Rev. Dr. Int. Pr.</b>	Nouveau Revue de Droit International Privé

<b>Ox.J.L.S.</b>	Oxford Journal of Legal Studies
<b>R.A.S.J.E.P.</b>	Revue Algérienne des Sciences Juridiques, Economiques et Politiques
<b>R.C.A.D.I.</b>	Recueil des Cours de l'Academie de Droit International
<b>R.C.D.I.P.</b>	Revue Critique de Droit International Privé
<b>R.I.D.C.</b>	Revue International de Droit Comparé
<b>Rep. Dr. Int.</b>	Répertoire du Droit International
<b>Rev. Alg.</b>	Revue Algerienne
<b>Rev. Dr. Int. Pr.</b>	Revue de Droit International Privé
<b>Rev. Hell. Dr. Int.</b>	Revue Hellenique de Droit international
<b>Rev. Trim. Dr. Civ.</b>	Revue Trimestrielle de Droit Civil
<b>Rev. Tunis. Dr.</b>	Revue Tunisienne de Droit
<b>Sask. Bar Rev.</b>	Saskatchewan Bar Review
<b>Sol. Jo.</b>	Solicitors' Journal
<b>Trans. Grot. Soc.</b>	Transaction-Grotius Society
<b>Trav. Com. Fr. D.I.P.</b>	Travaux du Comité Français de Droit International Privé
<b>U.Tasm.L.R.</b>	University of Tasmania Law Review
<b>U.To.L.J.</b>	University of Toronto Law Journal
<b>Val.U.Law Rev.</b>	Valparaiso University Law Review
<b>Virg. J. Int. L.</b>	Virginia Journal of International Law

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Sottomayer v. De Barros [N° 2]	(1879)L.R. 5 P.D. 94
Sowa v. Sowa	[1961] P. 70
Srini Vassan v. Srini Vassan	[1946] P. 67
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Sullivan v. American bridge Co.	[1935] 176 Atl. 24
Sussex Peerage Case	(1844) 11 Cl.& Fin. 85
Szechter v. Szechter	[1947] P. 286

Taczanowska v. Taczanowska	[1957] P. 301, [1957] 3 W.L.R. 141
Tallarico v. The Lord Advocate	1923 S.L.T. 272
Travers v. Holley	[1953] P. 246
Turner v. Thompson	(1888) 13 P.D. 37
Ungar v. Ungar	[1967] 2 N.S.W.R. 618
Valier v. Valier	[1925] 133 L.T. 830
Van .Grutten v. Digby	(1862) 31 Beav. 561
Van Mehran v. Van Mehran	1948 S.L.T. (Notes) 62
Varanand v. Varanand	[1964] 108 Sol. Jo 693
Vergani v. Guidetti	[1941] 32 N. E.(2ed)272
Vervaeke v. Smith	[1983] 1 A.C. 145, [1983] Fam. 145, affirming [1981] Fam. 77.
Waldegrave Peerage Case	(1837) 4 Cl. & Fin. 649
Wall v. De Thoren	(1874) 1 R. 1036; (1876) 3 R. (H.L.)28
Warrender v. Warrender	(1835) 2 Ci & F. 488; 11 Ci. & Fin. 1239
Warter v. Warter	(1890) 15 P.D. 152
Way v. Way	[1950] P. 71; 65 T. L. R. 707
Webster v. Webster	(1866) 14 R. 90
White v. White	[1937] P. 111
Winans v. Att. Gen.	[1904] A.C. 287
Wolfden v. Wolfden	[1946] P. 61
Wylre v. Laye	(1834) 9 Foc. 495

### Abstract

The present thesis is not a mere overview of the existing legal literature bearing on choice of law rules for marriage, nor is it a simple survey of the whole range of arguments endorsing one approach over another with regard to this issue: it rather puts forward a sustained argument towards a more appropriate way of looking at the conflict of law problems in marriage. Though choice of law rules for marriage has long preoccupied scholars and judges alike, the ever increasing antagonism between the preponderance of conflict values [predictability, certainty] and the growing concern to guarantee a just result in individual atypical cases makes the continuous exploration of this particular topic both necessary and of significant legal interest. The study seeks essentially to establish that, contrary to what most scholars would have us believe, the intractable conflict problems in marriage are not inherent in the inefficiency of the traditional general choice of law rules, nor simply in the interrelation between different social, religious and legal cultures.

Rather, they are attributable to the structure of a seemingly modern methodology that focuses more and more on the attainment of a just substantive result, the astonishing lack of consensus among legal systems, the disregard of coordination of policy considerations relevant in marriage, the parochial and nationalistic focus in choice of law, as well as in the application of the rule that *lex fori* is the only source of conflict norms. Further, the inappropriate application of the general choice of law rules, and the lasting antinomy between the international objectives [the attribution of an international relationship to the relevant system] and the national sources of conflict of laws are at the heart of the choice of law problems in marriage. The emerging academic movement to modernise choice of law rules for marriage, with a view to guaranteeing

desirable results in hard cases, defeats the very essence of conflict of laws, and renders illusory what little certainty and predictability the normative criteria of the conflicts orthodoxies may provide. The underlying reason lies in the inherent disregard of the practical difficulties facing the officials who have, outside the courts, to apply the law and to reconcile the competing goals of predictability and flexibility.

The present writer's objective is the development of a more appropriate approach which can establish an equilibrium between the much needed certainty in the present subject and judicial appreciation of the difficulties presented in the individual atypical cases, without scuttling the established conflicts orthodoxies, and at the same time to eliminate the social evil termed "limping marriage". Finally, the domestic and international law reform agencies should avoid the parochial and nationalistic focus in choice of law, and the rule that *lex fori* is the only source of conflicts norms if they wish to make a claim that their aim is the attainment of a universal uniform body of rules which will ensure the universal validity of a marriage, and the maximum harmony of decisions.

## INTRODUCTION

It is universally established that marriage, though it takes diverse forms in the varied nations of the world, is a fundamental institution that is the core of personal status in all organised societies. Its forms and incidents reflect the necessary efforts of each society to rationalize and to define the conditions and the manner of entry into, as well as the mutual rights and obligations of the parties within, this very basic human institution which stands out because of its unparalleled importance in the framework of civilised societies. Lord Westbury said in Shaw v. Gould 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 conditions of forming, and if necessary of dissolving, the marriage contract".<sup>(1)</sup> Marriage, though, is a contract in the sense that it requires the parties' consent to marry each other, yet can only be celebrated by a formal and public act, inasmuch as it creates a status which is of interest not only to the parties but to the society where they live as husband and wife. The celebration of a marriage by a formal and public act is the best way through which society ensures the protection of its interests in any change of status contemplated by its subjects.

There is one aspect on which the judicial and academic authorities agree: the subject of conflict of law problems in marriage is difficult and remains mired in mystery and confusion. Indeed, the requirements and the forms of entry into, as well as the effects of marriage, among legal systems are extremely varied to the extent that it is very difficult to establish any common denominator, in legal terms, to all unions called marriage. The logical explanation for this is that the rules relating to the entry into, termination and the nullity of marriage are closely connected with morality, religion and fundamental principles prevailing in each society. The definition of marriage in the

legal systems which are examined in the present thesis provides a good illustration of the existing diverse conceptions among legal systems. As regards Algerian law, a marriage may be defined as a contract which is performed in the legal forms between a man and a woman for life, the main objective of which is procreation.<sup>(2)</sup> The position is rather different in English and Scottish laws. A marriage as “understood in Christendom”, according to Lord Penzance’s judgement in the famous case of Hyde v. Hyde, is a “voluntary union for life of one man and one woman to the exclusion of all others”.<sup>(3)</sup>

It is clear that these definitions reflect the very basic difference between monogamy-insisting countries and those countries where polygamy is permitted with the view to satisfying certain special conditions besides the normal requirements of marriage. It is not appropriate to discuss here the Western, particularly English and Scottish, legal views relating to the concept of polygamy, and to repeat the arguments for and against the appropriate law to determine the nature of marriage. Suffice it to say that the English and Scottish views as to polygamous unions rest unfortunately on a lack of knowledge about polygamy as practised, for instance, in the Islamic world.<sup>(4)</sup> It is indeed very wrong to consider polygamy as the basic rule in Islamic legal systems simply because a man is permitted under special circumstances to have more than one wife. The main reason is that polygamy in Islam has never been encouraged, and thus monogamy seems indeed to be the principle insofar as the Koran stipulates that: “But if you fear that you will not be able to do justice, and you will never be able to do so, among them, then marry only one”.<sup>(5)</sup> Moreover, in Algerian law for instance, a man cannot take a second wife without obtaining a judicial authorisation to that effect. This permission cannot be granted unless the judge is satisfied that the husband is financially able to support more than wife, and there is a legitimate interest such as the attainment of the very objective of marriage, i.e. procreation. The husband has to inform the first wife and the second wife to be of his intentions and marital status respectively.<sup>(6)</sup>

Since marriage is a common institution among legal systems and thus whatever form it takes has for its object the same social and religious function, it is quite surprising that monogamy and polygamy must be regarded as so distinct. From a logical point of view it seems likely that polygamous unions are sufficiently akin to "Christian" ones to qualify for full recognition as legal unions. In both types, there is certainly an emphasis upon the proclamation of what is to be a lasting and formal relationship, the satisfaction of sexual needs coupled with desire for mutual comfort and support, and the procreation and upbringing of children within a stable family environment. The changes in English and Scottish laws over the last two decades are in favour of treating polygamous unions in the same way as "Christian" ones, indeed to the extent that a marriage owing its existence to a foreign law is to be equated, without further ado, with a domestic one for all purposes if it is valid according to the relevant conflict of law rules.<sup>(7)</sup>

Accordingly, the determination of which law governs the validity of marriage in conflict of laws is very important. The main reason is that questions involving the existence or non-existence of a valid marriage may arise in almost any conceivable context, namely, nullity, divorce, judicial separation, claims for dower, succession, legitimacy of the children, and bigamy. In practical terms, the validity of a marriage is the main ground upon which the validity of many issues of status and of property can be decided.<sup>(8)</sup> Added to this is the fact of the increased mobility among populations of the world in these days of easy and rapid international transit that has "provided much of the context for the resulting conflicts problems".<sup>(9)</sup> Choice of law rules for marriage are therefore one of the main subject of conflict of laws where certainty and predictability are greatly required by the principle of marriage stability, and diverse legal regulations of marriage among legal systems.

Unfortunately, the outstanding characteristic of conflict of law problems in the present subject-matter is the astonishing lack of consensus on the goals and methods of choice of law rules for marriage. Uncertainty about the proper approach to conflict problems of marriage reigns supreme and the diverse approaches which have been proposed are as complex as they are unconvincing. The underlying reason is that legal systems use different connecting factors to determine what law governs the validity of marriage; factors that reflect the fundamental opposition between the principles of territoriality and extraterritoriality in conflict of laws. In certain countries, like the United States of America, the entire validity of marriage is governed by the *lex loci celebrationis*, while retaining certain exceptions to the rule.<sup>(10)</sup> In most legal systems, however, the position is rather different insofar as they draw a distinction between formal and essential validity of marriage. While formal validity is referred to the *lex loci celebrationis*, these legal systems disagree on the issue of whether the personal law to which essential validity is referred should be determined by domicile or nationality. Added to this is the fact there is no uniformity among legal systems on the question of characterisation of requirements of marriage as relating to form or the essence of marriage. What might be deemed as a mere formality in one legal system might be regarded as a matter affecting the morals and religious principles of society in another.

However, the attainment of international uniformity in the present subject remains rather distant. The international conventions, in particular the Hague conventions,<sup>(11)</sup> which have been adopted to create a uniform body of rules to govern choice of law problems in matters of marriage have resulted neither in the success anticipated by their promoters, nor in the fiasco claimed by their opponents. The underlying reason is that the conventions have failed to recognise the relevance of coordination of relevant policy considerations in marriage insofar as they were concerned with the identification of compromises of the “lowest common denominator” that satisfy no one. Furthermore, the law reforms, that have been initiated at the domestic level in most legal systems,

have been either abandoned or resulted in parochial and nationalistic statutory changes which are more harmful than conducive to the proper application of the general choice of law rules for marriage. For instance, the English and Scottish Law Commissions in their 1987 joint report have concluded, "with humility not always displayed by law reform agencies", that there is no need for any comprehensive legislation insofar as certain choice of law rules in marriage are still in the process of development that should be best left in the hand of the judges.<sup>(12)</sup> However, the present writer has tried to analyse the different approaches voiced in the subject-matter, and the relevance of all policy considerations relevant in marriage in order to assert with certainty the sources of, and to propose certain solutions to resolve, the conflict problems arising within the sphere of marriage. It is my opinion that great progress in the present field would have been achieved by now if countries could agree at least on substantial limitations of their traditional rules. As a result of the discussion of scholars' controversies on the subject as well as the consideration of the position of both Common and Civil law systems, jurisprudence and international conventions, the present writer hopes that he has been able to shed some light on many significant points within three main chapters.

The first chapter will focus on the formal validity issues and the significance of the *lex loci celebrationis* as a generally accepted rule which governs the formalities of marriage at the present time. However, the first issue which falls to be considered here is the historical background of how and why the *locus regit actum* was introduced as the proper rule to govern the validity of a marriage. In fact, the consideration of this rule from a historical point of view is of vital importance to establish its significance as an acceptable rule that may achieve a high level of uniformity, if it is understood and applied in quite the same sense among legal systems. As the interpretation of the *lex loci* rule in different legal systems varies, the difficulties which these interpretations cause will be given careful consideration with a view to suggesting a solution to the question whether the nature of the *lex loci* rule should be imperative or facultative.

Besides, the present writer would also like to stress that the existence of compulsory civil, and religious ceremonies would certainly undermine the efficiency of the *lex loci celebrationis* as a universal rule through which the coordination of the relevant policies issues in marriage, and the prevention of limping relationships, might be achieved. The consideration of the characterisation problems arising out of the dichotomy of form and substance is also important, insofar as the determination of the proper law to govern the relevant requirement in issue depends solely on its characterisation as relating to form or substance. The discussion of this particular issue will be considered in the context of parental consent; a matter that English law (especially) and (perhaps also) Scots law characterise as a formality, irrespective of its classification as an essential matter under the relevant foreign law. More importantly, a minute examination will be given to the *lex loci* rule and its extent, as well as to the cases where its application becomes irrelevant. Finally, the present writer believes that the universal adoption of the facultative approach of the *lex loci celebrationis* as well as the optional system of civil or religious form of marriage might be the only realistic solution to the vast majority of practical problems to which the imperative application of the *lex loci* rule and the compulsory systems may give rise.

The second chapter will deal with the fundamental issue of substantive validity of a marriage which is referred to the parties' personal laws the determination of which is surrounded by major difficulties. It is the purpose of this chapter to analyse the special significance of domicile and nationality as connecting factors, and their appropriateness to determine the parties' personal laws. This issue has been examined with regard to the two different types of legal systems, namely, the Common and Civil law systems. It is also important not only to analyse the main existing theories but also the most recent flexible approaches on this topic that seems to be based on the *Favor matrimonii* principle and the inconclusiveness of the recent English judicial decisions displaying a

degree of flexibility hitherto conspicuous by its absence.

However, the application of the personal law as a general choice of law rule involves peculiar and crucial questions which need to be scrutinised here in order to establish the better view leading to certainty, predictability, stability of marital status, as well as the attainment of justice in the vast majority of normal cases -while retaining a degree of flexibility to deal with the occasional outrageous result. These issues include mainly the change of, and the subsequent changes in, the *lex causae*, the relevance of the *lex loci celebrationis* as to capacity to marry, capacity to enter into a polygamous marriage, as well as the parochial and nationalistic focus in choice of law. More importantly, the issue of the effect of recognition of foreign divorce and nullity decrees on capacity to remarry will be considered in great detail. The reason is that the divergencies between choice of law rules governing capacity to marry and the recognition rules are bound to give rise to conflict problems, particularly where the relevant laws differ as to whether the remarrying party has capacity to marry. The determination of the incidental question involved here is a very difficult issue that has divided scholars, lawyers and judges mainly into two groups, namely, the advocates of the *lex causae* approach and the promoters of the *lex fori* approach. Furthermore, the consideration of substantive requirements individually is highly important in order to determine the scope of bilateral impediments to which the parties' personal laws apply in cumulation.

Finally, it appears that the existing theories, particularly the flexible approaches, on this topic are mainly concerned with the determination of the validity of a marriage within the courtroom process, as well as the attainment of justice in the individual atypical cases. However, the present writer's contribution seeks to clarify the importance of the formulation of a general conflict rule that might be applied with certainty at the time of the ceremony, a matter that is countenanced by the preventive function of the essential requirements of marriage the observance of which falls to be decided by the marriage

officials at that time. Although the growing concern to avoid unjust results revolves around the special circumstance of each individual case, there is no justification for neglecting the relevance of coordination of competing policy considerations in the field of marriage. For this and other reasons the present writer would like to show that there is so much play in the orthodox approach's joints that the recent flexible views can be regarded as the most unusual development. The discussion of the different views as to the relevant choice of law rule to govern essential validity of marriage also intends to shed some light on the fact that the problems, with which scholars and judges have to deal with in the present subject, are the very consequences of the existing fundamental differences among legal systems as to the nature and the purpose of the requirements in issue, the disregard of the importance of temporal dimension of choice of law rules, and above all the parochial and nationalistic focus in choice of law. In other words, while it may be in accordance with the principle for the *lex loci celebrationis* to prevent the celebration of a marriage which offends the policy of the *lex loci*, or which appears to the officials of the *lex loci* to flout the parties' personal law (s). a *favor matrimonii* approach may yet be appropriate in cases where marriages have been celebrated, parties have acted on the faith of it, and its validity is to be determined *ex post*.

The third chapter emphasises the issue of nullity of marriage which is closely related to the issues of formal and essential validity of marriage as it is the inevitable consequence if the parties concerned have not complied with the formal and essential requirements of marriage. It is the purpose of this chapter to review the existing conflict of law rules concerning nullity of marriage within two different and interrelated contexts, namely, jurisdiction and choice of law. Jurisdiction, as the first matter for consideration in any nullity action, will be examined with reference to the Algerian Civil Proceedings Code 1966, and the Domicile and Matrimonial Proceedings Act 1973 by virtue of which the jurisdictional grounds have been simplified and placed on an exclusively statutory basis both in England and Scotland. The consideration of the distinction between void and

voidable marriages is of vital importance in order to understand the complex structure of the English and Scottish Common law rules of jurisdiction. In fact, the examination of the Common law rules of jurisdiction are needed for the understanding of the legal reforms brought into light by the 1973 Act.

The discussion of the choice of law rules in nullity will be limited to the issue which have given rise to the most difficult problems, and which have perplexed the majority of academic authorities simply because the conflict rules in the present context are essentially the same as those relating to the initial validity of marriage. The most interesting issue concerns the conflict rule for the physical defects, i.e. impotence and wilful refusal to consummate. The English and Scottish judicial authorities are far from being clear as to the appropriate law to govern these defects, and academic authorities are mainly divided between the application of the law of domicile and the law of the *forum*. It is therefore important to examine the main reasons and the appropriateness of using the law of domicile or the law of the *forum* as a choice of law rule to determine the effects of impotence and wilful refusal on the validity of a marriage. Further, if marriage for companionship is socially acceptable, the present writer would also like to consider the question whether impotence and wilful refusal should be maintained as grounds of nullity.

Finally, the general conclusion contains the present writer's suggestions which revolve around the best way to create a coherent and uniform body of choice of law rules that might lead to an efficient resolution of the numerous difficult problems arising when the validity of marriage is examined *ex post*. The attainment of a uniform body of rules would remain pure theory if legal systems are not prepared to abandon the existing lax practice as to the enforcement of foreign laws. It is also my argument that any further comprehensive legal reforms, either at the domestic or international level, must give

particular importance to the coordination of the competing policy considerations relevant in marriage, and concentrate on the eradication of parochial and nationalistic focus in the present subject. The discussion of the subject-matter in the present thesis is mainly based on the consideration of four legal systems, namely, English, Scottish, French and Algerian laws which represent the Common and Civil law systems respectively. The main purpose of this thesis is to argue that it is possible to construct a coherent approach to choice of law in the present subject-matter with a view to promoting the universal validity of marriage and international uniformity of decisions.

### Notes to Introduction:

- 1- Shaw v. Gould (1868) L.R. 3 H.L. 55, 82.
- 2- Algerian Family Law Code 1984, article 4, See Appendix III
- 3- Hyde v. Hyde (1866) L.R. 1 P. & D. 130, 133; See also Warrender v. Warrender (1835) 2 Sh. & Macl. 154.
- 4- Morris, J.H.C., "The Recognition of Polygamous Marriages in English law" [1953] 66 Harv. L.R. 973; Cf. Chalabi, M.M., Islamic Family Regulations, 4th ed., 1983, pp. 252-63 [In arabic].
- 5- The Koran, Sura 4, Verse 3.
- 6- Algerian Family Law Code 1984, article 8, See Appendix III.
- 7- See Law Com. N° 146 & Scots Law Com. N° 96, Polygamous Marriages: Capacity to Contract a Polygamous Marriage and Related Issues, 1985; Private International Law (Miscellaneous Provisions) Act 1995, Sections 5 & 7.
- 8- See Dicey & Morris, The Conflict of Laws, 12th ed., 1993, pp. 666-; Cheshire and North, Private International law, 12th ed, 1992, pp. 586.
- 9- Kahn-Freund, [1974] 143-III R.C.A.D.I. 139, at p. 334.
- 10- Palsson, L., Marriage and divorce in Conflit of Laws, 1974, pp. 144-; *Idem*, Marriage in Comparative Conflict of Laws, 1981, pp. 1-3.
- 11- See The Hague Convention For the Regulation of Conflict of Laws in Relation to Marriage, 12 June 1902; The Hague Convention on Celebration and Recognition of the Validity of Marriage, March 14, 1978.
- 12- See The Law Com. [N° 165] & The Scot. Law Com. [N° 105], Choice of Law Rules in Marriage, 1987, paras. 2.1 - 2.11; McClean, J.D., Morris: The Conflict of Laws, 4th ed., 1993, p. 143; Cf. Scot. Law Com. [N°135], Report on Family Law, 1992, paras. 14.1 -14.20.

## CHAPTER ONE

### Choice of Law Rules in Relation to The Formalities of Marriage

#### **Introduction:**

It is of note that different forms may be required, by different legal systems, in which the Judicial acts should be performed. However, requirement of a special form might be regarded as necessary for the validity of a special act, according to one legal system; whereas such forms may not be required, or considered as such in accordance with another legal system, and the parties may be free to choose a suitable form for the performance of their act.

This chapter will focus on the *lex loci celebrationis* as the main governing rule upon marriage formalities at the present time. However, a minute examination will be given to this principle and its extent, the exceptions in which it loses its authority over formalities of marriage, and the associated problems with its application to the determination of formal validity. For instance, limping marriages may involve the fact of the nature of *lex loci* application, namely imperative or facultative. It is the purpose of this chapter to offer some alternative ways of solving these problems. This will lead to examination of the possibility of submitting the formalities determination to the same law as the essentials, namely, to the national law or the law of domicile according to the Continental and Common Law Systems respectively; because the forms of marriage have no self governing nature, on the basis of their firm pertinence to the essential validity, and cannot be considered separately.<sup>(1)</sup>

Taking into consideration that the conflicts between states arise because of the existing divergences between legal systems, it is obvious that we must examine the possibilities for gaining international uniformity over the governing laws and recognition of the

validity of marriage celebrated abroad in forms which are not recognized as forms of ceremonies within the forum. Indeed, this will be attempted according to the provisions of the international conventions as being the only way to reach such uniformity.<sup>(2)</sup> Before discussing these matters, we must determine how the *lex loci celebrationis*, as a connecting factor, appeared in the determination of formal validity; and we must consider the distinction of the formalities from the essentials of marriage.

### **Section One:**

#### **Lex Loci Celebrationis And Its Authority on The Formal Validity of Marriage**

##### **A- How the Lex Loci Celebrationis, as a connecting factor, appeared in the determination of formal validity**

It is worth noting that in the past, the governing law upon the formal validity differed according to each juridical act. However, the subsisting rule was that the act must be performed in accordance with the form required by the law to which the act was subject. For instance, marriages must be celebrated within the form required by the law of the husband's domicile, because marriage itself was an act that subject to that law.<sup>(3)</sup> No problem arose if the marriage is solemnised at the domicile of the husband, but the question is, what is the solution when the marriage is celebrated in another place where the form laid down by that law is alien to the one required by the law of the husband's domicile?

Yet, it was noted that insuperable difficulties arise, for applying such form of the law of the place to which the marriage was subject to, when it was celebrated abroad. The dissimilarity of forms required in different places, and the pertinence of forms to public policy render the acceptance of foreign forms abroad difficult. Regarding these difficulties and the undesirable effects to which they lead, careful consideration has

been given widely to this matter. However, a new rule came into force to govern the juridical acts upon their forms; this is expressed: "Locus regit actum."<sup>(4)</sup> This means that the juridical acts must be governed by the law of the place of their performance, without taking into account the forms required by the law with which the acts have their real connection.

The *locus regit actum* rule was laid down since the 12th & 13th centuries, by the advocates of the theories (Glossators) and (Post Glossators) by their decision that the performance of a juridical act is subject to the law of the place where it is made. Hence, during the ancient jurisprudence, no distinction was made between formalities and substantive requirements. The whole requirements were subject to the *locus regit actum*.<sup>(5)</sup> The submission principle of the form to the local law, as distinct from the law which governs the essentials, was established by the jurist (Guillaume de Gun), since 14th century, who proclaimed the "*locus regit formam actus*" by applying it for testament.<sup>(6)</sup> A similar view had been reached by "Bartole" who maintained that: the foreigners living in a foreign territory have a right to perform their acts within the local law form.<sup>(7)</sup> Further, at the end of 15th century, the submission of the intrinsic requirements to the *locus regit actum* had been clarified, by an Italian jurist (Gurtius), on the basis of the parties' intention for the submission of their act to the *locus regit actum*, by electing to perform it in a such place. Moreover, in the 16th century, Dumolin thought that the basis of the submission of the intrinsic validity to the *locus regit actum* was the tacit consent of the contractors, therefore, the will of the parties capable of electing another law to which the essential validity must be submitted to.<sup>(8)</sup> *Locus regit actum*, as the governing rule, has been incorporated into many legal codes. For instance, in English and Scottish law, it is the governing rule over the formal validity of Bills of exchange, contracts...etc; and it is considered as such upon the formalities of all juridical acts according to article 19 of Algerian civil code 1976.<sup>(9)</sup>

The introduction of *locus regit actum* has been confirmed and justified by many writers as follows: the main reason is the mischief and confusion to which the existing rules beforehand led to.<sup>(10)</sup> Although the *Locus regit actum* was regarded as the most established rule, it is worth noting that its application is surrounded by many problems which may render it an intricate and difficult rule to apply upon the formalities of marriage. Yet, *lex loci celebrationis* must be complied with in regard to the formalities of marriage. As a general rule, the Scottish law considers a marriage celebrated abroad as valid if it is performed in accordance with the local form. Even though a mere exchange of consent, according to Scottish authorities, could confer status of husband and wife upon the parties, a marriage solemnised abroad without observance of *lex loci* formalities would not be considered as valid in Scotland. This view has been criticised as being absurd because of considering marriage in Scotland merely as a matter of consent.<sup>(11)</sup> Algerian law permit celebration of marriage in the parties' personal law form if, and only if, they have a common nationality.

English law has been familiar with the doctrine of supremacy in formal matters of the *lex loci celebrationis* since 1703, when the matrimonial regime issue arose in Foubert v. Trust.<sup>(12)</sup> It was expressed that *locus regit actum* was the governing law, therefore, "...the said residue [being the estate in common] should go according to custom of Paris, in the same manner as it would have gone if no such contract had been made...",<sup>(13)</sup> simply because the parties to a marriage depend upon the law or custom of the place where the marriage took place. In fact, in 1744, the doctrine was expressly stated in Cmvchund v. Barker by Lord Hardwicke: "so in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it was solemnised".<sup>(13a)</sup> The doctrine had been discussed widely, for the first time, in Scrimshire v. Scrimshire<sup>(14)</sup> where two English minors went through a ceremony of marriage in France, without observance of solemnities required by French law. Regarding the validity of marriage, it was alleged that the marriage should be

determined according to English law on the basis that the parties were English subjects and domiciliaries. This allegation was rejected because according to English law, "...English marriages are to be deemed good or bad according to the law of the place where they are made".<sup>(15)</sup> The judge of the ecclesiastical court, Sir Edward Simpson, had no doubt that French law was to be applied, saying:

"It is the law of this country {England} to take notice of the laws of France, or of any foreign country, in determining upon marriages of this kind. The question being in substance this -whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law."<sup>(15a)</sup>

He concluded that "all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made".<sup>(15b)</sup> Therefore, foreign law was accepted before an English court as applicable for the determination of the validity of marriage, as being the law of the place of celebration, even though the parties were members of the *lex fori*. The French nullity decree was considered as evidence of the French law.<sup>(16)</sup>

To sum up, the adoption of different conflict of law rules universally results in conflicts. Therefore, it has been established that uniformity is needed upon conflict of law rules for determining marriage validity. The only applicable law which leads to the extirpation of the infinite mischief and confusion, that must necessarily arise to the subjects of all nations, with respect to legitimacy, succession and other rights, is the *locus regit actum*. This rule may be interpreted differently in different countries, such as the element of parental consent requirement that may be viewed differently. Observance of the respective laws of different countries, upon formalities, will lead to such mischief; however, this will not ensue if the *lex loci celebrationis* rule is adopted.<sup>(17)</sup>

### 1- Bases and origin of the *locus regit actum*.

*Lex loci celebrationis* is well established as one of the clearest principles of the conflict of laws on the basis of some evident reasons. The certainty of this rule has led to the dearth of attempts to explain the principle. Mendes da Costa,<sup>(18)</sup> explained its acceptance on the basis that the rule is certain, "agreeable to the law of nations which is the law applicable to every country and take notice as such", and it is a rule "which it is fair to assume has been formulated with consideration for the moral and ethical well-being of society".<sup>(19)</sup> To claim that the *locus regit actum* complies with the law of the nations is debatable because formal adequacy has been referred to other laws than this principle in many countries, e.g. Germany, France. Further, it is not self-evident that the determination of the formalities of marriage according to the *lex loci* rule is better suited to advancing society's well-being than any other possible rules.

Yet, in the early development of the conflict of laws, it has been maintained that the doctrine was founded on the notion of comity. The court of the forum applies the law of the place of celebration to marriage celebrated abroad, in the hope that other states will, in turn, apply the *forum's* law to marriages solemnised within the *forum*.<sup>(20)</sup> This implies that the acceptance of the *lex loci* rule is linked to territoriality, in respect that the law of the *forum* has to govern every act which has been performed within its territory. The foundation of *lex loci* rule on the international comity has been denied, in England, because it is not easily reconcilable to any sound reasoning. It is said that reference to the *lex loci* rule is an obligation, therefore, "[t]he courts of the country where the question arises, resort to the law of the country where the contract was made not *ex comitate* but *ex debito justitiae* in order to explicate their own jurisdiction..."<sup>(21)</sup> Hence, the application of *lex loci* rule in Roach v. Garven<sup>(22)</sup> and Scrimshire v. Scrimshire,<sup>(23)</sup> was founded on an individualistic conception of the purpose of the conflict of laws, in respect that the desire, to avoid mischief and

confusion, and to protect the rights of individuals, is clear. Recently, Professor North said that: "certainty, predictability and uniformity of results are achieved by the application of the law of the place of celebration."<sup>(24)</sup>

The desire to eliminate these difficulties, arising from the application of any other laws to formal validity, the aim of uniformity of governing rules in conflict of laws, and harmonization of decisions were prime factors in establishing the doctrine of *locus regit actum*. Therefore, whatever the functional bases of its establishment, it is accepted as "the most settled principle of enlightened jurisprudence."<sup>(25)</sup> Further, it is accepted because of its accordance with the *Jus gentium*.<sup>(26)</sup> The question which should be asked therefore is, does the non-compliance with the formalities of the *lex loci* rule always lead to the annulment of the marriage? This matter arose in Ruding v. Smith<sup>(27)</sup> where two British subjects celebrated their marriage, in a private house at the Cape Colony in 1796, within the presence of chaplain of the English forces. It was celebrated by licence granted by the commander of the forces there, because of the husband's status being that of a member of the English forces. In principle, according to the mandatory application of the *lex loci* rule within the English law, the marriage would have been held void. But, the marriage was held to be valid because of the insuperable difficulties of complying with the local law, under which parental consent was required. Besides that, it is noticeable that the marriage validity was based on the parties' status being that of members of a conquering army.<sup>(28)</sup> This implies that members of a conquering army of a given country, have no need to comply with the *lex loci* rule.<sup>(29)</sup> The principle of the *lex loci* rule is confirmed in Berthiaume v. Dastous<sup>(30)</sup> where it has been illustrated that:

"If there is one question better settled than any other in international law, it is that as regards marriage "putting aside the question of capacity" locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter the proceeding or ceremony which constituted marriage according to the law of the place, would or would not constituted marriage in the

country of the domicile of one or other of the spouses. If the so called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding, if conducted in the place of parties' domicile would be considered a good marriage."

The same principle has been strongly affirmed in the case of Starkowski v. Attorney General<sup>(31)</sup> where it is illustrated that the rule *locus regit actum* laid down in Berthiaume v. Dastous has to be maintained as the main governing rule upon formal validity of marriage. And according to Starkowski v. Attorney General, the decision in Berthiaume v. Dastous is to be construed as referring to the content of the *lex loci celebrationis* when the case come before the *forum* (presumably so long as there has been no intervening marriage, valid as to substance and form).

#### **B- The Difference Between Formal And Intrinsic Validity of Marriage.**

As regards the duality of the laws applicable to the formalities and the essentials of marriage, a distinction should be made between matters pertaining to form, on one hand, and matters relating to the essence of marriage on the other. It is of note that *locus regit actum* was considered, before the middle of the 19th century, as the only governing law upon marriage validity. In the earlier cases up to Brook v. Brook,<sup>(32)</sup> although essential matters were involved, consideration was only given to the law of the place of celebration. Scrimshire v. Scrimshire<sup>(33)</sup> is an illustration of one of these decisions. It is pointed out that "These authorities fully shew that all contracts are to be considered according to the law of the country where they were made."<sup>(34)</sup> The implication which should be drawn from this case is that English law governs not as the parties' personal law, but as the law of the *locus actum*, the marriage being celebrated in England.<sup>(35)</sup> Careful analysis shows that that distinction was indicated as early as 1831 in Conway v. Beasley,<sup>(36)</sup> where it was shown that capacity to marry should be governed by the *lex domicilii*. It was stated that:

"The due effect of a Scottish domicile on this decision of these cases would demand a very careful consideration... Undoubtedly, questions of marriage are "prima facie" to be judged of by the law of the country where they are solemnised, but I am of opinion that considering the second marriage, I must ascertain the capability of the parties to contract."<sup>(37)</sup>

Despite this reference to the law of the domicile in this case, the ensuing decisions show that no changes have taken place until Brook v. Brook<sup>(38)</sup> The main reason for the decision in Brook v. Brook is that it is impossible to recognise a marriage which contravenes the public policy of the law of domicile, even though it is valid according to the *locus actum*. Although there was authority in Story<sup>(38a)</sup> for providing exceptions to the rule, in particular where public policy prohibitions on marriage on the grounds, for example, of incest or polygamy were involved, the House of Lords adopted a much broader approach by virtue of which the application of the *lex loci celebrationis* to issues of essential validity was abandoned. Lord Campbell stated

"But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*,..., the essentials of the contract depends upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated."<sup>(39)</sup>

In French doctrine the submission of the essentials to a different law was proclaimed by Guillaume De Gun who enacted the *Locus forman actus* rule.<sup>(40)</sup> Both French and Algerian law submit the determination of formalities to the universal established rule, i.e. *locus regit actum*,<sup>(41)</sup> and the essentials to the personal law of the parties.<sup>(42)</sup> The Hague convention, in relation to the conflict of laws upon marriage, of 1902 adopted the same approach. In its article 5, it is stated that matter of forms are subject to the law of the place of celebration, whereas article 1 refers capacity to marry to the national law of each party. There is criticism that this convention is "dominated by the principle of nationality generally prevailing in continental Europe at that time"<sup>(43)</sup>

### 1- Determination of the nature of the requirements:

The distinction between formalities and essentials pertains to the question of characterisation. Careful analysis shows that the nature of requirements has been classified differently in different legal systems. However, Dr Cheshire said that the basis of the determination of the nature of any requirement is the effect to which its non-observance leads. Therefore, if absence of a requirement leads to the voidness of marriage according to the law of domicile, this determine its nature as essential; whereas if it renders the marriage only voidable, it should be considered as a formal matter because of the probability of its validation by observing certain formal requests.<sup>(44)</sup>

This view has been criticised on the basis that consent either affects capacity or does not. Relying on the effect of the lack of any requirement to decide its nature is unsound, because although its non-observance renders the marriage void, it may be classified as a formality. For instance, it is stated in the Matrimonial Causes Act,<sup>(45)</sup> that disregard of the appropriate formalities leads to a marriage being void, are these formalities to be considered as essentials? Hence, Cheshire's view was rejected by the Court of Appeal in Apt v. Apt<sup>(46)</sup> where the decision was that *lex loci celebrationis* would prevail on the ground that such a requirement was a formality according to English law, even though the parties' absence would render the marriage celebrated in England void *ab initio*.

As regards Brook v. Brook,<sup>(47)</sup> a different view may be deduced: the nature of a requirement as essential should be connected with the fact of its consideration as an *impedimentum derimens* "impediment irritant". For instance, prohibition of marriage between a husband and his deceased wife's sister is an impediment irritant which incapacitates the parties. In Sottomayer v. DeBarros it was held that the marriage is valid in England, even though marriage between first cousins is invalid according to the

Portuguese law. One reason for this decision was the application of English concepts for determining the nature of the requirement. However, it is clear that this view relies on the effects of non-observance of the requirement, according to the law imposing it, to decided its nature.

It is suggested that public policy is the basis upon which the nature of a requirement depends. It will be considered as an essential, if it is an issue of public policy. It seems that Apt v. Apt<sup>(48)</sup> is the basis of this theory, where the parties' presence at the ceremony arose. Lord Meriman illustrated that:

"The contract of marriage in this case was celebrated in Buenos Aires; that the ceremony was performed strictly in accordance with the law of that country; that the celebration of marriage by proxy a matter of form of the ceremony or proceeding; that there is nothing abhorrent to christian idea of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony valid where it was performed is not effective in this country to constitute a valid marriage."<sup>(49)</sup>

Accordingly, the dependency of party's presence, to be regarded as an essential, is related to its consideration as a matter of public policy. This decision is ambiguous, because it is not clear whether the proxy marriage belongs to form because of its insufficiency to raise a public policy issue; or pertains to formalities and, therefore, *lex loci celebrationis* should govern as far as it does not infringe English public policy. I think the latter view fits the general rule governing formalities. It is difficult to apply such a suggestion on the basis that it is not a satisfactory guide for determining the nature of a foreign requirement. For instance, in Simonin v. Mallac,<sup>(50)</sup> although the respect of the foreign requirement involved was not contrary to English public policy according to the general rule upon which the essential validity depends, the marriage was held valid on the ground that the question involved pertained to formalities. We should now turn to an examination of the continental and the common law systems, and

their definition of formalities. In both systems, formalities may be described as the external manners for the validity of marriage.<sup>(51)</sup>

As regards English and Scots laws, substantive requirements of marriage incorporate capacity to marry, statutory prohibition, the nature of marriage itself, and the parties' consent.<sup>(52)</sup> The crucial question, therefore, is; are those matters which vitiate parties' consent regarded as essentials? Clearly, consideration of these matters as essentials is related to their effects upon the existence of marriage. For instance, mistaking the ceremony as one of betrothal and not a marriage ceremony is essential because it leads to non-existence of a marriage,<sup>(53)</sup> whereas a mistake to the nature of the marriage is not sufficient to render the marriage void or voidable.<sup>(54)</sup>

Formalities are the requirements which pertain to the ceremony, the presence of an official, as well as his competence in territorial and personal respects. The matters relating to the performance of the ceremony are: the time and the place of celebration, the publication of banns, and the way in which the ceremony is carried out, for example, the parties' and witnesses presence at the ceremony, the way in which the parties' declaration of consent must be expressed, and the reading of some text concerning the duties and rights of husband and wife.<sup>(55)</sup> Besides that, according to English law, parental consent is a formality.<sup>(56)</sup> In Algerian law, essentials of marriage are: parties' consent, parental consent, capacity to marry, non-existence of any impediment irritants. Formalities involve the registrar's presence and his authority, the publication of marriage, forms of celebration, presence of parties and witnesses at the ceremony, and the form of the ceremony.<sup>(57)</sup>

It is worth mentioning that, although marriage is a status, its coming to existence is based on consensual agreement which is embodied in the expressing of an offer and acceptance. The degree of strength of social interest in marriage is a basis upon which

the formalities and essentials are distinguished. The reason for that is that all legal systems give varying importance to the requirement which results in creation of a status according to social environment and customs. Hence, characterisation of requirements and their attribution to any governing rule differs according to the social interest of a society where the requirements are imposed. Accordingly, the degree of vitality and importance of the requirement to the marriage status leads to its classification as a formality or essential. Therefore, essential validity is involved when a requirement relates to the contract to marry; whereas, formal validity is involved when it pertains to the external conduct.

## **2- Characterisation Question**

Dacey and Morris who have strenuously backed the view point of Bartin maintain that: "...even if the countries of the world agreed upon uniform conflict rules, cases involving the same facts would still be decided differently in different countries, quite apart from such factors as public policy and difference in procedures, for they might characterize the question differently."<sup>(58)</sup> It is well known that characterisation is a fundamental and intricate problem in conflict of laws which has perplexed writers for decades. Its existence, related to that of different domestic laws, localization of connecting factors for each legal category, results in distinction among conflict of law systems.

It is understood from the view point of Bartin that a certain uniformity is needed for the characterisation of legal matters into categories. To avoid classification problems and conflicts between different legal systems, it is not sufficient to agree upon uniformity of conflict rules. For instance, in marriage conflict rules; it is well established among all the legal systems that formalities pertain to the *lex loci celebrationis* determination on one hand, and the *lex domicilii* or national law of the parties is the main governing rule upon substantive requirements on the other. The crucial question, therefore, is the

differing classification of some requirements as formal or essentials, such as parental consent. This is considered as a formality according to English law, but it is an essential under French law. That leads to the application of dissimilar conflict rules, i.e. application of the *lex loci celebrationis*, and the application of the parties' national law respectively.

In both Algerian and Scottish law, it is generally recognised that characterisation of any requirement must be determined by the law of the *forum*. The Algerian civil code provides in its article (09)<sup>(59)</sup> that the Algerian court should classify any matter arising in conflict of laws according to Algerian law as being the law of the *forum*. However, the submission of classification to the law of the *forum* leads to the consideration of Algerian domestic law rules in order to decide whether the matter involved is a formality or essential. As can be seen, this is unhelpful because of the absence of a distinction between the requirements of marriage, as formality or essential, under Islamic law, which is the basis of the Algerian family law. It transpires that the Algerian distinction concerning the law applicable to the formalities and essentials has been borrowed from French law.

According to the authorities in Scottish Law, it is held that characterisation question is a matter for Scots law. It is illustrated in Bliersbach v. MacEwen<sup>(60)</sup> that: "in these circumstances, our law regards parental consent, not as something which can render a marriage *funditus* null, but as one of the factors relating to the celebrating of the marriage ceremony. The requirements regarding such consent in the case of marriage celebrated in Scotland therefore depend on Scots law". The marriage of Dutch persons lacking parental consent could proceed in Scotland, since Scotland has no rule requiring parental consent.

In English law, a characterisation problem arose for the first time in Simonin v. Mallac<sup>(61)</sup> where a marriage between French subjects took place in England without parental consent. It was held that parental consent was a matter of form on the basis that the court adopted English concepts to classify requirements relating to parental consent.<sup>(62)</sup> The same view was confirmed in Apt v. Apt<sup>(63)</sup> where the parties' presence at the ceremony was viewed as a formality, even though the lack of presence of one of the parties would render the marriage void if it was solemnised in England. However, it is stated that: "The classification of the ceremony, celebration, proceeding or whatever word one may choose to describe the formality of marriage contract, must be determined by the law of this country."<sup>(64)</sup> Hence, it is accepted that it is for the *lex fori* to determine whether the parties' presence at the ceremony raised the issue of formal validity. Careful analysis shows that the same view was held by French courts and academic writers. It is worth noting that Bartin argued that it is impossible to apply the *lex causae* upon characterisation question, on the basis of its being the result of classification. It was held in Caraslanis case<sup>(65)</sup> that whether a religious ceremony raised the issue of formal validity should be determined according to French concepts as being the *forum*.

Taking into consideration the lack of Algerian decisions relating to this question, it is difficult to argue that the Algerian court will not give consideration to the concepts of the relevant foreign law involved thereof. But a careful examination of section (19) of the Algerian civil code shows that it is impossible to look at the relevant foreign law for classifying the question involved in any case, if the parties decided to celebrate their marriage within the Algerian form, on the basis of the optional choice given to them.

It is worth mentioning that according to these systems, it is for the *lex fori* to determine whether the requirement is a formality or an essential. As regards the purposes of the conflict of laws rules upon marriage, this is controversial and critical. However, it is

unsound to apply the *forum* law concepts to decide whether the legal element involved is a formality or essential, without taking into consideration the concepts of the relevant foreign law involved thereof.

### **3- Matter of Parental Consent**

As regards the cases in which the validity of marriage is subject to a special consent of parents, this consent is a crucial and polemical question because of the existing divergences between legal systems which require parental consent for marriage. Problems arise when the *lex loci celebrationis* regards the marriage as valid, and it is invalid because of parental consent characterisation as essential according to the personal law of the parties. A question arises whether parental consent is a substantive requirement or a formality?

In continental law systems, this consent is classified as a substantive requirement to a marriage, its absence rendering the marriage invalid. It is argued that the reasons are historical.<sup>(66)</sup> It is thought that minors' consent is not sufficiently mature, they are inexperienced upon marriage and its effects, and the family has an interest; this consent is therefore intended to ensure protection for minors and the family interest.<sup>(67)</sup> On the legislation so far, the position in Algerian domestic law is that men under 21 years of age, and all women require parental consent for marriage.<sup>(68)</sup> The reasons which probably led to this position are significant. Prior to the Algerian independence, consent of minors should be completed by the consent of their matrimonial tutor.<sup>(69)</sup> Matrimonial tutor is one of the requirements of marriage, according to the Algerian family code. Article (9) of this code is not clear. The Arabic text of this article does not contain any precision: either the matrimonial tutor's consent is necessary, or only his presence suffices, whereas his presence at the ceremony is clearly stated in the French text.<sup>(70)</sup> Taking into consideration article (77) of the Algerian "Etat civil" code 1970, the registrar or judge, to whom the function of celebrating marriages has been

given, cannot draw up a marriage certificate without the authorization of the matrimonial tutor.<sup>(71)</sup> It is therefore clear that the matrimonial tutor's consent is essential, on the basis that the only recognised celebrant is prevented from celebrating marriage without the matrimonial tutor's authorisation. Further, the presence referred to in article (9) of the Family Code implies the tacit consent of the tutor.

Relying on the Islamic law, as the main basis of Algerian family law, a woman needs matrimonial tutor's consent, even if she is major. This may be explained by the morals and customs of the society which does not accept the fact that a woman can have a direct relation with the man who wants to marry her, before the wedding ceremony. Hence, the matrimonial tutor is for transmitting her consent and conditions to the other party. Besides, the father can prevent his virgin daughter from marrying if such prevention is in her interest.<sup>(72)</sup> This is questionable, because this condition debilitates the basis of parental consent requirement; and virginity has therefore no relation with this fact. Further, the arguments advanced by the academic writers do not stand, because the inexperience of a virgin man does not result in requiring parental consent if he is over the age of (21) years of age. Accordingly, these provisions mentioned above are restricted by article 12 (1) of the Family Code. Thus, the matrimonial tutor has to explain his refusal to consent by advancing sufficient justification, otherwise the judge can authorise the celebration of marriage.<sup>(73)</sup> It is of note that in the case of an orphan minor, or in cases where the matrimonial tutor cannot give his consent, judicial consent substitutes therefore.<sup>(74)</sup> Regarding article (33) of the family Code 1984, a marriage celebrated without obtaining parental consent is voidable.

The question arises, what is the Algerian court's position when the marriage involves a foreign element? First of all, the general rule which is established over the essentials of marriage is that the essential validity of marriage is a matter which must be determined

by the personal law of each party. It is understood from the viewpoint of Professor Issâd, that the non-observance of the essential requirements of each party's personal law is sufficient to hold the marriage void before Algerian courts according to article (11) of the Algerian Civil Code.<sup>(75)</sup> According to Batiffol's view,<sup>(76)</sup> a marriage which takes place in France without parental consent, between foreigners might be considered valid in France where the age of majority, according to French law, is slightly higher than the age required by the foreign law involved thereof. On the other hand, foreign law which requires a higher age of majority, and parental consent, should be respected before the French courts. Regarding French judicial precedent, a marriage of foreigners solemnised in France without obtaining parental consent, is valid if the parties belong to a country of which the law does not require such consent. This is accepted, as lack of parental consent does not offend French public policy. Hence, parental consent is referred, as a matter of essentials, to the personal law of the parties.

However, according to Algerian choice of law rules, there is no obstacle to the recognition or permitting of celebration of marriage in Algeria, without obtaining parental consent, of parties who are major under their personal law, even if they are not as such according to Algerian law. Further, the more demanding laws are respected before Algerian courts. In case where the personal laws of the parties do not require parental consent, a marriage of such parties is validly solemnised in Algeria without such consent. By virtue of article (13) of Algerian Civil Code<sup>(77)</sup>, the situation becomes very intricate and precarious when marriage is between an Algerian and a foreign minor whose law does not require parental consent. Having regard to this article, the foreign minor must obtain parental consent on the basis that Algerian law prevails upon marriage whenever an Algerian subject is involved, except that the matter of capacity remains under the personal law of each party. It is clear that the fact of requiring parental consent is pertaining to capacity to marry, and hence, this consent should not be regulated by the Algerian law even if an Algerian is involved. To this

end, we can say parental consent should be an exception to article (13). Hence, a marriage between an Algerian and a foreign minor, whose law does not require such consent, is valid before Algerian courts, even if it is celebrated without such consent.

Consequently, consideration of parental consent as a mere formality in the common law of England and Scotland has been argued upon the canon law application to marriage, before Temesti decree of the Council of Trent, that requires only a mere exchange of consent "*per verba de præsenti*" for conferring husband and wife status upon the parties.<sup>(78)</sup> Therefore, it is difficult to understand the *ratio* of considering a marriage celebrated abroad, between English subjects, without parental consent as valid after the promulgation of Lord Hardwicke's Act 1753 which put forward the celebration in *facie ecclesiae*, and the importance of parental consent to marriage.<sup>(79)</sup> Dicey and Morris<sup>(80)</sup> pointed out that because of the non-distinction between formal and essential requirements, and the submission of marriage validity to the *lex loci celebrationis* in earlier cases, the English court felt obliged to adopt the logically doubtful theory established in the earlier decisions even after the distinction between formal and essential validity was adopted -i.e. the issue of parental consent belongs to the marriage ceremony. Although Falconbridge's suggestion that the problem could have been solved by characterising only the English requirement as relating to form seems logical and reasonable,<sup>(80a)</sup> it is believed that it would not have provided an explanation for those earlier decisions.<sup>(80b)</sup>

As regards English law, parental consent is required for enabling a minor between 16 and 18 years of age, unless the minor is a widow or widower. The reasons of dissuading minors from contracting unwise marriages was buttressed by the prevailing policy of cutting down the number of unstable unions, are likely to be the bases of parental consent's requirement.<sup>(81)</sup> Although parental consent is required, a marriage

celebrated without it will not be annulled before English courts, unless in the case of marriage by banns and the person whose consent is required dissented from the marriage at the time of publication of banns.<sup>(82)</sup> This result might be said to be against the basis of parental consent, because it will permit unsuitable unions. However, Parliament discussed this matter very recently, and there was suggested the removal of the English legal requirement of parental consent regardless of the domicile of the parties. Accordingly, a foreigner who wants to marry in England will not be required to obtain parental consent, unless it is the case under his or her domiciliary law.<sup>(83)</sup>

The fact that "*locus actum*" remained as a governing rule upon marriage validity, and the persistence of consensual marriage in Scotland until 1940,<sup>(84)</sup> meant that intricate and difficult cases were created. Compton v. Bearcroft<sup>(85)</sup> is an illustration of one of these decisions. Two English subjects, both minors, solemnised marriage "*per verba de praesenti*", without parental consent required by English law, at Gretna Green. It was held valid, according to its validity under the *lex loci celebrationis*. This decision was confirmed in so many cases afterwards.<sup>(86)</sup> Accordingly a similar view was upheld in cases where the marriages were celebrated in England. In Simonin v. Mallac,<sup>(87)</sup> two French subjects went through a ceremony of marriage in England without parental consent. The main argument concerns the characterisation of the foreign legal rule involved, and whether the non-observance of such requirement leads to an absolute incapacity? Relying on the fact that the parties were free to marry after three months formal asking, no matter what the answer of their parents might be, it was held that the French rule incorporates an additional formality.<sup>(88)</sup> The opinions suggest a possibly different approach if the non-observance of such requirement were to result in an absolute incapacity.<sup>(89)</sup>

This decision is questionable. Regarding the fact that parents could seek a decree of nullity within one year after the celebration, it is clear that the marriage was

voidable.<sup>(90)</sup> Hence, the French decree of nullity should have been conclusive in England, according to Salveson v. Administrator of Austrian Property, where it was decided that the courts of the husband's (or, here, common) domicile have jurisdiction to grant a decree of nullity if the marriage is only voidable.<sup>(91)</sup> Nevertheless, it has been argued that the French decree was granted on the basis that the marriage was in *fraudem legis* to French law as being the personal law of the parties.

In my view, English concepts of characterisation, as *lex fori*, are used for determining parental consent nature, no matter what the effect of its absence by another law may be. This is confirmed in Sottomayer v. DeBarros [N°1]<sup>(92)</sup> where Simonin v. Mallac is interpreted:

"It only remains to consider the case of Simonin v. Mallac. The objection to the validity of the marriage in that case, which was solemnised in England was the want of the consent of parents required by the law of France, but not under the circumstances by this country. In our opinion this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage."

However, it is unsound to uphold that this decision is based on the consideration of French rule as providing an additional formality, because a similar decision was reached in Ogden v. Ogden,<sup>(93)</sup> even though the legal rule involved regards parental consent differently. Hence, it seems unlikely to hold this decision as a guide in all cases, dealing with this requirement, on the basis of its wide *ratio* and its undesirable effects. In Ogden v. Ogden, it appears that the question of classifying the French rule involved, was never considered. There was reliance on the assumption that such requirements relate to formalities, according to Simonin v. Mallac decision. The main reason for the decision in Ogden v. Ogden is that a marriage celebrated in England and involving an English domiciliary is not impeached by any incapacity which is unknown to English law.<sup>(94)</sup>

As regards Scottish authorities, it appears that Scots law recognises two kind of impediments to marriage: *impedimentum dirimens* which is fundamental, thus, rendering the marriage void, and *impedimentum impeditivum* which is of a prohibitive character (i.e. the parties are not allowed to marry until the impediment is removed). It is understood from the view point of Professor Clive,<sup>(95)</sup> that a foreign domiciliary who is incapable of marrying according to his personal law, under which the prohibition pertains to the essentials of marriage, cannot marry in Scotland. Parental consent is unknown to Scottish law.<sup>(96)</sup> The question, accordingly, is how the Scottish courts deal with a case involving such consent? In Bliersbach v. MacEwan,<sup>(97)</sup> it was maintained that parental consent was an *impedimentum impeditivum*, on the basis of its pertaining to the formalities.<sup>(98)</sup> One reason for this decision was that, the celebration of marriage being within Scotland; the effect of parental consent on the nature and the validity of marriage would be determined by Scots law as being the *Lex loci celebrationis*.

No consideration was given to the effect of the impediment under the foreign law in this decision. This is confirmed in Lodge v. Lodge<sup>(99)</sup> where the absence of parental consent under the relevant foreign rule leads to an absolute incapacity. Nevertheless, the marriage was held valid. Even though reliance is placed on the domestic distinction between *impedimentum dirimens* and *impedimentum impeditivum*, it would not seem to be accurate to say that the effect to which an impediment leads, reflects its nature. Therefore, a requirement may be considered as essential, but having regard to the surrounding social customs, a given legal system may feel obliged to render the marriage only voidable. Further, this has been criticised by Professor Clive who states: "many countries do not have the concept of a marriage void *ab initio* and there is no necessary connection between this distinction and the form/substance distinction".<sup>(100)</sup> Moreover, taking such distinction as a guide in all cases would lead to intricate results

such as considering formalities as essentials and vice versa. Therefore, this distinction dilapidates the Scottish private international law principles.

If the boot were on the other foot, a Scottish court should respect a French rule requiring (let us say) parental consent to the marriage of all persons of young age (whatever their personal law) if that marriage takes place in France.<sup>(101)</sup> This is undesirable. However, "it might surely be a question whether a protection intended for the rights of Dutch parents, given to them by Dutch law, should operate to the annulling of a marriage of British subjects, upon the ground of protecting rights, which do not belong, in any such extent, to a parent living in England."<sup>(102)</sup> The case is surely different, and the Dutch parents have a clear interest.

As regards the social view point, these decisions produce undesirable effects, namely consideration of the woman as married and unmarried in the place of celebration and the place of the domicile respectively. Thus, they result in the creation of a limping status, preventing the parties from marrying again within England or Scotland, and the legitimacy of the children is accepted in one place and not in the other. I think that the use of domestic rules to characterize a foreign requirement is unsound. The aim of extirpation of limping marriage necessitates giving respect to the foreign law involved. Further, the *Iex fori* has no interest in holding a marriage valid while it is declared null according to the personal law of the parties. Therefore, parental consent should be characterised as a substantive requirement. This can be argued, on the basis that requiring such consent is related to the matter of age of the parties, which is considered as a substantive requirement. Nevertheless, even if the English courts maintain the consideration of parental consent as a formality, a foreign decree annulling a marriage celebrated in England or Scotland without parental consent should be recognised on the basis of extirpating limping marriages, especially when English domiciliaries are involved (i.e. necessarily, as the party not requiring consent).

**(i)- Criteria for classifying parental consent**

It worth mentioning that these decisions appear as ammunition to academic writers for appraising and stigmatizing the characterisation of parental consent as a formality. Many of the earlier theories marked out a distinction between those requirements which created absolute incapacity and those which do not. It is understood from the view of Westlake<sup>(103)</sup> that parental consent is not considered as a formality if it creates an absolute incapacity. This approach examines the provision in its context in the foreign law. However, Falconbridge<sup>(104)</sup> criticised this approach because it examines parental consent in isolation, when it should be considered in the whole context of foreign law. The advocates of analytical jurisprudence and comparative law theory state that the English court when considering a foreign requirement should give effect to the whole provision of foreign law. Thus, provisions relating to parental consent are regarded as matters of family law, therefore, they should be respected everywhere.<sup>(105)</sup> Clearly, the latter view is not based on analytical jurisprudence and comparative law, but it stands better than the former view mentioned above.

Falconbridge<sup>(106)</sup> points out: " in order to characterise the requirement of French law, the English courts must examine the concrete provisions of the French law of marriage, not merely the relevant provision as to parental consent or other alleged ground of invalidity, dissociated or isolated from their context, but the whole title or group of chapters and articles relating to marriage." This view is upheld as correct, because it gives respect to the relevant foreign law involved. Accordingly, it would not seem to be accurate to rely on the *lex fori* for characterising any requirement, when the consideration should be given, on comity to the personal law of the parties, on the basis that the *lex fori* theory debilitates the basis of choice of law rules.

Professor Anton, though he admits that the law of the forum must decide whether the relevant foreign rules relate to the formalities or to the essentials of the marriage for the

real issue is one of establishing a choice of law rule, had little doubt that foreign rules establishing impediments to marriage should be examined in their foreign setting if the tendency of preventing limping marriages would be achieved.<sup>(106a)</sup> One might argue that this process seems to be the only rational method by which full and proper effect can be given to the forum's choice of law rules. To this extent, the general editor of Cheshire and North's private international law submitted that

“[t]o take the opposite course and uphold a marriage essentially void under the personal law of the parties by attributing a merely ceremonial character to a rule regarded as essential by that law would not only be the negation of so-called comity, but would incongruously debilitate the English [forum] choice of law rule”.<sup>(106b)</sup>

It is therefore clear that a foreign classification cannot be ignored unless it contravenes the forum's public policy or is repugnant to some fundamental principle of the forum.

Finally, the Scottish Law Commission has recently suggested that the Scottish courts must examine foreign rules on parental consent in the light of the system of which they form part. The Scottish Law Commission justified its positions by arguing that it would be impracticable and unsatisfactory to characterise all requirements of parental consent automatically as pertaining to form, for such a requirement may result in a legal incapacity if, and only if, it is “intended to prevent the young person from entering into a valid marriage anywhere, in any way, just as the Scottish rule about under-age marriages is intended to prevent a Scottish domiciliary under the age of 16 from entering into a valid marriage anywhere”. But it is interesting to underline that a foreign rule which merely delays a minor's marriage without parental consent for a period after consent was refused would not be regarded as resulting in a legal incapacity simply because it would not preclude the young person's marriage. Relying on the fact that it would be unsatisfactory to characterise all foreign requirements of parental consent automatically as requirements resulting in a legal incapacity, the Scottish Law

Commission recommended that:

“[a] rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age”.<sup>(106c)</sup>

One might therefore argue that the proposed rule appears to be much more consistent with the policy consideration behind section 3(5) of the Marriage (Scotland) Act 1977 which was designed to discourage “runaway” marriages by foreign minors without parental consent. It is also interesting to note that the proposed rule would have resulted in a different decision in the case of Bliersbach v. MacEwan and in the much-criticised case of Ogden v. Ogden.

### **C- Forms of Performing Marriage**

As regards the existing divergences between domestic laws of countries, a fundamental difference of attitude concerning forms of marriage exists between countries where domestic law confers on the marriage a secular nature, on one hand, and those countries where the marriage is considered as a sacrament on the other. Accordingly, the question of necessity of any ceremony and the question of the presence of an official at the ceremony have been characterised differently. In what follows, consideration shall be given to the system of compulsory civil ceremony, to the system of compulsory religious ceremony, and to the optional system.

#### **1- Civil Ceremony**

A civil ceremony necessitates intervention of a public authority or an official, and fulfillment of certain formalities at a definite time and place.<sup>(107)</sup> It is pointed out that many countries consider civil ceremony compulsory for celebration of marriage within their territories, without considering nationalities or domiciles to which the parties belong. On the other hand, they recognise marriages solemnised abroad in accordance

with the *lex loci celebrationis*, regardless of the ceremony by which they are celebrated.<sup>(108)</sup> A marriage between Algerians, abroad, in a local form is recognised as valid if the local form is a civil ceremony. But if the ceremony is religious and the parties are Muslims, the marriage will not be recognised, unless the *locus actum* requires observance of the rules of the religious denomination of the parties, i.e muslim ceremony for the Algerians.<sup>(109)</sup>

An important question arises when foreigners celebrate their marriage within these countries; is the requirement of a religious ceremony required by the countries to which the parties belong a formality or essential? In determination of the validity of a religious or civil marriage celebrated within these countries between parties belonging to countries, at least one of them require religious form, reference should be made to that law for determining the significance conferred on such marriage.<sup>(110)</sup> But the result of such a seemingly fair-minded point of view is the dictating extra-territorium by the religious to the secular country as to how the latter should conduct its marriage ceremonies, a stance adopted by Malta and rejected by England in the Maltese Marriage Cases. Regarding these systems which consider civil ceremony compulsory, a marriage celebrated in a religious ceremony within the *forum* is null and void, even if this ceremony is the only recognizable method by the personal law of the parties. This is well founded on public policy of the *forum locus actum*. Further, the insurance of protecting parties' interest, the gravity of the act, and third party and society interest are bases of such requirement too.<sup>(111)</sup>

Public policy as a basis of requiring a civil ceremony is questionable, and implies that the personal law of the parties remains in theory applicable, but its application is dismissed because of its contradiction of the *forum* concepts. Relying on the aim of conferring universal validity upon marriage, the *forum locus actum* has to admit the

exigency of a religious ceremony required by the parties' personal law, especially when the parties belong to common nationalities or when the personal laws of the parties require the same ceremony. But a marriage celebrated in a civil ceremony ought to be recognised by the personal law of the parties, otherwise a limping marriage will be created.<sup>(112)</sup>

## **2- Religious Ceremony**

A religious ceremony necessitates the presence of a priest or a minister of the church or any authorised religious body. As regards countries whose domestic law regards religious ceremony as obligatory, extraterritorial application of this principle is required. Apparently, it appears from Greek law that any person who wants to marry must take into account his religious denomination's form, and then, in cases where the parties belong to different religious denomination, both ceremonies must be respected. This is based on the marriage consideration as a sacrament, and the religious celebrant is the representative of God. Further, religious nature is not conferred on the marriage only by the presence of an authorised celebrant, but relies on the parties' will to solemnise a confessional act by observing the requirements of their personal law.<sup>(113)</sup> Besides, a civil marriage, of parties belonging to these countries, abroad will not be recognised unless it is followed by a religious ceremony. The Hague convention on marriage 1902 provides that these countries can refuse to recognise as valid, marriages of their nationals or domiciliaries solemnised abroad in a civil ceremony.<sup>(114)</sup>

A question arises, whether the court of the *forum* should recognise a marriage celebrated religiously without observance of *lex loci celebrationis* requirement. The court of the *forum*, being the *lex loci celebrationis* may refuse recognition of a marriage celebrated in a religious ceremony without observance of the local law preliminaries, especial when the application of the local law is imperatively required.<sup>(115)</sup> Reliance on the parties' will to solemnise a confessional act as a basis

of requiring a religious ceremony is questionable, and implies that the parties may choose to celebrate their marriage in a civil ceremony. Hence, these countries which require such form, as essential, have to restrict their laws, in particular when the marriage involves a foreign element whose law requires a civil ceremony. However, they should accept as valid a civil marriage entered into where only one of their nationals is involved, unless the personal law of the other party requires religious ceremony and both parties belong to a common religious denomination. Therefore, if the parties belong to a common nationality, or their personal laws require a religious ceremony and they belong to the same religious denomination, the *lex loci celebrationis* should permit such celebration on the basis of creating a universal valid marriage. Furthermore, these countries have to permit foreigners belonging to countries requiring civil ceremony to celebrate their marriages in such ceremony within their territories.

### **3- Optional Systems**

English and Scottish laws state that provisions relating to the form of the ceremony and mode of solemnisation of the marriage pertain to formalities. The question of the necessity of a religious or civil ceremony has been examined in many cases, and it was held that the form of the ceremony should be determined by the *lex loci celebrationis*.<sup>(116)</sup> However, within the United Kingdom it is established that celebration of a marriage either in civil or religious ceremony is permissible with observance of some preliminaries, such as marriage notice and marriage schedule.<sup>(117)</sup> Moreover, the authorised celebrant must proceed to celebrate the marriage within a form recognised, by the religious body to which he belongs, as sufficient for the solemnisation of marriage. The authorised celebrant cannot celebrate the marriage religiously unless the parties produce before him the marriage schedule. It is therefore clear that a marriage celebrated without the production of the schedule will not be recognised. The marriage of foreigners who fail to observe the preliminaries of *lex*

*loci celebrationis* will be held invalid according to English and Scottish law.(118)

It is worth mentioning that the optional system reduces limping marriages, on the basis that it takes into account the characterisation of the marriage as a sacrament or as a civil act. Further, it is based on the fact that, though the existence of celebration is necessary, the nature of the ceremony is not an aim in itself: the nature of the ceremony, as secular or religious, is less important. Therefore, the optional system should be adopted in a way which permits the parties to use their personal law form if they belong to a common nationality or domicile, or if their personal laws require the same form. Where such conditions are not fulfilled, the *lex loci celebrationis* form should be applied imperatively. Therefore, extraterritorial application should not be granted to the personal law forms, unless one of the above conditions is fulfilled, where the *lex loci celebrationis* should permit such celebration. To achieve the universality of this rule which will lead to universal validity of marriage, this should be incorporated in all legal systems, and should be stated in international conventions.

#### **4- Proxy marriage**

Proxy marriage may be described as a marriage which is celebrated without the presence of one or both parties. But his or her consent is delivered by a special authorised agent or a proxy appointed to participate in the marriage ceremony on behalf of his or her principal. The main criteria of a proxy marriage is that it requires a formal celebration with the assistance of a civil registrar or a religious celebrant.

The proxy marriage question was widely discussed in Apt v. Apt, (119) where a proxy marriage was celebrated in Argentina. The power of attorney was executed in London. It was argued that the issue involved was one of essential validity. This was rejected on the basis that "...the method of giving consent as distinct from the fact of consent is

essentially a matter for the *lex loci celebrationis* and does not raise a question of capacity."<sup>(120)</sup> Therefore, the *lex loci celebrationis* is the governing rule upon determination of all questions relating to the power of attorney and formalities applicable to marriage, if proxy form is permitted.<sup>(121)</sup> Taking into consideration the question of determining the place of celebration, it is argued in this case that there is no *locus contractus* as both parties to the marriage were not present at the ceremony. It was held that the place of celebration is the place where the proxy participates in marriage ceremony and that the marriage certificate seems to be conclusive as to the place of celebration. Accordingly, if the proxy marriage is regarded as valid in that country, there is no appropriate reason for its non-recognition in third countries. From the view point of Professor Palsson, it is understood that the opposite view states that the place of celebration of a proxy marriage is the place where the power of attorney is executed, on the basis that the consent of the represented party is really given when and where the proxy is appointed. Therefore, the communication of the consent by the proxy at the ceremony is only for establishing the marriage relation.<sup>(122)</sup>

Palsson's rival view seems unfounded because the consent of the represented party is not decisive before its communication at the ceremony. Hence, the place where the consent are exchanged and where the transaction takes place is the place of celebration.<sup>(123)</sup>

## Section Two:

### Application of *Locus Regit Actum* Rule

#### A- Nature of the *Lex Loci Celebrationis*

*Locus regit actum* with regard to marriage is a commonly found maxim, but it has been subject to varying interpretations in different places as a result of the existence of different religions, morals and customs. What might be deemed as a mere formality in one place might be regarded as a matter affecting the essential validity of marriage in another. It is stressed in many countries that "the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted,"<sup>(124)</sup> and, therefore, the personal law of the parties is irrelevant whether or not it coincides with the local law. Whether any ceremony constitutes a formally valid marriage depends exclusively on the law of the place of celebration, and thus, non-compliance of the ceremony with the existing formalities of local law results in the formal invalidity of the marriage even though the ceremony is recognised as a way of performing a valid marriage under the personal law of the parties.<sup>(125)</sup>

The imperative approach of *lex loci celebrationis* has been confirmed and justified by many academic writers. In the past, it was maintained that the concept of sovereignty is one of the bases upon which this approach stands. This is related to the territoriality doctrine under which it is thought that the local form is the most convenient because of its enactment according to the morals and customs of the "*locus actum*" state. Local forms are applicable within the forum where they are enacted and upon the subjects of the state who are residents of the *forum*, irrespective of the duration of their residence. Therefore, the *lex loci* rule must be of imperative application on the basis that compliance with the local forms produces their effects even if the parties' personal law

requires different forms.<sup>(126)</sup> This is questionable; enactment of local forms according to the morals and customs of the *forum locus actus* appears to be a most convenient basis for applying the law on the ground of personality principle since it is unsound to subject a person to foreign morals and customs. Further, application of the law of the *forum locus actum* upon a foreigner residing temporarily within the territory of the forum is not well founded. Therefore, this approach is inconsistent with the existence of personal status.<sup>(127)</sup>

Public policy and the need for the intervention of public authority or an official are adduced to justify this approach. Formalities of marriage are characterised as public form relating to public policy on the basis of the gravity of marriage and its importance to the parties and society as being a family matter. The society, however, has an interest in the submission of marriage celebration to the local forms within the territory of the *forum*.<sup>(128)</sup> For instance, if marriage is regarded as secular (only) results in preventing any religious body from solemnising marriage within the territory of the place where such a rule is adopted and vice versa.<sup>(129)</sup> Intervention of an official or public authority is required for marriage celebration, and, therefore, the form should be governed by the law to which the authority belongs, "*lex magistratus*". It has been suggested that *lex loci celebrationis* cannot be applied facultatively in cases bearing on public policy because the intervention of a marriage officer is a principle of public law.<sup>(130)</sup> As regards the fact that the place of celebration may be accidental and uncertain, as, for instance, when the marriage is celebrated aboard a ship, public policy reasoning is unfortunate because it implies that the personal law should, in principle, determine the formal validity, and the *lex loci* rule is applied alternatively in accordance with the role of public policy in the ancient choice of law rules.<sup>(131)</sup>

On the authorities so far, English and Scottish laws regard the *lex loci* rule as an imperative rule, and therefore, a marriage involving Scottish or English subjects and

celebrated abroad without compliance with '*locus actum*' will be held void, even though the form in which it is solemnised is considered as a good form for performing a valid marriage under Scottish and English laws.<sup>(132)</sup> This matter arose in the case of MacCulloch v. MacCulloch,<sup>(133)</sup> which concerns two Scottish domiciliaries who went to the Isle of Man and cohabited there for [06] months. It was held that the marriage was void on the ground that cohabitation with habit and repute does not constitute a legal marriage in the place of celebration. It is evident that English and Scottish Court felt obliged to follow the decisions granted at the time when the principle of submitting the entire validity of marriage to the *lex loci celebrationis* was prevailing. The imperative approach was confirmed as early as 1752, when the Courts decided that "[o]ne rule in these cases should be observed by all countries -that is, the law where the Contract is made."<sup>(134)</sup> It is illustrated that *lex loci celebrationis* is the most convenient and certain law to be applied upon formalities of marriage on the basis that application of parties' personal law results in infinite mischief and confusion.<sup>(135)</sup>

Indeed, the local law is the most convenient law to ascertain the validity of marriage, in particular if the parties are from different countries and different forms are required by their personal laws. But holding convenience and certainty of the rule as a basis for imperative approach is not easily reconcilable to any sound reasoning because uncertainty is not one of the effects of a facultative approach. Even if the facultative approach is adopted, the parties would still have to respect and satisfy the chosen law. Further, *lex loci* rule loses its certainty in cases where the parties belong to a system conferring upon the ceremony the character of essential requirements because of its (*lex loci*) incapacity to confer a universal validity upon marriage.<sup>(136)</sup>

In Taczanowska v. Taczanowski<sup>(137)</sup> and Kochanski v. Kochanska,<sup>(138)</sup> it is stressed that application of '*lex loci*' rule depends solely upon a presumption that the

parties intended to submit the question of formal validity to the local law. Thus, it leads to the assumption that the *lex loci* is not applicable whenever the parties rebutted the presumption. It seems, however, that the parties' decision for celebrating their marriage abroad within their personal law forms should be considered as a presumption of the parties' intention to subject their marriage celebration to their personal law. Mendes da Costa stated that the presumption referred to in Scrimshire decision does not mean "that the parties intended the law of France to apply", but they intended only to confer jurisdiction upon French Courts.<sup>(139)</sup>

The other main approach to the rule is the facultative approach under which the parties have an optional choice to comply, either with the local law or their personal law when they perform a contract.<sup>(140)</sup> It is reasonable to conceive that the *lex loci celebrationis* is a permissive rule in private international law. Generally, it is admitted that the parties performing a contract have an optional choice to observe the forms of either local law or the law governing essentials of the act.

A question arises; why is this view not taken, *a fortiori*, concerning the marriage contract of which the essentials and formalities are more tightly linked? Relying on the marriage as a contract, it is suggested that *locus actum* should be a facultative rule upon marriage inasmuch as it is applied for other Contracts.<sup>(141)</sup> This has been criticised on the basis that assimilation of marriage to an ordinary contract is not reconcilable to any sound reasoning because of its aspect of creating a status of which the effects cannot be limited by a consensual agreement, and the intervention of a marriage officer is very important in protecting social interest.<sup>(142)</sup> However, contrary to what has been said, my opinion is that assimilation of marriage to other contract will not confer upon the parties entire freedom inasmuch as to limit the marriage effects, but it confers only the option of choosing the forms which confer upon their marriage universal (formal) validity.

The preliminary publications to a marriage are adduced for protecting social and family interest, and thus permit any person having any reason to submit an objection to marriage as, for instance, that the parties are within the prohibited degrees. However, preliminary publications as a formality are designed for the respect of an essential requirement.<sup>(143)</sup> This leads to say that *lex loci* should be applied facultatively upon formalities, for the place of celebration might be accidental. It has been also established that where the use of local forms is precluded by some circumstances, compliance with the Common Law of England or Scotland will suffice for holding the marriage valid according to the English and Scottish laws. It is said that the use of local form is impossible where these forms are inconsistent with the social and cultural environment to which the parties belong.<sup>(144)</sup> From the standpoint of logic, it would seem that this argument should be a basis for establishing the facultative application of *lex loci* rule upon formalities of marriage. The fact that countries should take notice and respect the laws of each other with respect to marriage is a great support to this view.

By virtue of the Algerian Civil Code, article 19,<sup>(145)</sup> celebration of marriage according to the forms of the common personal law of the parties is permissible. Therefore, there is no obstacle to validating a marriage solemnised in Algeria within the forms of the parties' personal law if this is necessary for the international validity of the marriage. The difficulty lies, however, in the implementation of such a possibility. According to Article 71 of Algerian Civil Status Code,<sup>(146)</sup> the registrar and "Cadi" judge are the only competent authorities for celebrating marriages within the territory. However, marriages celebrated before "Cadi" are usually regarded as religious marriages. This is doubtful because the "cadi" is not a minister. These marriages are regarded as such on the basis of the substantive rules which govern the essentials. It is reasonable, therefore, to conceive that the same procedure could be admitted for marriages of foreigners solemnised before ministers of their religion who would have the same authority as "Cadi."<sup>(147)</sup>

As regards the Hague Convention of 1976, the facultative approach adopted earlier is dismissed.<sup>(148)</sup> It is provided that the formal adequacy of marriage shall be determined sufficiently by the law of the state of celebration, and thus, if that state permits celebration of marriage according to the parties' personal law, the marriage should be recognised by third states as valid.<sup>(149)</sup> This convention, therefore, has been criticised on the basis that it does not provide respect for systems under which the religious ceremony is compulsory.<sup>(150)</sup>

In conclusion, it may be said that application of *lex loci celebrationis* imperatively shows a lack of consideration to certain religious orders which are required as essential in accordance with some legal systems. Furthermore, it debilitates the basis upon which the *lex loci* rule is introduced because it leads to the same undesirable effects to which the existing rules before its introduction led. Thus, this approach does not take into account the existing divergences between legal systems whose domestic laws regard the marriage, on the one hand, as a sacrament, and legal systems adopting the secularisation nature of marriage. For instance, such a case would occur where two Greek nationals wish to marry in France. According to Greek law, Greek subjects must marry in accordance with the formalities of their Church irrespective of the provisions of the *lex loci celebrationis*, whilst under French law a civil ceremony is compulsory. This type of situation may lead to a limping marriage, and it would seem that the only solution, as suggested by Savigny,<sup>(151)</sup> is that the parties must go through both ceremonies in order to affect a universal valid marriage. Although this might not seem an undue hardship -and perhaps not a precaution which it would be unreasonable to suggest - a better (optional) rule can be devised.

One might argue that the facultative application of *lex loci* rule satisfies the concept divergence between systems which regard the marriage as a sacrament, those

considering it as a civil act, and those which do not require any formalities for marriage, i.e. consensual marriage system. In MacCulloch v. MacCulloch, for instance, the marriage would have been held valid before Scottish Courts if the facultative approach was adopted.<sup>(152)</sup> Besides, the introduction of *locus regit actum* rule in 16th century so as to facilitate celebration of marriage constitutes the major argument and reasoning of this approach. The desire to confer a universal validity upon marriage buttressed by the prevailing policy to eliminate limping marriage status, and the existence of consular forms might be invoked as bases for this approach. It is reasonable to conceive that for avoiding criticism, the permissive approach must be lessened by some restricting conditions, i.e. the parties may use their personal law forms if they belong to a common personal law, or if the forms of their personal law coincide. Therefore, the *lex loci* rule becomes imperative in cases of mixed marriages if, and only if, the personal laws of the parties require different forms. The law of the place of celebration, however, would have to admit the exigence of religious ceremony required by the parties' personal laws and vice versa. Furthermore, the states which require such forms, as essential, would have to restrict the application of their own law to marriages solemnised between parties both of whom owe allegiance *qua* personal law to that state. To achieve international uniformity, this should be taken into consideration in international conventions so as to ensure respect for every legal system, and it should be the prevailing view under every legal system.

### **B- Marriages celebrated within the *Forum***

It has been established that formal validity of marriage is a matter to be determined by the *lex loci celebrationis*, the law of the state where the marriage ceremony takes place, which reflects one of the general principles of the conflict of laws, i.e. *locus regit actum*. Non-compliance, however, of the marriage ceremony with the formalities of the *lex loci celebrationis* is sufficient to hold the marriage void before Scots Courts.<sup>(153)</sup> However, observance of formalities, either of the place of celebration or

of the parties' personal law, if they belong to a common nationality, suffices for the validity of marriage before the Algerian Courts.<sup>(154)</sup>

From the view point of Professors Anton and Clive,<sup>(155)</sup> it is understood that a marriage celebrated in Scotland between parties domiciled abroad, inasmuch as it complies with a sufficient form under Scottish law, will be held valid in Scotland, even though the ceremony, if it is conducted in the country of the parties' domicile, would not constitute a valid marriage and vice versa. This rule is confirmed in many cases which consider the question of validity of marriage containing a foreign element celebrated in Scotland. For instance, reference may be made to Miller v. Deakin,<sup>(156)</sup> where the Lord Ordinary held that the marriage was null and void on the ground of non-compliance with Section 1 of Marriage (Scotland) Act 1856 which provided that any irregular marriage celebrated in Scotland after 31st December 1856 will be valid if one of the parties had his usual residence there or had lived in Scotland for 21 days preceding the marriage.<sup>(157)</sup> It appears in this case that the parties are domiciliaries of England, and it is clear from the evidence given that neither of them had his or her usual residence in Scotland, nor lived there for 21 days before the marriage.

In Tallarico v. The Lord Advocate,<sup>(158)</sup> an Italian native met an English woman in London when he was staying there temporarily. Thereafter they became engaged in 1917. An agreement was reached about choosing Scotland as a place of celebration of their marriage. Afterwards, she went there and resided for 21 days prior to the marriage. The ceremony took place in a solicitor's office, in the presence of his clerk, where they accepted each other as husband and wife. A declaration recording their mutual consent had been signed by them. It was held that the marriage was formally valid, and a decree of declarator was granted on the ground of compliance of the marriage with the requirements of Scots law, as being confirmed by the evidence which was given to the Court.

As regards Scots law as it stands after the coming into force of the Marriage (Scotland) Act 1939, a marriage celebrated without proclamation of banns or publication of notice of intention to marry was considered as a void marriage.<sup>(159)</sup> In Bradely v. Mocherie,<sup>(160)</sup> a marriage celebrated without either publication of banns, or notice of intention to marry as required under Marriage (Scotland) Act was held a null act. A question arises as to whether the marriage is valid in cases where the preliminaries were carried out on the basis that the parties supplied the Registrar with wrong information concerning their status. The answer is in the affirmative if the false statement is not related to capacity to marry. For instance, the fact that the Registrar has been supplied with false information concerning the parties residence is not sufficient to hold the marriage void according to Section 1(4) of Marriage (Scotland) Act 1939 which provides that: "any marriage contracted in accordance with the foregoing provisions shall, unless there is a legal impediment thereto, be valid and regular marriage in all respects."<sup>(161)</sup> Therefore, a marriage celebrated without the presence of the parties at the ceremony, or publication of notice or proclamation of banns, or presence of a competent authority is formally invalid.

According to the Marriage (Scotland) Act 1977, as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, a marriage formally defective is valid under Scots law provided the parties were present at the ceremony and the marriage registration has duly taken place. It is stated in Section 23(A) of the Marriage (Scotland) Act 1977<sup>(162)</sup> that:

"subject to Section (1 & 2), without prejudice to Section 24 (1), of this Act, where the particulars of any marriage at the ceremony in respect of which both parties were present are entered in a register of marriage by or at the behest of an appropriate Registrar, the validity of that marriage shall not be questioned in any legal proceeding whatsoever, on the grounds of failure to comply with the requirement or restriction imposed by, under or by virtue of this Act."

The validity of a formally defective marriage is not questioned in any legal proceeding unless there is a legal impediment to it, as, for instance, the parties are within the forbidden degrees. Therefore, it might be said that the validity of a formally defective marriage is questionable in any legal proceeding if it is not registered before its validity is questioned.

In the case where one of the parties resides in England or Wales, submission of an approved certificate issued by an English Superintendent Registrar may be a substitute for the submission of a normal notice of intention to marry. Thus, the marriage will be valid even if the other party resides in Scotland.<sup>(163)</sup> Further, a foreign domiciliary is required, if it is possible, to produce to the Registrar a certificate issued by a competent authority in his or her domicile state in order to ascertain that "he is not known to be subject to any legal incapacity (in terms of the law of the state) which would prevent his marrying."<sup>(164)</sup> Non-submission of such a certificate is not regarded as a basis for invalidating a marriage, unless there is a legal incapacity under the personal law of the foreign party. The main reason, as Professor Clive has suggested, is that "Not all countries issue Certificates of no Impediment."<sup>(165)</sup> It is worth pointing out that if the reason for not issuing such a certificate is that the *lex domicilii* does not recognise the party's divorce or annulment, granted by a Court of a civil jurisdiction in Scotland, or such as would be recognised in Scotland, the marriage can be celebrated without such a certificate.<sup>(166)</sup>

Since the Algerian law regards the formal validity of marriage as a matter either for the *lex loci celebrationis*, or for the common personal law of the parties, it concedes that foreigners may marry in Algeria according either to the form of Algerian law or to the forms required by their common nationality law.<sup>(167)</sup> In cases where the parties choose to comply with Algerian formalities, the marriage is upheld valid before the Algerian Court, even if the marriage will be void according to the parties' common

nationality law. Furthermore, a marriage celebrated in accordance with the forms of the parties' common personal law is valid, especially if such a celebration is needed for conferring international validity upon marriage in the view of the personal law.

As regards Article 71 of Algerian Civil Status Code<sup>(168)</sup>, foreigners may solemnise their marriage in Algeria according to Algerian forms, provided one of the parties has resided there for a month preceding the ceremony. Therefore, no marriage between foreigners shall be solemnised in Algeria, unless one of the parties had at the date thereof his or her domicile there, or had resided in Algeria for a month preceding the marriage ceremony. It is worth noting that the Code contains no provisions about the effects of non-compliance with the residence requirement. However, it is assumed from Article 77, alenia 2<sup>(169)</sup> that non-compliance with such a requirement would not invalidate a marriage solemnised, unless there is a legal impediment to it under the personal law of the parties.

In addition, if a woman has been married before and her marriage has been dissolved, she must submit to the Registrar a copy of the divorce or annulment decree. A widow must submit the death certificate of the former husband.<sup>(170)</sup> Nevertheless, non-submission of such a certificate is not a basis for annulling a marriage of a foreign woman solemnised in Algeria unless her marriage subsists at the time of the celebration of the second marriage, provided the second marriage is not consummated.<sup>(171)</sup> But, a marriage celebrated in Algeria without compliance with the prescribed formalities cannot be invoked in Algeria as valid unless it is registered after a decision of the court stating that it is valid.<sup>(172)</sup>

In conclusion, it might be said that a marriage is formally valid before Algerian and Scottish courts even if the marriage would be void under the parties' personal law in

cases where the *lex loci celebrationis*' formalities are complied with. The practical difference between the Algerian and Scots laws is that the latter shows lack of consideration to certain requirements which might be regarded as essential under the parties' personal law. Consider, for instance, Bliersbach v. MacEwan,<sup>(173)</sup> where parental consent was a matter of capacity in accordance to the law of the parties' common personal law. Nevertheless, the marriage was held valid before Scottish Courts on the basis of characterising such a requirement as a formality under Scottish law. Let us suppose that the case comes before the Algerian Courts, what would be the decision? Applying the Algerian concepts of characterisation, the marriage would be held void because an essential requirement, according to the personal law of the parties, is not satisfied. Furthermore, Algerian law gives the opportunity for the parties to use their personal law formalities, if it is the only recognisable way of performing marriage under their common personal law. For instance, in Caraslanis case<sup>(174)</sup> the marriage would be held valid before the Algerian Courts on the basis of complying with the parties' personal law formalities.

The present writer believes that it is unreasonable to consider a marriage valid because of its compliance with *lex loci celebrationis*, whilst it is invalid under the law with which the marriage has its real connection, i.e. the law which will be asked to govern the effects of that marriage. Universal uniformity of conflict of law rules needs co-operation between all legal systems. Each of the systems has to respect and take into account the others, as far as they do not offend its public policy. From a logical standpoint, the consideration of parties' personal law formalities within the '*locus actum*' is not an offence to the public policy of the *forum*. Therefore, a marriage celebrated according to forms of the common personal law of the parties should be regarded as valid, especially if such a celebration is needed for rendering the marriage universally valid.

### C- Marriages celebrated abroad

The basic rule is that every marriage celebrated abroad without observance of the *lex loci celebrationis* formalities will be held void *ab initio* and will be regarded as such before Scottish courts, unless it falls within the exceptions mentioned below.<sup>(175)</sup> A marriage involving either Scottish elements or foreigners celebrated abroad within the formalities of the place of celebration will be held valid, even though the form in which it is celebrated, if it is conducted in Scotland, will not constitute a valid marriage under Scottish law. In Warrender v. Warrender,<sup>(176)</sup> for instance, the validity of marriage, between a Scotsman and an English woman celebrated according to the law of England, i.e. *lex loci*, was upheld before the Court of Session. Furthermore, a proxy marriage solemnised abroad would likely to be recognised as valid in Scotland provided this method of celebration is acceptable in the place of celebration.<sup>(177)</sup>

On the other hand, the Scottish Court would be likely in certain circumstances to dismiss recognition of the validity of marriage celebrated abroad if there has been no compliance with the formalities of *lex loci celebrationis*. In MacCulloch v. MacCulloch<sup>(178)</sup>, for example, the validity of a marriage by cohabitation with habit and repute (a matter of form, it would seem) which took place on the Isle of Man, was considered. On proof that cohabitation with habit and repute was not recognised there to constitute a legal marriage, it was held that the marriage was void. It was established in Johnstone v. Godet,<sup>(179)</sup> that a marriage celebrated in a religious ceremony in a legal system where such form is not recognised, would not be held valid in Scotland. This issue arose in the case of Elbaz v. Elbaz,<sup>(180)</sup> where a woman, English domiciliary, solemnised a marriage with a Jewish man, an Israeli domiciliary, in Israel. The ceremony was Jewish. Moreover, the rabbinical authorities in Israel had been deceived by the woman into believing that she was Jewish. The Israeli law recognises only marriages in Jewish form in Israel, if both parties were born of a Jewish mother,

or who were converted to Judaism. From the evidence, it appears that she was not a member of Judaism and she had never been one. Hence a decree of nullity was granted on the basis that the ceremony which the parties had entered into was of no effect because *lex loci* requirements were not taken into consideration therein. As regards the religious ceremony, the *lex loci celebrationis* must be complied with if it requires observance of the rules of the religious denomination to which the parties belong, otherwise, non-compliance with its formalities does not affect the validity of a marriage.<sup>(181)</sup>

The same view was held in Salvesen (Vonlorang) v. Administrator of Austrian Property,<sup>(182)</sup> where a Scotswoman domiciled in Scotland went through a form of a marriage with an Austrian subject in France, where residence and publication were the conditions of constituting a valid marriage. On the evidence, it appears that these formalities had not been complied with, and a court of the common (German) domicile of the parties granted a decree of nullity. Although the question before the Court was that of recognition of the nullity decree, it might be deduced that the marriage was held to be void before the English and Scottish Courts on the basis of recognising the nullity decree. It merely happened that the conflict rule of the foreign German forum was the same as that of Scotland.

As regards Marriage (Scotland) Act 1977, a Scottish resident who wishes to marry abroad can obtain a certificate of no impediment if the law of the place of celebration requires the submission of such a document.<sup>(183)</sup> There is, however, no decision which actually sustains the validity of a marriage solemnised without obtaining such a certificate. In order to sustain the validity of such a marriage, Scottish Courts would be likely to refer to the law of the place of celebration for ascertaining the effect of the absence of such requirement upon the validity of the marriage. Therefore, it would be inaccurate to hold the marriage valid, if it is void under the *lex loci celebrationis*.

The question which should be asked, therefore, is whether a marriage solemnised without observing local forms of the place of celebration will always be held void before Scottish Courts. The answer should be in the negative. However, a marriage solemnised in a form which is sufficient under the *lex loci celebrationis* will be held valid.<sup>(184)</sup> For instance, a marriage between two British subjects, solemnised in Algeria, in an English or Scottish form is a valid marriage according to Algerian law.<sup>(185)</sup> It would be inaccurate to regard the marriage before the Scottish Courts as void inasmuch as such a decision will promote limping marriages, and the Scottish Courts therefore should follow the rules of the Algerian *lex loci celebrationis*.

The rigidity of '*locus regit actum*' rule under English and Scottish conflict of laws, the adoption of the rule as a facultative one under many legal systems, and the desire to gain international uniformity of decisions in order to eliminate limping marriages strongly led to the acceptance of 'renvoi doctrine' for sustaining the formal validity of marriage.<sup>(186)</sup> In Taczanowska v. Taczanowski,<sup>(187)</sup> a marriage took place in Italy between two Polish subjects, in a form which did not constitute a valid marriage in accordance with the domestic law of the *lex loci celebrationis*. On the proof, Italian conflict of laws would recognise the validity of marriage celebrated according to the parties' personal law. It was assumed that an English Court would be prepared to refer to the national law of the parties. Further, in Hooper v. Hooper,<sup>(188)</sup> English law was applied on the basis of renvoi. A marriage between two British subjects was held to be void on the basis that no banns had been published according to the Marriage Act 1949. (The marriage had taken place in Baghdad, where there was a requirement of compliance with the parties' nationality).<sup>(189)</sup> This case, therefore, may be treated as authority that renvoi is accepted by English and Scottish Courts in relation to the formal validity of marriage.

The renvoi doctrine in relation to the formal validity of marriage has been discussed

recently by the English and Scottish Law Commissions.<sup>(190)</sup> Importance has been given to the factors which favour the application of renvoi. It was shown that application of renvoi leads to desirable effects, such as promoting uniformity of status and preventing creation of limping marriages. Furthermore, it is conceded that it is consistent with the principles of favor matrimonii and harmonisation of decisions.<sup>(191)</sup> Therefore, reference to the *lex loci celebrationis* "should be construed as a reference to the whole law of that Country (including its rules of private international law) and not merely its domestic rules."<sup>(192)</sup> It is stressed that reference to the *lex loci celebrationis* should be, *prima facie*, a reference to its choice of law rules. Hence, the reference to the *lex loci* cannot be regarded as alternative reference to either its domestic rules or its conflict law rules, because:

"such an alternative reference would be convenient for the parties and would obviously support the policy in favour of validity of marriages, but it would do so at the expense of producing a "limping marriage as between the country of celebration and our own."<sup>(193)</sup>

In explaining how the alternative reference would create a limping marriage, it is said that:

"In practice, the relevant question in any given case should be whether the formalities prescribed by the law of the country of celebration have been complied with for that case; and there would be something odd in upholding a marriage on the ground that it complies with the law of the foreign country of celebration when the Courts of that country would regard the marriage as void."<sup>(194)</sup>

Hence, it might be said that:

"A marriage should not be held to be formally valid on the ground that it complies with the domestic rules of the foreign country of celebration if the choice of law rules of that country requires the parties to observe the formalities prescribed by some other legal systems."<sup>(195)</sup>

The Scottish Law Commission has recently suggested that reference of the formal validity by the law of *lex loci celebrationis* to some other law by way of renvoi is acceptable, and that the rule should be considered as part of the law of the place of celebration. The Scots Law Commission has therefore recommended that there is no need or necessity to state expressly in any future codification of the law that renvoi is permitted.<sup>(195a)</sup>

In line with this view, one might think that the acceptance of renvoi leads to a lessening in the rigidity of *locus regit actum* as an imperative rule under English and Scottish conflict of laws. Further, it will tend "to bring about a certain rapprochement to those countries whose conflicts systems admit a choice between *lex loci* and the personal law."<sup>(196)</sup> Finally, it might be assumed that if the English and Scottish courts do not recognise the validity of a marriage celebrated according to whatever system is referred to by the choice of law rule of the *lex loci*, the decision would be inconsistent with the imperative nature of the *lex loci* rule under English and Scottish laws.

According to Algerian law, application of a universal established rule, i.e. *locus regit actum* lies in Article 97 of Civil Status Code<sup>(197)</sup> and article 19 of the Civil Code.<sup>(198)</sup> In the former, it is stated that Algerian Courts should recognise the validity of a marriage celebrated according to the *lex loci* provided the required essentials (i.e. capacity) under the personal law of the parties are complied with. Compliance with *lex loci*, however, is sufficient to hold a marriage valid before Algerian Courts unless it requires observance of the rules of a religious denomination to which the parties do not belong. For instance, Algerian Muslims celebrating a marriage abroad in a religious form other than the Muslim ceremony is void in Algeria.<sup>(199)</sup> Besides, the validity of the marriage cannot be invoked in Algeria unless it is registered by the decision of the Court which is delivered by a Judge after satisfaction that the marriage is valid.

Furthermore, there is no doubt that the validity of a marriage will be recognised before the Algerian Court, if the form required is a civil ceremony.

As the permissive approach is adopted in Algerian law,<sup>(200)</sup> the form needs not to be the one required by the *lex loci*, but the marriage is regarded as valid before Algerian courts if it is celebrated in a form which is sufficient to constitute a legal marriage under the *lex loci celebrationis*. A marriage solemnised in Italy, for example, between two Greeks in a religious form required by the Greek Law will be recognised as valid. Furthermore, although the *lex loci celebrationis* would not recognise a marriage celebrated within its territory in the parties' personal law form, it would be regarded before Algerian courts as valid provided the personal law of the parties holds its validity. In case of a marriage between parties, one of whom is a national of the state of celebration, the solution (*lex loci form*) adopted in Article 91(1) of Civil Status should apply.<sup>(201)</sup> Therefore, it might be assumed that the same solution should apply to the marriage between foreigners from different countries.

From a logical standpoint, recognition of a marriage, considered as void under the *lex loci celebrationis*, as valid before an Algerian Court will produce a limping marriage as between the country of celebration and Algeria. In order to gain international uniformity of decisions and of a status, consideration should be given to the foreign *lex loci*, especially if the common personal law of the parties considers the marriage void. In that case, Algerian law would not recognise the marriage because it is unreasonable to hold it as valid when under the law which will be asked to govern its effect it is regarded as invalid.

As understood from Professor Issâd,<sup>(202)</sup> the case of a marriage between an Algerian woman and a foreigner abroad is missed out in the Article 97 of the Civil Status Code, on the basis that reference is only made to the marriage between Algerians themselves,

and Algerian men with foreign women.<sup>(203)</sup> This may be explained by the prohibition of marriage between Muslim women and non-Muslims which exists under Islamic law. In line with Issad, this omission is ill-founded on the basis that application of Article 97 itself is sufficient for holding such marriages void, inasmuch as recognition of the validity of marriage is based on the respect of the required essentials under the personal law of the parties, because such prohibition is an essential of marriage.<sup>(204)</sup>

In conclusion, it might be said that the practical difference between Algerian and Scottish laws is that the validity of a marriage celebrated according to the formalities of the parties' common personal law is upheld under the Algerian law, even if the ceremony is not recognised according to the *lex loci*. The Scottish law regards a marriage celebrated in a such form as valid, however, only if the parties' personal law is appointed by the *lex loci* choice of law rules.

**D- Time element: Do any changes in the *Lex Loci Celebrationis* after solemnisation affect the marriage validity?**

"Time becomes an important factor in the solution of a conflict of laws problem, where a change occurs ... in the content of substantive law of the foreign legal system selected under the appropriate conflict rule of the forum."<sup>(205)</sup> It is well established that since the law of any country is a changing body of rules, and the legal acts need certainty as to their validity, the choice of law rules should therefore determine the legal system which is applicable, and the relevant time at which reference to that law should be made.<sup>(206)</sup>

So far as the formalities of marriage are concerned, it is generally believed that the formal validity is a matter of *lex loci celebrationis* as it stands at the time of the ceremony. According to this view, any later changes in the *lex loci celebrationis*'

provisions either positive or negative have no effect on the validity of marriage. One reason for that is that the state of marriage should be determined with certainty, and acceptance of any retrospective change in the law of the place of celebration will result in the insecurity of the relationship between the parties.<sup>(207)</sup> It appears from the cases concerning marriage that this has been the prevailing view in English and Scottish laws until the time the question of the effect of a subsequent validating legislation came before the court. It was held that the formal validity remains a matter of the law of the place of celebration as it exists at the time when the ceremony took place, but may be affected by a subsequent validating legislation in certain circumstances.

In Starkowski v. Attorney General,<sup>(208)</sup> two persons of Polish domicile and origin went to Austria where they were married at a Roman Catholic Church according to their religious rites in May 1945. On June 12, 1945, a daughter, "Barbara", was born to them. Expert evidence indicated that a purely religious ceremony would not have constituted a valid marriage under Austrian law at that time. However, while the parties remained resident there, new legislation came into force on June 30, 1945 providing retroactive provisions for validation of certain marriages, those performed according to rites, upon an entry in the family book as made by the Registrar. For unknown reasons, the registration had been delayed until 1949, by which time the parties had acquired a domicile in England. They lived as husband and wife until 1947, when they separated. Towards the end of 1947 and early 1948, she met another Pole by whom she had a child in 1949. A year later they went through a ceremony of marriage at the Registrar's office in Croydon.

It is clear from the evidence that there is no doubt that the Austrian marriage was void according to the *lex loci celebrationis* for not being solemnised in a civil ceremony as required by the Austrian law which was in operation at the time of solemnisation. "Before 1949," said Lord Reid, "it was really not disputed that if the question of their

status had arisen when they first became domiciled here neither the law of Austria nor the law of England could have regarded them as legally married."<sup>(209)</sup>

The crucial question, therefore, was whether the subsequent validating legislation would have the effect of validating the Austrian marriage before the English court. The suggestion that subsequent legislation as being repugnant to public policy, and to the well established principle, "that the court of one country will not recognise the extra-territorial effect of foreign legislation on the status of a person neither domiciliary nor national of the legislating state," should not have effect upon the status of English domiciliaries was ruled out. The reason is that there are numerous English statutes enacted dealing with formally defective marriages solemnised in England, and neither the domicile nor the nationality of the parties have had effect upon its operation. Lord Tucker, therefore, said:

"It would seem to be in accord with comity and with principle that our court should recognise the validity of similar foreign laws dealing with an aspect of marriage, viz, formality, which has always been recognised as governed by the *lex loci celebrationis*. There are other reasons for accepting this view, the most cogent of which are I think, as follows: (i) since a marriage, even if valid by the law of domicile, is regarded as invalid if not in conformity with the law of the place of celebration, it would seem illogical if the same law cannot retrospectively cure the invalidity. (ii) The legislature of the place of celebration is more cognizant of the informality, and accordingly, more likely to afford the necessary statutory relief."<sup>(210)</sup>

It is also pointed out that the argument to the effect that the state of marriage should be determined with certainty, and that the foreign retrospective legislation should therefore not be given effect unless the parties consent to its operation is not convincing. It was illustrated that such retrospective legislation "has no concern with the state of affairs at the time when it is enacted: its purpose is to validate the original ceremony, and if there was then the necessary consent to marry, that is all that matters."<sup>(211)</sup>

Therefore, it was held that a formally defective marriage which has been subsequently validated by a retrospective legislation of the *lex loci celebrationis* would be recognised as valid by English law. The reason is that the balance of justice and convenience was leaning towards recognising the validity of such retrospective legislation under such circumstances. However, according to Lord Reid, "once it is settled that the formal validity of marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision."<sup>(212)</sup> One might venture to suggest that there may be a caveat -viz so long as there has been no marriage in the intervening period valid as to form and essentials by the law of the forum. The Scottish Law Commission, in the 1992 report on family law, seems to be of opinion that the *lex loci celebrationis* should be applied in the light of any retrospective changes made in it in so far as the retrospective changes lead to validating invalid marriages. The Commission has therefore recommended that there is no need for inserting such a rule in any future statutory provisions simply because it is obvious that a reference to the law of the place of celebration after such changes have occurred would have to take account of it.<sup>(212a)</sup>

The decision in Starkowski v. Att. Gen. can be explained, "as a complete departure from the judicial tradition associated with the case of Lynch and Aganoor,"<sup>(213)</sup> on the basis that acceptance of foreign retrospective legislation is related to the surrounding circumstances in each case, and it might be refused recognition in certain cases, for instance, in cases where the parties of the second marriage are domiciliaries or nationals of a country which denies recognition to retrospective validating legislation.<sup>(214)</sup> Desire to eliminate limping marriage status might be a dominant motive in reaching a decision in favour of holding a second marriage valid if the earlier marriage is void and has not in the interval been validated. Furthermore, a general rule as to state that formal validity is determined by the *lex loci* as it stands at the time of the proceeding cannot be inferred from Lord Reid's statement mentioned above.<sup>(215)</sup> However, it might be

deduced that retrospective legislation should have effect as far as it is consistent with balance of justice, otherwise the general rule of Berthiaume v Dastous<sup>(216)</sup> will remain unchallenged.

Indeed, the present writer agrees that registration is a mere administrative act, and therefore, the consent of the parties to its operation is irrelevant, but the parties must be informed that their marriage is validated by registration, especially when one of them had inquired of the Registrar and had been told that his or her marriage was nullity.<sup>(217)</sup> The reason for this is that a void marriage needs no decree to be declared null, and the parties to a such marriage may marry without obtaining a decree of nullity. Nevertheless, the fact that the wife had inquired was ignored in this decision. It seems, however, that the decision was based on the parties' residence in Austria at the time when the legislation was enacted.<sup>(218)</sup>

As regards the certainty which the marriage needs, operation of a retrospective legislation retroactively should be restricted by a limited period of time. In Pilinski v. Pilinska,<sup>(219)</sup> for example, subsequent legislation operating retrospectively ceased to have effect after a period of time if the marriage has not been registered within that specified period of time. Therefore, the marriage, in this case, was held to be void. Dr Mann<sup>(220)</sup> thinks that giving effect to retrospective legislation should be based on the continuation of the relationship between the parties at the time of registration. This has been criticised because it does not give consideration to a temporary separation, and it is unreasonable to base determination of a child's status on the fact of continuation of its parents' relationship at the time of validation.<sup>(221)</sup>

The question that remains to be answered is whether retrospective legislation would have the same effect, if such legislation or the ensuing registration of marriage had been

preceded by the re-marriage of one or both parties, or a nullity decree had been granted by a competent jurisdiction beforehand. The overwhelming weight of opinion among academic writers is that the *forum* should not give effect to a retroactive legislation preceded by a second marriage of one of the parties.<sup>(222)</sup> One can argue that the validity of the second marriage in such circumstances is unchallengeable on the ground that "a new relationship would have to come to existence and been consummated which the *lex loci celebrationis* could not in justice undo."<sup>(223)</sup> It is worth pointing out that acceptance of retrospective legislation in such a case would be a source of a great injustice and inconvenience. Therefore, this conclusion does not have to depend on a vague notion of public policy,<sup>(224)</sup> but it is sufficient to say that at the date of the second marriage, there is every reason to uphold it (the second marriage). Further, the retrospective legislation is irrelevant in this case not because of application of any conflict principle or rule (though it would not be hard to find one), but it is hard and undesirable to accept any subsequent legislation which may jeopardise the validity of the second marriage, especially if the parties have cohabited and acted in the reasonable belief that they were husband and wife. The arguments of justice, convenience and comity in favour of recognition cease to be relevant here. However, it is necessary to consider more closely the parties' interest that justice be done, especially when the second marriage is likely to be validated by the personal law of the parties and the *lex loci celebrationis*.<sup>(225)</sup>

Consequently, this analysis is appropriate if either party sought a decree of nullity prior to the promulgation of the subsequent legislation or prior to the registration of the marriage and the non-recognition has been granted on the ground of the finality of the decree.<sup>(226)</sup> It seems that recognition should be denied not only because of the finality of the decree, but because the decree had brought to light the status of the parties. Therefore, such legislation would be of no avail especially if the parties had remarried other partners. The denial of recognition is strongly approved in cases where foreign

legislation purports to invalidate an initially valid marriage.<sup>(227)</sup> Public policy and the prevailing policy of validation *favor matrimonii* are a great support to this view.

As regards English law, it is not entirely clear whether the House of Lords was inclined to restrict the application of the decision in Starkowski v. Attorney General to foreign retrospective validating legislation or whether the converse case is included. However, "the prevailing extrajudicial opinion is against any extension of that case to a situation in which the foreign law invalidates an initially valid marriage."<sup>(228)</sup> Nevertheless, a foreign retrospective invalidating legislation should be recognised if the parties are nationals or domiciliaries of the foreign legislating state,<sup>(229)</sup> or of a third state recognising the effect of the invalidating legislation.

The question of recognising a foreign retrospective legislation changing the nature of marriage from potentially polygamous marriage to a monogamous one arose in Parkasho v. Singh.<sup>(230)</sup> In this case, the parties went through a ceremony of a potentially polygamous marriage in India according to the sikh religious rites. The marriage became a monogamous one under the provisions of Indian law which came into force in 1955. It was held that legislation converting a potentially polygamous marriage into a monogamous one should be recognised in English law. Therefore, the proper time for ascertaining finally the character of marriage is the time of proceeding and not the time of its inception. To support this view, Sir Jocelyn Simon said:

"if legislation can be recognised as retroactively changing the character of a union from void to valid marriage, I can see no reason at all why legislation may not be recognised as at least prospectively changing the character of a marriage from potentially polygamous to monogamous."<sup>(231)</sup>

Taking into consideration the lack of Algerian decisions relating to the question of time in conflict of laws, it can be inferred from Article (6) of the Civil Code<sup>(232)</sup> that a

change in the substantive law of the legal system appointed by the Algerian conflict of law rule may be recognised before Algerian courts if it validates an originally invalid marriage, especially when the marriage has been consummated and an Algerian subject is involved. Additional support from domestic law is that a formally defective marriage cannot be annulled after consummation, if only one formality has not been complied with.<sup>(233)</sup> On the other hand, in cases where a second marriage took place, or a decree of nullity was granted prior to the promulgation of the foreign retrospective legislation or prior to the registration of the former marriage, the second marriage will be upheld as valid, and the retrospective legislation will be denied recognition before Algerian courts.

A new law incapacitating a person has no effect on transactions passed before its promulgation.<sup>(234)</sup> It seems that a formally valid marriage cannot be affected by a retrospective legislation invalidating the marriage unless the parties are domiciliaries or nationals of the legislating state, or of a third country recognising the effect of a foreign retrospective invalidating legislation.

**Section Three:**  
**Exceptions to the *lex Loci Celebrationis***

Although the appropriate law to which questions concerning matters of formal validity is to be referred is the *lex loci celebrationis*, a marriage which has not been celebrated in accordance with the local form is still regarded as valid under some exceptional cases. These exceptions include consular marriage, service marriage, and cases where the local form is inappropriate and impossible. Consular marriage,<sup>(235)</sup> and cases where celebration within local form is impossible are the main concern of this section. It will be established that these exceptions to the *lex loci celebrationis* provide sufficient and convincing grounds for the appropriateness of the facultative approach to *locus regit actum*.<sup>(236)</sup>

**A- Formal Validity of Consular Marriages**

It appears essential for many states, even those adopting the *lex domicilii* as a connecting factor,<sup>(237)</sup> that their nationals abroad may celebrate marriage before their diplomatic or consular representatives according to their national law, possibly relieving them from restrictions imposed by foreign laws. The use of such form lessens in certain cases the rigidity of the imperative application of the *locus regit actum*, and expresses the facultative application of the rule in a sense that a limited option is presented to the parties, and the chosen form must be scrupulously respected.<sup>(238)</sup>

The practical need for such exception appeared in the world of conflict of laws in the 19th century by which time the more demanding form of celebration was established, i.e. civil ceremony. Accordingly, insuperable difficulties arose in applying the local form based on religious conceptions alien to the parties. The non-availability of local form to foreigners in some countries due to legal, moral and religious reasons,

buttressed by the expansion of immigration and the rise of civil ceremony may be invoked in support of consular marriages.<sup>(239)</sup> Apart from this, the validity of consular marriages has been based to a great extent on the principle of extraterritoriality, by virtue of which the diplomatic premises are considered as part of the sending state territory.<sup>(240)</sup> Perhaps, the most significant grounds the doctrine of extraterritoriality is justified on are the inviolability of the diplomatic premises and the comity of international law.<sup>(241)</sup> As regards the latter argument, it was said that

"By the comity of international law, embassies are considered extraterritorial of the country in which they are locally situated, and to be part of the country which the Ambassadors represent, and applying this principle, a marriage may be celebrated within such ambassador's house or chapel according to the law of the country which such ambassador represents -at all events if one or both of the parties married are subjects of such ambassador's sovereign or state."<sup>(242)</sup>

As regards English and Scots laws, there is some early authority to the effect that a British Embassy or Consulate abroad is considered extraterritorial to the country where it is situated. In *Hay v. Northcote*,<sup>(243)</sup> it was stressed that "[t]he Consulate must for this purpose be considered as English territory. The English legislature cannot make French territory English but it can say that acts done there in a certain manner shall have the same effect as if the territory were English."<sup>(244)</sup> Therefore, a French decree annulling a marriage between a French subject and an English subject celebrated before the British Consul at Bordeaux, was not recognised.<sup>(245)</sup>

It is indisputably a rule of law in all legal systems that the extraterritoriality doctrine is only a fiction of law, which cannot be a basis for explaining the competence of diplomatic or consular agents concerning marriage celebration, because it implies that the diplomatic envoys are not within the receiving state territory where they have to fulfil their duties, but they are within their own countries where their presence is useless.<sup>(246)</sup> Recently, the overwhelming weight of opinion among academic writers

disfavour the doctrine on the ground that the premises are not to be considered foreign territory for the reason of their inviolability, pertaining to the privileges and immunities the diplomatic envoys enjoy, because the object of such immunities is to enable them to fulfil their duties.<sup>(247)</sup> Hence, "the real property [of diplomatic premises] is subject to the laws of the country in which it is situated,"<sup>(248)</sup> and the premises remain subject to the local law for many purposes. The more recent decisions in England and Scotland have been inclined to favour this view. In Radwan v. Radwan,<sup>(249)</sup> where the origin and development of the doctrine were examined, it was demonstrated clearly that the doctrine was now obsolete, and could not be recognised as a basis of consular marriage inasmuch as the diplomatic premises were to be regarded as a receiving state territory.

It is the view of the present writer that the consular form is widely accepted in order to lessen the rigidity of *lex loci celebrationis* rule which, in the past, led to the nullity of many marriages. It is therefore reasonably clear that the necessity of creating universally valid marriages, the existing policy of validity and the desire to co-ordinate between legal systems, would seem to be a reasonable basis and a dominant motive for upholding the validity of consular marriages. In both Scots and Algerian laws, it is generally recognised that celebration of marriage before diplomatic or consular agents is permissible. But the difference lies on the object of such marriage. Scots and English laws show that the object to such form is enabling British subjects residing abroad to be legally married without being put to too much inconvenience. It may be, though, that the rule is designed to maintain the imperative nature of the *lex loci* rule because celebration of consular marriage under the Foreign Marriage Order 1970 is subject to the existence of insufficient facilities under the local law.<sup>(250)</sup>

As regards Algerian law, though sufficient facilities exist under the local law, parties are permitted to marry in a consular form.<sup>(251)</sup> According to this view, consular

marriage seems to be an option, or a service, offered by the sending state to its subjects on the ground of the increase in international tourism and world travel. To support this view, it has been suggested that

"[a]side from any question of the legal possibility of using the local form, it is natural for an act of such importance and personal character as marriage that the parties often desire to avail themselves of the familiar form of their own law even when they have decided to marry abroad."<sup>(252)</sup>

### **1- The Formalities required for the celebration of Consular Marriage**

A question which requires consideration in connection with this matter is whether the local law should prevail upon consular marriage. According to the view adopted by the overwhelming majority of Courts and authors, such marriages should be celebrated in accordance with the prescribed formalities of the law of the sending state.<sup>(253)</sup>

The *lex magistratus* principle seems to be the most appropriate reason to explain why the sending state's law should prevail. This is because diplomatic and consular agents have to lend assistance to the celebration of marriage in conformity with the law of the sending state from which they derive their authority.<sup>(254)</sup> Furthermore, such a view derives its main argument and reasoning from the introduction of consular form in the 19th century so as to facilitate celebration of marriage for the parties.<sup>(255)</sup> However, the universal validity principle, the prevailing policy of validation, and the desire to eliminate limping marriages have been inclined to be in favour of this view that mainly prevails in countries where the continental law system is adopted, such as France and Algeria.<sup>(256)</sup> The law of the sending state is widely recognised as the most appropriate law to be applied upon the formal validity of consular marriage. The Hague Convention of 1902 which was designed to regulate the conflict of laws in regard to marriage, provides for recognition of consular marriages in conformity with the legislation of the country to which the celebrant belongs, as being valid as to form, if

the state of celebration does not oppose the marriage, and neither of the parties is a national of that state.<sup>(257)</sup>

With respect to Algerian law, it is reasonably clear that Algerian diplomatic or consular agents are authorised to solemnise marriages in conformity with Algerian law.<sup>(258)</sup> On failure to comply with the formalities required by Algerian law, any marriage celebrated at the diplomatic premises abroad will not be recognised as being valid as to form before Algerian courts. The question that remains to be answered is whether the same rule applies in cases of foreign consular marriages celebrated in Algeria. It is generally believed, though there is no explicit rule to that effect, that the reciprocity of the rule in question must lead to the validation of foreign consular marriages solemnised in accordance with the law of the sending state.<sup>(259)</sup> One might argue that the application of Algerian law upon consular marriages solemnised in Algeria is not easily reconcileable with any sound reasoning because of the adoption of the facultative approach inasmuch as consular form is an efficient way of implementing the facultative application of *lex loci* rule. Besides, the ratification of the Vienna Convention on Consular Relations 1963 implies that foreign diplomatic or consular agents are authorised to celebrate marriages of their subjects in Algeria by a rule of public international law.<sup>(260)</sup>

The confident statement of the principle that the formal validity of consular marriage is governed by the law of the country to which the marriage officer belongs is based on the general view of judges and academic writers alike that it represents both English and Scots laws in as far as celebration of consular marriage before a British marriage officer is concerned. This view is supported by a case involving the validity of a marriage between a French man and an English woman celebrated before the British Consul at Bordeaux, in which the formal validity was determined by English law.<sup>(261)</sup> Moreover, the most recent decision in England, concerning the validity of consular

marriage, has been inclined to favour the view referring the formal validity of British consular marriages to be determined by the Foreign Marriage Act 1892.<sup>(262)</sup>

The Foreign Marriage Act 1892 contains various requirements as to formal and procedural matters.<sup>(263)</sup> Section 8 of the Act, however, seems to be the most important section, and provides that a consular marriage may be celebrated according to the rites of the Church of England,<sup>(264)</sup> or in such other form as the parties see fit to adopt. The ceremony must take place at the official house<sup>(265)</sup> of the marriage officer, with open doors, and in the presence of two or more witnesses. The question concerning the effect of non-compliance with the required formalities under the Act was considered in Collet v. Collet,<sup>(266)</sup> where a marriage between a British subject and a Bulgarian one was solemnised at the British Consulate in Prague in 1948. It was held that the requirements embodied in Sections 2,3,4,7 and 9 were directory in nature, and as all the essential requirements of Section 8 had been complied with the marriage was valid. The decision is consistent with Section 13 of the Act, which enacts that failure to comply with certain formalities such as parental consent, residence, authority of marriage officer, will not render the marriage invalid.<sup>(267)</sup> From this it would seem to follow that a marriage performed according to the provisions of the Act, though the formalities of *lex loci* were not observed, is regarded as being valid as to form. In order to prevent conflict with the receiving state and limping marriages, a marriage officer must not solemnise a marriage, or allow it to be solemnised in his presence, if he is satisfied that it would be "inconsistent with international law or the comity of nations."<sup>(268)</sup>

The matter of formal validity of a marriage solemnised in a foreign embassy or consulate abroad has been recently considered in Radwan v. Radwan [N° 2],<sup>(269)</sup> a case involving a marriage celebrated in a polygamous form at the Egyptian Consulate General in Paris, between an Egyptian national and an English woman domiciled in

England. Relying on the reason advanced in Radwan v. Radwan [N° 1],<sup>(270)</sup> the almost unanimous view of the judicial authority was that English law regarded the Egyptian Consulate General in Paris, where the marriage took place, as French and not Egyptian territory. Accordingly, the formal validity of such a marriage must be determined by French law as being the *lex loci celebrationis*, and as there is no "decisive evidence (of French law) to rebut the presumption that this was a valid marriage,"<sup>(271)</sup> the marriage was valid in England. It is therefore reasonably clear that English and Scots courts will recognise as valid as to form a marriage celebrated at a foreign embassy or consulate abroad, if the receiving state regards the marriage valid no matter what the formal requirements followed in the celebration.

The question of the formal validity of a marriage solemnised before a foreign diplomatic or consular agent accredited in the UK has not arisen yet for decision before English or Scots courts. Judicial opinion is not entirely clear, even though there is some early authority which indicates that such marriages in conformity with the law of the sending state are valid in England and Scotland if the parties are nationals, and perhaps domiciliaries of the sending state.<sup>(272)</sup> The opinion which has been expressed at the diplomatic level seems to be in favour of upholding the validity of a consular marriage solemnised at a foreign embassy in the UK in accordance with the law of the sending states, if the parties are members of that state. Apart from diplomatic conventions, however, all other marriages at embassies, and all marriages at foreign consulates are to be void unless the requirements of English or Scots laws have been complied with.<sup>(273)</sup>

This view can be criticised on two bases: narrowly from the construction of the Foreign Marriage Act 1892, 1947, and on a much broader front from consideration of the bases of introducing consular marriage. Looking at the spirit in which the Act was made, it is

meant to facilitate rather than to discourage British subjects' marriages abroad, and to try to prevent limping marriages. However, submission of the formalities of marriages celebrated at foreign embassies and consulates to be determined by English or Scots law seems to be an obstacle against the possibility of achieving the Foreign Marriage Acts' objective on the basis of the comity of international law which will be the basis of foreign states' objections to the celebration of marriages at British Embassies or Consulates. This view is inconsistent with the Foreign Marriage Order 1976 which enacts that a marriage officer cannot celebrate marriage if the receiving state objects to its celebration.<sup>(274)</sup> Looking at the basis upon which consular form is introduced, it would not seem to be accurate to impose local form to be observed in the celebration of a marriage at any embassy or consulate, because this implies that consular marriage hardly mean the change of the celebrating authority and nothing seems to be done to prevent limping marriages. Therefore, on the ground of reciprocity and *favor matrimonii* principle, this view is probably an unsatisfactory instrument for securing the achievement of consular marriage objective.

In conclusion, it is clear that the validity of such marriages at embassies or consulates is of universal concern and it is obviously desirable that states approach the issue with the same view in order to avoid limping marriages. Therefore, based on the comity of nations principle, English and Scots courts ought to recognise consular marriages celebrated in accordance with the law of the sending state, *secus* conflicts will ensue. It seems more appropriate to attach weight to the practical implications of each view. On such ground it is believed the predominant view whereby the law of the sending state is decisive deserves preference. The rival view would entail great complications and render the ensurance of international recognition of the validity of consular marriage exceedingly difficult, if not impossible. This is because each state would have to object to the solemnisation of marriage within its territory, at other states' embassies or consulates on the ground of comity.

## 2- The Authority of Diplomatic and Consular Officers

It is now universally acknowledged that the prevailing policy of avoiding controversies and conflicts between states, and that of ensuring the international recognition of the validity of consular marriage, especially in the receiving state, is in favour of limiting the diplomatic envoys' authority by certain conditions. A valid consular marriage would only come into existence if, besides being permitted by the law of the sending state (which will in any case be a condition for diplomatic envoys of that country to lend their assistance to it), it was also sustained by the law of the receiving state where the officer exercises his functions.

1- Authorisation by The Sending State: The authorisation that should be granted by the sending state to permit diplomatic or consular officers to act as a marriage officer is widely established as a central prerequisite for the validity of a consular marriage under the laws of most states, though the nature of such authorisation differs considerably. However, if a diplomatic or consular officer is not duly authorised, any marriage celebrated before him is regarded as invalid.<sup>(275)</sup> As to the question of the scope of the authorisation, a fundamental difference of attitudes exists between English and Scots laws on the one hand, and the Algerian law on the other.

As regards the former, it is generally believed that the authority to solemnise marriages is conferred by individual authorisation, i.e. marriage warrant, issued by a Secretary of State, even though certain persons may be authorised to act as marriage officers without any warrant.<sup>(276)</sup> This might be explained on the basis of the purpose of the 1892 Act as to provide facilities for marriage only where the local law is inappropriate or inapplicable. Therefore, authorisation of every ambassador to act as a marriage officer seems less persuasive under the terms of the Act.<sup>(277)</sup> A marriage officer, therefore, is the holder of a marriage warrant from the Secretary of State, or any officer, who under

the marriage regulations, is authorised to act as a marriage officer without warrant. In fact, a warrant is issued normally to a "Post" or "District",<sup>(278)</sup> but there have been occasions where it has been allocated to a specified diplomatic person.<sup>(279)</sup> The general principle deserves preference because of its consistency with the objective of consular marriage. Furthermore, allocation of a warrant to the name of a diplomatic person would render the consular marriages' objective exceedingly difficult to achieve. For instance, a temporary officer occupying a post where a named warrant applies is not legally authorised to solemnise marriage, unless a fresh warrant is issued to him.

Consequently, the Algerian law demonstrates clearly that the authorisation is granted by operation of law "de plein droit", and is lodged in the diplomatic or consular office as such without any reference to the individual officer or the country where the officer is serving.<sup>(280)</sup> Marriage officers for the purpose of the Act, however, are heads of diplomatic missions "pourvus d'une circonscription consulaire", and heads of consular posts.<sup>(281)</sup> Furthermore, Vice-Consuls can be authorised to substitute in a permanent manner the head of consular post following individual authorisation (decision) issued by the Foreign Affairs Officer. Moreover, consular agents can be authorised in the same manner as Vice-Consuls to act with the full powers of a Registrar.<sup>(282)</sup>

However, the only question arising in this connection is whether a marriage solemnised before unauthorised officer can be regarded as void. By virtue of the Foreign Marriage Act 1892, as soon as the celebration has taken place, it is no longer necessary to give any proof of the authority of the marriage officer and no evidence is needed to prove his authority in any proceeding touching the validity of the marriage.<sup>(283)</sup> It seems that the introduction of such a provision rests on the desire to assure the validity of marriage, where some impropriety in the appointment of the officer occurs, or where he solemnises a marriage without warrant. The Algerian law position, on the other hand, is entirely unclear. Although there is no explicit rule, it may be suggested that such a

marriage celebrated before a Vice-Consul or any consular agents without being authorised shall be regarded as valid to form, especially if it is consummated, so as to safeguard the marriage from any impropriety in the appointment of the officer, which has no relation with the parties' interest unless the parties know that he is not authorised. The legal significance of the authorisation is to create competence in the consular officer to solemnise marriages wherever some requirements are complied with. These requirements, though their scope varies considerably, are consistent with the policy of avoiding conflicts with the receiving state, and of ensuring the international recognition of the validity of such marriages.<sup>(284)</sup>

2- Nationality of the Parties: Possession of the sending state's nationality by the parties or one of them seems to be the primary condition for the authority of diplomatic or consular agents to act as marriage officers under the laws of most states. Generally, a marriage officer is only authorised to solemnise a marriage when the parties are both nationals of the sending state.<sup>(285)</sup> But in practice, many states permit their agents to solemnise a mixed marriage providing that one of the parties possess the nationality of the sending state.<sup>(286)</sup> By the British Foreign Marriage Acts, it is sufficient that one of the parties is a British national. Section 1 of the 1892 Act provides that:

"All marriages between parties of whom one at least is a British subject solemnised in the manner provided in this and any foreign country or place by or before a marriage officer shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law."<sup>(287)</sup>

The first point to note is that this section is entirely unclear as to what the nationality of the other party should be. The prevailing policy of preventing conflicts with the receiving state seems to require that neither parties should possess the nationality of the receiving state. This is because the receiving state is unwilling to consent to a consular marriage involving one of its subjects, but if it does consent the marriage will be

recognised as valid to form. From this, it seems to follow that double nationality might be a bar for the solemnisation of a consular marriage where one of the parties possesses also the nationality of the country of celebration.<sup>(288)</sup> Article 6 of the Hague Convention<sup>(289)</sup> provides for the recognition of such marriages as being valid as to form, if neither party is a national of the receiving state, and this state does not oppose the marriage.

Subsequently, by virtue of Algerian Civil Status Code 1970, a general competence to celebrate marriage between Algerian nationals is conferred by operation of law in diplomatic or consular agents. Nevertheless, a provision has been made for the authorisation of consular marriages involving an Algerian man and a foreign woman if the ceremony takes place in a country determined by decree.<sup>(290)</sup> It is noteworthy that such a decree is not promulgated yet, and the question arises as to cogency of this decree. This solution is introduced in France on the basis that French subjects cannot use local law in certain Muslim countries where the religious ceremony is the only prescribed form.<sup>(291)</sup> The possibility for an Algerian Consul to celebrate a mixed marriage will depend either on an international agreement, such as the Algerian-French Convention 1974, or on the receiving state's regulations in conformity with the Vienna Convention. Furthermore, it is worth noting that Algerian law permits the celebration of a mixed marriage before diplomatic or consular agents only if the husband is an Algerian. It has been suggested that this distinction rests on the assumption of predominance of the husband's nationality. The *ratio* of this distinction is laid down in Article 18 of the Algerian Nationality Code, which enacts that Algerian women acquire the nationality of their husbands by the fact of the marriage.<sup>(292)</sup>

3- Existence of Insufficient Facilities Under the Local Law: By virtue of the Foreign Marriage Acts, a consular officer who is a marriage officer should, prior to celebrating a marriage, inquire whether or not sufficient facilities exist under the local law of the

receiving state for the solemnisation of a marriage to which a British subject is a party.<sup>(293)</sup> It has been the practice that where sufficient facilities exist under the law of a foreign state, a marriage officer should not celebrate marriages, this being a situation that was deemed to be inconsistent with the imperative approach of *lex loci* rule.<sup>(294)</sup>

Furthermore, it has been suggested that the *onus* of deciding if sufficient facilities exist under the local law rests in the hands of the Secretary of State. This is so in view of his capacity to refuse to grant the marriage warrant to a consular officer officiating where sufficient facilities exist under the *lex loci celebrationis*. One might say that insufficient facilities exist under the local law where a polygamous form is the only form available in the place of celebration and the parties are domiciled in the United Kingdom, or where practical difficulties in complying with the local law arise. Therefore, a marriage officer and hence secretary of state has complete discretion to decide whether or not sufficient facilities exist under the *lex loci*. Finally, it might be said that this provision is designed to maintain the imperative approach of *lex loci celebrationis* as well as to prevent limping marriages. But one might argue that, though sufficient facilities exist under the local law, a marriage officer should be able to celebrate marriage in consular form if the receiving state does not object to such a celebration.

4- Recognition of the validity of marriage under law of countries to which each party belongs: Although the authorisation by the sending state and the consent of the receiving state suffice in recognising the marriage as being valid as to form, the consent of the countries to which the parties belong is still required. This requirement is of paramount importance in so far as it strengthens the policy of ensuring the universal validity of such marriages.<sup>(295)</sup> This is apparently the position in England and Scotland where it is maintained that the marriage officer must be satisfied that the

parties will be recognised as validly married by the law of the country to which each party belongs. Recently, the Law Commission stressed that "the law of the country to which each party belongs" should be amended as to refer expressly to the law of each party's domicile on the basis that essential validity of marriage is covered by Article 3(1)(d).<sup>(296)</sup>

5- Consent of the Receiving State: The authorisation granted by the sending state is not legally sufficient to hold a consular marriage as being valid as to form. This is because consular marriage involves issues of public international law as diplomatic or consular officers exercise a public authority within the receiving state's territory.<sup>(297)</sup> Therefore, the prevailing policy of avoiding conflicts and preventing limping marriages seems to require the consent of the receiving state.<sup>(298)</sup> Consent by the receiving state to a consular marriage is granted expressly or tacitly. The express consent may be incorporated in an international convention, either bilateral or multilateral treaty,<sup>(299)</sup> or in a unilateral act or a declaration addressed to the sending state. A tacit consent is nevertheless very difficult to ascertain. Where no objection has been raised, this consent may be deduced from the judicial practice of the receiving state.<sup>(300)</sup>

As regards English and Scots law, the *onus* of inquiring into this is in the hands of the marriage officer. The marriage officer is not empowered to celebrate a marriage under the Foreign Marriage Act 1892, unless he is satisfied that the authorities of the receiving state will not object to the celebration of the marriage.<sup>(301)</sup> It is suggested that whatever the grounds for the objection, this must be taken into consideration by the marriage officer. Under the Algerian law, on the other hand, there is no statutory provision that states expressly that the consent of the receiving state is required. But the Algerian practice seems to suggest that the consent of the receiving state is required. For instance, the Algerian-French Convention<sup>(302)</sup> states clearly that a consular officer may celebrate marriages only between parties belonging to the country he represents.

Such a requirement should be introduced in the Algerian legislation with a view to achieving the universal validity of such marriages.

Finally, one might say that the universal validity of such a marriage is strongly ensured if, and only if, the authorisation is granted by the sending state and the consent of the receiving state is given. Furthermore, this principle will be jeopardised if one of these requirements is not satisfied because "the position of third states will vary with the private international law policies of each country."<sup>(303)</sup>

### **3- The Status of Consular Marriages**

1- Where Both Parties are Members of the Sending State: As regards English and Scots law, there is evidence, expressed at the diplomatic level, to suggest that marriages solemnised at foreign embassies are valid providing that the parties are subjects of the sending state. This was the opinion expressed by the Royal Commission on Marriage in 1868: "We think that it would be proper that the law should except from its operation marriages in the chapels or houses of foreign ambassadors only when both parties are subjects of the foreign country."<sup>(304)</sup>

Although there is no clear case law or statutory intervention in the subject, it has been suggested that there is some early authority to the effect that such marriages are regarded as being valid as to form if both parties are members of the foreign country.<sup>(305)</sup> It appears that this suggestion was based on Petreis v. Tondear,<sup>(306)</sup> where a marriage had been celebrated in the chapel of the Bavarian Ambassador in London, between parties neither of whom was a member of the foreign state; it was held that the marriage was void. Therefore, the practical result of this decision is that it implies that embassy marriages involving parties both of whom are nationals or domiciliaries of the sending state will be upheld. Recently, the Law Commissions have considered the question, and it was pointed out that the validity of such marriages

should be based on the bilateral treaty between the foreign state and the U.K. government. But in the absence of such an agreement, there is an additional requirement to marriages solemnised in foreign embassies or consulates in England and Scotland, namely, that they are valid only if they comply with the local law.<sup>(307)</sup>

The Algerian law position as regards foreign consular marriages is not clear inasmuch as no statutory provision has been promulgated to deal with this matter. Article 96 of Algerian Civil Status Code 1970 provides for recognition of Algerian subjects' consular marriages abroad as being valid as to form. By analogy, foreign consular marriages should be recognised as such if the parties are members of the marriage officers' state. The Algerian-French Convention 1974 appears to be a conclusive evidence for the recognition of such embassy marriages.

2- Where only one of the parties is a member of the sending state: Many domestic laws as well as international agreements are content to require only one of the parties to be a national of the sending state to authorise diplomatic or consular agents to act as marriage officers.<sup>(308)</sup> Such marriages are the most difficult to evaluate in that there is no clear authority to suggest the recognition of these marriages' validity. Under English and Scottish laws in general, the tendency has been to uphold such marriages when the requirements of English or Scots law have been complied with, or when there is an agreement between the sending state and the U.K. government even if the local law is disregarded. The Royal Commission in 1868<sup>(309)</sup> stated clearly that when a British subject is involved, a marriage solemnised at a foreign embassy or consulate could not be recognised as legally valid, unless it is solemnised in the presence of a minister of religion duly authorised to solemnise marriages in the U.K.

One can argue that foreign consular marriages where only one of the parties is a

member of the ambassadors state should be recognised as valid on the basis that English and Scots courts recognise marriages in British Embassies and consulates abroad under the Foreign Marriage Act 1892, where only one of the parties is a British subject.<sup>(310)</sup> Therefore, English and Scottish courts should recognise embassy marriages in England and Scotland. The grounds of comity of nations and reciprocity seem to demand this.

Subsequently, a unilateral rule concerning marriages at Algerian embassies and consulates abroad where one of the parties is Algerian is embodied in Article 97 alinea 2 of the Civil Status Code.<sup>(311)</sup> This article provides for the recognition of marriages solemnised between an Algerian man and a foreign woman if the latter is not a subject of the receiving state, provided that the celebration takes place in a country designated by decree. The reciprocity of this article is clear evidence suggesting recognition of marriages at foreign embassies and consulates in Algeria, between parties of whom one at least is a subject of the consular officer's country.<sup>(312)</sup>

### **B- Service marriages**

Both common and continental law systems make special provisions for marriages of members of the armed forces serving in foreign territory: such marriages have to be performed by a person deriving his authority from the law of the country to which the forces belong. The origin of this exception was founded on the doctrine of extraterritoriality on the ground that members of conquering forces cannot be expected to submit themselves to the laws of the conquered state, which for many reasons may be unacceptable and repulsive.<sup>(313)</sup> The common law view expressed in the early 19th century was that members of the British Army serving in a foreign territory carried with them English Law, and therefore they were exempted from the *locus actus*. To this extent, Lord Ellenborough said that:

"considering it as a marriage celebrated in a place where the law of England prevailed: For I may suppose that in the absence of any evidence to the contrary that the Law of England ecclesiastical and civil was recognised by subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them."<sup>(314)</sup>

Before the promulgation of the 1823 Minister's Act which was titled "An Act to relieve His Majesty's subjects from all doubt concerning the validity of certain marriages solemnised abroad", the position of service marriages was governed by the Common Law of England. In the early 19th century marriage cases, the English Common Law, as the personal law of the parties, was applied.<sup>(315)</sup> However, members of conquering forces may celebrate a marriage without complying with the law of the conquered state, and it will be recognised as valid as to form before English and Scottish courts if it complies with the requirements of Common Law. The only formal requirement for a Common Law marriage was the exchange of consent *per verba de prasenti*. In 1843 a further requirement was added in that the ceremony should be performed by an episcopally ordained priest.<sup>(316)</sup> The unanimous opinion was that the rule in R. v. Millis does not apply to marriages celebrated abroad. The position of service marriages is now determined by Section 22 of the Foreign Marriages Act 1892, as amended by the Foreign Marriage Acts of 1947 and 1988, provides that:

"A marriage solemnised in any foreign territory by a Chaplain serving with any part of the naval military or air forces of Her Majesty serving in that territory, or by any person authorised, either generally or in respect of the particular marriage, by the Commanding Officer of any part of those forces serving in that territory shall, subject as hereinafter provided, be as valid in law as if the marriage had been solemnised in the United Kingdom with a due observance of all forms required by law. (1A) Subsection (1) above shall not apply to a marriage unless:-(a) at least one of the parties to the marriage is person who - (i) is a member of the said forces serving in the foreign territory concerned or is employed in that territory in such other capacity as may be prescribed by Order in Council; or (ii) is a child of a person falling within sub-paragraph (i) above and has his home with that person in that territory; and. (b) Such other conditions as may be so prescribed are complied with. (1B) In

determining for the purposes of subsection (1A) above whether one person is the child of another - (a) it shall be immaterial whether the person's father and mother were at any time married to each other; and (b) a person who is treated by another as a child of the family in relation to any marriage to which that other is or was a party shall be regarded as his child"<sup>(317)</sup>

The important point to note is that the problems and difficulties, encountered by Section 22 of the Foreign Marriage Act 1892, as to the interpretation of the phrases: "within the British lines",<sup>(318)</sup> "British Army Abroad"<sup>(319)</sup> and the phrase "officiating under the Orders"<sup>(320)</sup> have been resolved under the re-enacted Section 22 of the Foreign Marriage Act 1947. A further difficulty in regard to the interpretation of Section 22 of the 1892 Act was whether the section applies to marriages solemnised outside the United Kingdom or outside Her Majesty's Dominions. This has been cleared up in the 1947 Act, where the term "Foreign territory" is characterised as referring to any territory occupied by the British Forces excluding Her Majesty's Dominions, and including ships in foreign waters.<sup>(321)</sup>

It is generally believed that the central pre-requisite of the validity of a service marriage is that it must be authorised by the law of the country to which the armed forces belong. British Foreign Marriage Acts 1892-1947 and 1988, for example, provide for the recognition of a service marriage as valid if it is celebrated by a Chaplain serving in any foreign territory with the naval, military or air forces in such territory, or by anyone authorised by the Commanding Officer of such forces, provided that certain formalities, such as the giving of notice to the Commanding Officer and the presence of at least two witnesses, have been complied with.<sup>(322)</sup> As to the effect of non-compliance with these requirements, it has been suggested that once a marriage has been solemnised under Section 22 of the Act it is no longer necessary to prove the authority of the person by or before whom it was solemnised nor shall any evidence to prove his want of authority be given in any legal proceeding touching the validity of the marriage.<sup>(323)</sup>

The question arises as to whether one of the parties must be a British subject. It is noteworthy that Section 22 of the Act does not contain any restriction on nationality. Therefore, Hodson, L.J. pointed out in Taczanowska v. Taczanowski,<sup>(324)</sup> "...it would seem anomalous that while aliens may serve in the British Forces, they should not have the privileges conferred by the Section." It is sufficient for the celebration of marriage to take place under the Act that one of the parties to the marriage is a member of Her Majesty's Forces or a person employed in such capacity in that territory as may be prescribed by order in council.<sup>(325)</sup> Recently, suggestions have been made to extend the categories of persons who may celebrate their marriage under Section 22, as to include United Kingdom civil servants and civilians accompanying the forces and also the children of members of the forces and such civilians.<sup>(326)</sup>

It is of note that the unanimous opinion of academic writers and courts is that Section 22 of the Act is not limited in its terms to marriages of British subjects, but it does include marriages of members of forces associated with the British army. Taczanowska v. Taczanowski<sup>(327)</sup> is an illustration of cases where this rule has been considered. In this case, the parties were Polish nationals who went through a ceremony of marriage in Italy in 1946. The husband was an officer in the Polish 2nd. Corps which was a part of the Allied forces of occupation in Italy. The ceremony was performed by a Polish army chaplain according to the rites of the Roman Catholic Church. The marriage was invalid according to Italian domestic and private international law which referred to the *lex patriae* of the parties. In support of the marriage, it was argued that it came within Section 2 of the 1892-1947 Acts, which allow marriages within the British lines to be solemnised by any chaplain officiating under the orders of a Commanding Officer of a British Army serving abroad. Although Hodson, L.J. was of the opinion that Section 22 of the Act was not restricted to marriages of parties of whom at least one was a British subject,<sup>(328)</sup> he rejected the argument in favour of the validity of the marriage on the basis that the Polish army

chaplain was not serving under the order of the Commanding Officer of a British army serving abroad.

Nevertheless, the Court of Appeal upheld the marriage as being a valid Common Law marriage on the basis that the parties were members of belligerent forces in occupied territory, the court being of the opinion that conquerors are not deemed to submit themselves to the law of a conquered state and therefore are free to marry according to English common law. Hodson, L. J. stated that:

"The principle in *Scrimshire's* case, that the parties by entering into a marriage contract in a foreign country subject themselves to have the validity of it determined by the laws of that country, does not apply in the case of a contract performed in an occupied country by a member of the occupying forces."<sup>(329)</sup>

In the older cases, Common Law marriage as an exception to the rule of *locus regit actum* has been confined to marriages between British subjects abroad. *Taczanowska v. Taczanowski* was the first instance where the common law marriage theory has been extended in its application to marriages between foreigners. Hodson, L.J. remarked that: "The Common Law conception of marriage knows no distinction of race or creed."<sup>(330)</sup>

This case, however, has been subjected to vigorous criticism by academic writers which expressed doubts as to the astuteness of the extension of the common law marriages.<sup>(331)</sup> It is clear that the decision relied on *Scrimshire v. Scrimshire*,<sup>(332)</sup> the Court being of the opinion that the rule of *locus regit actum* applies on the basis of the parties' presumption to subject themselves to the law of the place of celebration. As to this, Sir Simpson meant that the parties may select the place of marriage and thus, indirectly the law governing the marriage, but they cannot rebut the *lex loci* rule and appoint another law other than that of the place of celebration. He maintains that,

"As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, *ad aliud examen*, to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left."<sup>(333)</sup>

Indeed, Sir Simpson did not intend such interpretation of his words as was found in *Taczanowska*, because later in the judgement he expressed the imperative approach of the *lex loci* rule: "it is of equal consequence to all, that one rule in these cases should be observed by all countries, i.e., the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not."<sup>(334)</sup> Furthermore, it has been suggested that English Common Law was applied in the older cases, where British subjects were involved, as being the parties' personal law.<sup>(335)</sup>

As regards marriages of foreigners abroad, the general opinion of academic authorities was that such marriages would be valid if celebrated in a form recognised as sufficient in the circumstances by the law of their common domicile. Professor Dicey suggested that "when compliance with the local law is impossible, our courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners were domiciled."<sup>(336)</sup> However, the significance of the law of the domicile was expressly denied by Parker, L.J. in *Taczanowska* who stressed that:

"we should not, in such cases as this, look to the *lex loci*, nor do I see any reason why we should look to the law of the domicile of the spouses at the time of the marriage. Indeed, if English law were to look at the law of the domicile, what would be the position where the spouses had different domiciles. In my judgement there is no authority or reason which requires us to look to any other law, once the *lex loci* is inapplicable."<sup>(337)</sup>

As regards the objection put forward for denying application to the *lex loci*, it has been suggested that the difficulties which would occur where the parties had different domiciles would be overcome by applying both domiciliary laws.<sup>(338)</sup> It is of note that common law of England was applied in this case as being *lex fori*: "If it be said that since the parties are not British subjects, the common law of England does not apply to them, my answer is that such is the law prima facie to be administered in the courts of this Country."<sup>(339)</sup>

It is submitted that the application of English common law, as it existed in the early 18th century, to determine the formal validity of foreign marriages between parties who have no connection with England is not in line with modern private international principles. Dicey pointed out that "it is indeed a remarkable proposition that a marriage celebrated in a foreign country between persons domiciled in another foreign country who have never visited England in their lives can derive formal validity from compliance with the requirements of English domestic law as it existed 200 years before the marriage."<sup>(340)</sup> The only point, and it is admittedly a weak one, which could be made against this stance is that some connection with United Kingdom may be likely if the parties are members of H.M. forces.

It is the opinion of the present writer that the decision in Taczanowska v Taczanowski, though consistent with *favor matrimonii* principle, is in conflict with the prevailing policy of universal validity of marriage, the desire to eliminate limping marriages, and creates conflicts between English law and foreign laws. This is so because:

"A marriage that is void by the *lex loci celebrationis* and by the personal law of the parties will scarcely attract universal recognition merely because it satisfies the law of England, a country with which they had no connection at the time of the ceremony, more especially when it is not the existing law of England that is called in aid, but that which was abolished in 1753 by Lord Hardwicke's Act."<sup>(341)</sup>

Therefore, the *lex domicilii*, as an alternative rule should apply in such cases because it is the most appropriate law which will lead to the harmonisation and uniformity of decisions and assist certainty in conflict of law cases.

### **C- Where the local form is impossible**

It is a principle of English and Scots laws that a marriage celebrated without observance of the local law form is void *ab initio*. Nevertheless, it has been established that where the local form is not available to the parties, or its use is impossible, a marriage solemnised under such circumstances will be valid, though the form prescribed by the *lex loci* has not been observed, if the requirements of common law marriage have been complied with.<sup>(342)</sup> Common Law marriage, as being an exception to the *lex loci* where insuperable difficulty existed, was established as early as 1811 in Lord Cloncurry's case,<sup>(343)</sup> where Lord Eldon was of the opinion that the marriage was a valid common law marriage because insuperable difficulty in complying with *lex loci* arose, since no Roman Catholic priest would have been permitted to marry the parties. The same principle has been expressed in most recent cases, as for instance Wolfenden v. Wolfenden.<sup>(344)</sup> In this case, two English domiciliaries went through a ceremony of marriage in the Chinese province of Hupeh. The ceremony was performed by the local minister of the Church of Scotland. It was held that the marriage was a valid common law marriage, although no episcopally ordained priest was present at the ceremony. To this extent, Lord Merriman, was of the opinion that the rule in R. v. Millis was confined to marriage celebrated in Ireland and England, said: "In such a territory as this there is, so far as the requirements of English law are concerned in relation to a common law marriage, no obligation that the ceremony shall be performed in the presence of an episcopally ordained priest."<sup>(345)</sup>

It is to be noted that the Common Law prevails only where compliance with the local

law has been precluded by insuperable difficulty. A mere difficulty in complying with the requirements of *lex loci* is not sufficient for the application of common law. In Kent v. Burgess,<sup>(346)</sup> for example, where the parties did not comply with the residence requirement (six months residence in that country before celebration of marriage), it was held that the marriage was void on the basis that compliance with the local law was possible. The question that remains to be answered is what are the situations under which one might say that compliance with the local law is impossible. It has been suggested that insuperable difficulty in fulfilling the local law exists where there is no local form, or where the local form is not available to foreigners, or is opposed to the parties' religious convictions.<sup>(347)</sup> Dicey illustrates that:

"The impossibility may arise either because such local forms of marriage as exist are completely alien to the social and cultural environment to which the parties belong, or because the form provided by the local law is one which it is morally or legally impossible for the parties to use."<sup>(348)</sup>

In conclusion, it might be said that the circumstances under which the local law is impossible to apply are similar to the scope of the consular form. The latter applies where the local form is inappropriate and impossible: the Foreign Marriage Order 1970 restricted the application of consular form to cases where insufficient facilities exist under the local law.<sup>(349)</sup> It is reasonably clear that the circumstances mentioned above are in favour of applying *lex loci* facultatively, and thus, the consular form deserves preference as it is one of the most appropriate ways to implement the facultative nature of *lex loci* rule.

## Notes to Chapter One

- 1- For instance, the ecclesiastical nature of a marriage, as a sacred institution which requires the intervention of an authorised celebrant, according to the law of some countries; imposes the religious ceremony as necessary form for the performance of marriage. See, Delaporte, V., Recherches sur la Forme Des Actes Juridiques en Droit International Prive. Thesis; Paris University- Sorbone- , 1974.
- 2- Hague Convention on celebration and recognition of the validity of marriage [1976] 16 international legal materials 18. For a general discussion of the convention, see, Christian Roehrich, La Convention de LAHAYE du 1/10/1977 sur la Celebration et la Reconnaissance de la validite des Mariages. Travaux du Comite Francais en Droit International Prive. 1977-1978, p.3-.
- 3- Savigny, F.C.V. A Treatise on The Conflict of Laws and the Limit of Their Operation in Respect of Place and Time. 1869, p266. Also, Savigny illustrated that: "...Contracts must be made according to the statutory forms of the stipulated place of fulfilment, testaments according to the forms which prevail at the domicile of the testator..."
- 4- Savigny, op. cit., p 267.
- 5- Batiffol, H. Les Conflits de Lois en Matière de Contract. These Paris, 1938, N° 22.
- 6- Meijers, L'Histoire Des Principes Fondamentaux du Droit International Prive a Partir du Moyen Age. [1934] 49(3) R.C.A.D.I., LAHAYE., p. 601.
- 7- Lainé, A., Introduction au Droit International Prive. Vol. 1, 1888, p138. See, Silz, E., Du Domaine d'Application de la règle Locus Regit Actum. Ph.D Thesis, 1933, N°14.; Batiffol H., op. cit., n°23. ; Meijers, op. cit., p 603-604. It is illustrated that the bipartite division of status to real and personal was proclaimed by (Guillaume De Gun); and it was confirmed by (Bartole) who reached the decisive progress upon the forms which he characterised in a new category of status: Formal status.
- 8- Batiffol,H., op. cit., n°26; See, Idem, Droit International Prive. 4th ed. Paris , 1967, p. 323-326, 601. However, *Locus Regit Actum* has been applied for the first time in the case of pommereuil which was decided by the parliament of paris in 1721. This case reported in Britten, Dictionnaire des Arret (1727), Vol.vi. p575. See, Vonm Overbeck, A.E., Conflit de Lois en Matière de Forme des Testaments.
- 9- Bill of Exchange Act 1882 (45&46 Vict.C. 61) S.72 (1) & (11). See, Croker v. Hertford (1844) 4 Moo. P. C. C 339. See also, Algerian civil code 1976, article 19 which stated that:" Les actes entre vifs sont soumis, quant à leur forme, à la loi du lieu où ils ont été accomplis. il peuvent être également soumis à la loi nationale commune aux parties." The current Scottish rule refers formal validity of contracts to the *lex loci celebrationis* or to the proper law. see, Van Gmitten V. Digby (1862) 31 Beav. 561; Guepratte v. Young (1851) 4 De G.& Sm. 217.
- 10- Story, J., Commentaries on the conflict of laws. 2nd ed. Vol. II, 1878, p. 1297; See, Savigny, op. cit., pp 266-267; Fraser, P. Treatise on Husband and wife According to Scottish Law, 2nd, Vol. II, 1878, p. 1297; Weiss, Traité Théorique et Pratique du Droit International Prive. Vol.3, 1898, p. 115 et seq.; Pillet, Principe de Droit International Prive, 1903, n° 253.

- 11- It is illustrated that: "While the interchange of consent openly before witnesses in Edinburgh will constitute a marriage, the same consent cannot be interchanged before the same witnesses in Paris and that Scots courts will refuse to uphold the same contract in the same way." Gillespie's Bar, 2nd ed. p. 371. But is it unreasonable for scottish domiciliaries to comply with a foreign *lex loci celebrationis* so far as it is practicable?
- 12- Foubert v. Trust (1703) 1 Broc. P.C. 129.
- 13- Ibid, p130. It is illustrated in Roach v. Garven (1748) 1 Ves. Sen. 157. that matrimonial cases were to be governed according to the legal rule prevailing in the country where they were solemnised, secus "the right of mankind would be very precarious and uncertain." Ibid, p159.
- 13a- Cmvchund v. Barker (1744) 1 Atk 22, 50.
- 14- Scrimshire v. Scrimshire (1752) 2 Hag. Con. 393.
- 15- Ibid, p 402; 161 E.R 785.
- 15a- Ibid, p. 407-408.
- 15b- Ibid, p. 417. Although it might be argued that the application of the *lex loci celebrationis* was laid down in the context of an issue of formal validity, its generality was accepted in a series of decisions over the next century. See, for example, Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54; Jones v. Robinson (1815) 2 Phill. 285; Ruding v. Smith (1821) 2 Hag. Con. 371, 389-392; Warrender v. Warrender (1835) 2 Cl. & Fin. 488; Simonin v. Mallac (1860) 2 Sw. & Tr. 67.
- 16- Ibid, pp398, 411. To answer the allegation which is that the french decree constitutes a bar before English court for proceeding with questioning the validity of the marriage, his Lordship states that: "... foreign decree alone could not of itself be a bar to entering into consideration of the question whether the marriage between English subjects was good or not by the law of England." Ibid, p398. Cf, Veraeke v. Smith [1983] Fam. 145: English award upholding the marriage on the basis that if the parties wilfully and knowingly consented to marry, it is immaterial if they did not intended to live together as man and wife. Leaving aside policy questions the subject matter of the Belgian nullity decree was *res judicata* in an English court.
- 17- Ibid, 417, 161 E.R. 790.
- 18- Mendes da Costa, *The Formalities of Marriage in The Conflict of Laws*, [1958] 7 I. C. L. Q. 233.
- 19- Ibid, p. 233-235; See, Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395-412.
- 20- Batiffol, H., Aspects Philosophiques du Droit International Privé, Paris, Dalloz, 1956, p. 73-74, para. 32. See also, Traité Élémentaire du D.I.P., 4th ed, 1967, p. 474, para. 425; Jaffey, A.J.E. *The Foundation of Rules For The Choice of Law*. [1958] 2 Ox. J. L. S. , 368, p 372.; Fine, *The Formal Sufficiency of Foreign Marriage*. [1976] 7 Fed. L. Rev. 49, p. 51; North, P.M., *Development of Rules of Private international law*, [1980]166 R. C. A. D. I. , 1, p. 71
- 21- Warrender v. Warrender (1835) 2 Cl.& F. 488,530.
- 22- Roach v. Garven (1748) 1 Ves. Sen. 157. This case is decided according to the *lex loci* rule, and the foriegn decree recognised, secus "the right of mankind would be very precarious and uncertain." Ibid, p. 159.

- 23- Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395. It is illustrated that: "From the mischief and confusion that must necessarily arise to the subjects of all nations,... if the respective laws of different countries were only to be observed... such marriage should be good or not according to the law of the country where they are made." Ibid, p. 416.
- 24- North, P. M., [1980]166 R. C. A. D. I., 1, p. 74.
- 25- Guepratte v. Young (1851) 4 De G. & Sm. 217.
- 26- Compton v. Bearcroft (1769) Bull.N.P. 113; Middelton v. Javerin (1802) 2 H.C. 437, 446; Dalrymple v. Dalrymple (1811) 2 H.C. 54; Herbert v. Herbert (1819) 3 Phill. Ecc. 58, at 63.
- 27- Ruding v. Smith (1821) 2 Hag. Con. 371.
- 28- See, Foreign Marriage Acts 1892-1947, as amended by the Foreign Marriage (Amendment) Act 1988.
- 29- See Infra, Discussion under heading "Exception of *lex loci celebrationis*"
- 30- Berthiaume v. Dastous [1930] A.C. 79 at 83. See, Story, Commentaries on The Conflict of Laws, 7th ed. 1834, § 113 - 113a; North, P. M. op. cit., p 21; Vergani v. Guidetti [1941] 32 NE 2d, 272.
- 31- Starkowski v. Attorney general [1954] A.C. 155 at 177.
- 32- E.g., Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395 Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54; Jones v. Robinson (1815) 2 Phill. 285; Ruding v. Smith (1821) 2 Hag. Con. 371, 389-392; Warrender v. Warrender (1835) 2 Cl. & Fin. 488; Simonin v. Mallac (1860) 2 Sw. & Tr. 67.
- 33- Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395.
- 34- Ibid. at p.413. This rule has been confirmed in Dalrymple v. Dalrymple (1811) 2 Hag. con. 54. where a marriage *per verba depraesenti* is held valid according to the Scottish law as the only applicable law, under English choice of law rules, for its being the *lex loci celebrationis*. See, Herbert v. Herbert [1819] 2 Hag. Con. 263; Dicey and Morris, The Conflict of Laws. 11th ed. 1987, p. 598-99; See now, 12th ed., vol. 2, 1993, pp. 539-40.
- 35- This is the general rule deduced from the case of Scrimshire v. Scrimshire.
- 36- Conway v. Beasley (1831) 3 Hag. Con.639, 162 E.R 1292. It is suggested that the decision in Ruding v. Smith (1821) 2 Hag. Con. 371, 161 E.R 774, should be considered as an early stage where the law of domicile applied for determining the validity of marriage. Unfortunately, this is unsound because the validity issue involved thereof is one of a formal character, and the English law is applied as an alternative for the *locus actum*. See, Foreign Marriage Act 1892-1947 as amended by the Foreign Marriage (Amendment) Act 1988; Pilinski v. Pilinska [1955] W.L.R 329; Taczanowska v. Tacznowski [1957] P. 301; Kochanski v. Kochanski [1958] P. 147.
- 37- Ibid, at p.652; E.R, p.1297. However, the *lex domicilii* was not considered as the basis of this decision. Therefore, the marriage was held void, because of its celebration in England.
- 38- See, supra, no 31. Cf, Story, *op. & loc. cit.* § 113-113a; Beale, Conflict of Laws, 1934, vol.1, p. 669.
- 38a- Commentaries on the Conflict of Laws, 7th ed., Secs. 110, 113.
- 39- Ibid, at p.193, 11E.R 703. Savigny reached the same conclusion. A Treatise on the Conflict of Laws. Guthrie's Translation 2nd ed. pp 291-92.

- 40- Meijers, L'Histoire Des Principes Fondamentaux du Droit International Prive a Partir du Moyen Age, [1934] 49(3) R. C. A. D I. p.601.
- 41- The Algerian Civil Code 1976, Section 19 provides that it is permissible for the parties to celebrate their marriage in their personal law forms when they belong to a common nationality. See, article 170 of french Civil Code; Lucas, L., La Distinction du Fond et de la Forme Dans le Reglement Des Conflits Des Lois. Melange Maury, T.1, p.175.
- 42- The Algerian Civil Code 1976, Section 11 states that: "Les conditions relatives a la validite du mariage sont regies par la loi national de chacun des conjoints."; See, Issaad, M., Droit International Privé. Vol.1, 1980, p.236.
- 43- Palsson, L., Marriage and Divorce in Comparative Conflict of laws. p29.
- 44- Foote, A Concise Treatise on Private International Law. 5th ed. 1925, p123; See, Schmitthoff, A Text Book of The English Conflict of Laws, 2nd. ed., 1948, p. 300. In Simonin v. Mallac (1860) 2 Sw. & Tr. 67; 164 E.R. 917, section 151/152 of French Civil Code classified as a formal requirement, on the basis that it does not create an absolute incapacity.
- 45- Matimonial causes Act 1973, section 11; see Marriage Nullity Act, 1971; Marriage (Scotland) Act 1977, Section 13(2).
- 46- Apt v. Apt [1948] P. 83.
- 47- See, Supra n°1 & 10. See, Sottomayer v. DeBarros [No 2] (1879) 5 P.D. 94; Bliersbach v. MacEwan 1959 S.C. 43.
- 48- See supra note 46.
- 49- Ibid, p85.
- 50- Simonin v Mallac (1860) 2 Sw. & Tr. 67.
- 51- RABEL, E., The Conflict of Laws: Comparative Study. Vol.1, 2nd.ed., 1958, p 224; See, RIGAUX, La Theorie de Qualification en Droit International Prive. 1956, p 425 et seq.
- 52- It is maintained that a marriage must be of a monogamous nature. See, Gravesson, R.H., Conflict of Laws. 7th ed., 1974, p 240 et seq.
- 53- Gravesson, *op. cit.*, p 251 et seq. See, Valier v. Valier [1928] 133 L.T. 830; Mehta v. Mehta [1945] 2 ALL. E. R. 69, 174 L.T. 63; Way v. Way [1950] P. 71, 65 T.L.R. 707.
- 54- Gravesson, *loc. cit.*, p 251 et seq. See, Kassim v. Kassim [1962] P. 224; Bandail v. Bandail [1946] P. 122, 62 T.L.R 263.
- 55- Thomson, J.M., Family Law in Scotland. 1987, p 8 et seq. Palsson, L., Marriage and Divorce in Comparative Conflict of Laws. 1974, p 317 et seq.
- 56- It is understood from professor Anton that Scots law has no rule relating to parental consent. See, Anton, A.E., Private International Law. 1967, p276; and see now , 2nd ed., 1990, p. 420.
- 57- Saad, F., Commentaries on The Algerian Family Law. 1986, p. 119 *et seq.*; The Algerian Family Code 1984, Article 9; Ordonnance n° 70/20, 19th february 1970, Article 97. For French law, see Batiffol et Lagarde. Droit International Prive. 7th ed. Vol.2, 1983, p. 60 *et seq.*
- 58- Dicey & Morris., The Conflict of Laws, 11th ed., 1987, p 35, 36; and also see, 12th ed., 1993, pp. 34-47. Both the German jurist Kahn and the French jurist Bartin, with whom the discovery of the problem of characterisation is associated, declared that although exactly the same connecting factor might be used in different legal systems, it might not well have the same

meaning in every system and might be qualified or characterised in different ways. See, *Bartin*, "On the impossibility of arriving at the definitive suppression of conflicts of law", [1897] *Clunet*, pp. 225-55, 466-95, and 720-38. These articles are reprinted without modification in *Bartin's Etudes de droit international privé*, 1899.

- 59- The Algerian civil code 1976, Article 9 states: "En cas de conflit de lois, la loi Algerienne est competente pour qualifier la categorie a la quelle appartient le rapport de droit, objet du letige, en vue de determiner la loi applicable."
- 60- *Bliersbach v. MacEwen* 1959 S.C 43 at p.51; For full discussion of the matter see, Anton, A.E., *Private International Law*, 1967, p. 275-76; See now, 2nd ed., 1990, pp. 433-35.
- 61- *Simonin v. Mallac* (1860) 2 Sw.& Tr. 67.
- 62- A similar view was held in *Ogden v. Ogden* [1908] P. 46.
- 63- *Apt v. Apt* [1947] P. 130 at pp.137.; See also *Chetti v. Chetti* [1909] P. 67 at pp.87.
- 64- *Ibid.*
- 65- *Caraslanis*, Civ. 22/6/1955, *Clunet* 1955, p.682, note Sialelli, *R.C.D.I.P.*, 1955, p. 723.
- 66- Parental consent is regarded, in French law, as essential pertaining to capacity to marry since 1556. The position was that a person under 21 years of age, and after a certain period when reaching the age of majority could not marry without parental consent or accedant consent. See, *Gaudemet, Droit Romain et Principess Canoniques en Matière de Mariage au Bas Empire*, Millan, 1950, pp. 184-185. However, it is maintained that parental consent is needed for minor's marriage, according to french law since 1933, because their consent is unsufficiently mature. See, French law of february 2. 1933; French civil code, article 148; Anton, A.E. et *Francescakis, Ph.*, *Modern Scots "Runaway Marriages"* [1958] *Jur. Rev.* 253 at 264.
- 67- See, *Batiffol, H.*, *Droit International Privé*, Paris, 1967, pp. 147-155, & 326-327 at footnote 601(1); *Batiffol, H. & Lagarde, P.*, *Droit International Privé*, Tome I & II, 7th. ed., 1981, n° 415, pp. 43-44; *Trib. Civ. Seine* 18/1/1923, *Gaz. Pal.* 1923, I, p.294; *Trib. gr. Inst. Troyes* 9/11/1966: [1967] *R. C. D. I. P.*, 530 note Malaurie; *Trib. gr. Inst. Paris* 15/03/1972: *R. C. D. I. P.* 1973, 509; *Jaffey, A.J.E.*, *The Foudation of Rules for the Choice of law*, [1982] 2 *Ox. J. L. S.*, p. 369.
- 68- The Algerian Family Code 1984, article 7 provides that: "La capacité de mariage est réputée a ving et un (21) ans revolus pour l'Home et à dix huit (18) ans revolus pour la femme. Toutefois, le judge peut accorder une dispense d'age pour une raison d'intérêt ou dans cas de necessité."
- 69- It can be said that the decision of requiring parental consent has been influenced by the Islamic law and French law. "Ordonnance" of 4th February 1959, article 2, provides para. 3: "...Le consentement des mineurs ou des interdits judiciaires ou légaux doit être complété par celui de leur tuteur." However, this has been maintained afterwards according to the law of 31st december 1962. Article provides that the existing French rules should prevail in Algeria after the independance, as far as they do not offends the state sovereignty, until a new legislation will be promulgated.
- 70- The French text of article (9) provides:" Le mariage est contracté par le consentement des futures conjoints, la presence du tuteur matrimonial..."
- 71- The civil status code 1970, Article (77), states: "Le cadi ou l'officier de l'etat civil qui a dressé un acte de mariage, sans l'autorisation des personnes habilitées a assister l'un des conjoints, est

- puni des peines prévus à l'article 441, alinéa 1 du code penal..."
- 72- Benmelha, Gh., Élément du Droit Algerien de la Famille. v.1, 1985, pp. 448-50; Saâd, F., Commentaries on the Algerian Family law, 1986, pp.71 (in Arabic); The Algerian Family code, Article 12 provides: "...Toutefois, le père peut s'opposer au mariage de sa fille vierge si tel est l'intérêt de la fille."
- 73- See, supra note 7; The Algerian Family code 1984, Article 13 states: "Il est interdit au wali (tuteur matrimonial) qu'il soit le père ou autre, de contraindre au mariage la personne placée sous sa tutelle, de même qu'il ne peut la marier sans son consentement."
- 74- Benmelha, Gh., op. cit., p. 50; Saâd, F., op. cit., 76; Haddad, R., La Jeune Fille et le Consentement au mariage. Revue El-Mouhamat, 1975, n°3, p. 9; Trib. d'Alger 1re Ch. Civ. 23/7/1965: Rev. Alg. n°4, 1968, p.1194; Cour de Mostaganem, Ch. Civ. 3/11/1966: Rev. Alg. n°4, 1968, 1200. It is stated in article.11 (2) of the family code: "...Le juge est le tuteur matrimonial de la personne qui n'en a pas."
- 75- The Algerian Civil Code, Article 11 states: " les conditions relatives à la validité du mariage régles par la loi national des deux conjoints". See, Issad, M., Droit International Privé. vol. 1, 1980, p. 236.
- 76- Batiffol, H. et Lagarde, P., op. cit., n° 415, pp. 43-44; See Trib. Troyes 9/11/1966: [1967] R.C.D.I.P., 530 note malaurie; Trib. gr. Inst. Paris (1re Ch.) 15/3/1972: [1973] R. C. D. I. P., p. 509. Cf. Brook v. Brook (1860) 9 H.C.L. 193; Mette v. Mette (1859) 1 Sw & Tr 416.
- 77- The Algerian civil code 1976, Article 13 provides: " Dans les cas prévus par les articles (11) &(12), si l'un des deux conjoints est Algerien, au moment de la conclusion du mariage, la loi Algerienne est seule applicable, sauf en ce qui concerne la capacité de se marier." This article and its application will be discussed in the second chapter.
- 78- Temesti decree of the Council of Trent. [1545-1563]
- 79- Lord Hardwicke's Act 1753 [26 Geo. II, C33] Section 3.
- 80- Dicey and Morris, The Conflict of Laws. 1987, 11th.ed., vol.2, pp. 602-603, now see 12th ed., 1993, p. 644; See, Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395.
- 80a- Falconbridge, Essays on the Conflict of Laws, 2nd ed., 1954, pp. 76-77.
- 80b- See, Scrimshire v. Scrimshire (1752) 2 Hagg. Con. 395; Middleton v. Janverin (1802) 2 Hagg. Con. 437; Kent v. Burgess (1840) 11 Sim. 361.
- 81- Bromley, P.M. and Lowe, N.V., Bromley's Family Law. 1987, 7th.ed., p. 39. He thought that parental consent was introduced in Lord Hardwicke's Act 1753 on the basis of preventing property to get into hands of undesirable suitors. The persons whose consent is required are cited in order in Bromley's Family Law, Appendix B, p. 768.
- 82- Law com. [N° 53], Annex para 49.; See Marriage Act 1949, Sc. 24, 25 &48; See now Marriage Act 1983, Sch. 1; R. v. Birmingham [1828] B & C. 29; Bromley, op. cit., pp. 80-81.
- 83- See, New Law Journal Reports "The Practitioner", March 25, 1988, p.91.
- 84- Consensual marriage was abrogated according to Marriage (Scotland) Act 1939, s.5; See, now Marriage (Scotland) Act 1977, s.21. But marriage by cohabitation with habit and repute remains.
- 85- Compton v. Bearcroft (1769) Bull. N. P.113; 2 Hag. Con. 444n. It is of note that the doubt

expressed in Robinson v. Bland, as to whether this marriage was not valid as it is *in fraudem legis* to English law, was not taken into consideration. However, it was suggested that if the view of *fraudem legis* was taken, no difficulties would be ensued. See, Birtwistle v. Vardhill (1839) 7 Cl & Fin. 920-22.

- 86- See, Griesson v. Griesson (1781) 2 Hag. Con. 86; Beamish v. Beamish (1788) 2 Hag. Con. 83; Bell v. Graham (1859) 133 Moo. P. C. C. 242.
- 87- Simonin v. Mallac (1860) 2 Sw. & Tr. 67.
- 88- According to articles 151 & 152 of French civil code, the parties have to ask for their parents' consent by a respectful and formal act; but if the consent is not forthcoming within three month formal asking, the marriage can lawfully take place.
- 89- Simonin v. Mallac Ibid, pp. 76-77. But see similar result in Ogden v. Ogden, below (at 148)
- 90- French civil code, article 183.
- 91- Salveson v. Administrator of Austrian property [1927] A. C. 641; And also see, Inverclyde v. Inverclyde [1930] P. 29; Falconbridge, Characterisation in the Conflict of Laws. 1937, 53 I.C.L.Q. 235 at p. 248; Cheshire and North, Private international law. 10th ed. 1979, p. 316, See now, 12th ed., 1992, p. 573.
- 92- Sottomayer v. De Barros (N°1) (1877) 3 P.D. 1 at p. 7.
- 93- Ogden v. Ogden [1908] P. 46, article 148 of French civil code provides that a son who has not reached the age of 25 years, and a daughter who has not attained the age of 21 years must obtain parental consent for being able to marry; See. Cheshire and North, op. cit., p. 50-51, See now, 12 th ed., 1992, pp. 49-50.
- 94- Sottomayer v. De Barros [N°2)] (1879) 5 P. D. 94; Ogden v. Ogden Ibid, pp. 75-77.; See, Chetti v. Chetti [1909] P. 67 at pp. 81-88; Friedman v Friedman [1922] P. D. 43n; Dicey and Morris, op. cit., pp. 624, 638, See now, 12 th ed., 1993, pp. 665, 680.
- 95- Clive, M., Husband and wife, 1982, 2nd ed., p.135; See now ,3rd ed., 1992, p. 120. It is suggested that if the prohibition imposed by the *lex domicilii* pertains to form, such as the exigence of religious ceremony under Greek law, would not be considered as a prohibition which results in legal incapacity as far as the Scots law is concerned, when the marriage is celebrated within Scotland. See, Hoy v. Hoy 1968 S. L. T. 413, [1968] S. C. 179; Pease v. pease [1967] S. C. 112.
- 96- See, Anton, A.E., op. cit., p. 276 *et seq*; See now, 2nd ed., 1990, p. 420.
- 97- Bliersbach v. MacEwan 1959 S. C. 43; S. L. T. 81.
- 98- See, Lord Frazer, Husband and wife, 2nd ed., vol.1, p. 55.
- 99- Lodge v. Lodge [1963] 107 Sol. Jo. 437; See, Hoy v. Hoy 1968 S. C. 179.
- 100- Clive, E M., op. cit., p. 136; See now, 3rd ed., 1992, p. 121-22 with reference to the 1977 Act; See, Anton, A. E., op. cit., pp. 280-81, See now, 2nd ed., 1990, pp. 433-34.
- 101- See, Scrimshire v. Scrimshire [1752] supra., in this case the marriage would have been valid if the personal law of the parties was taken into consideration. However, the English court recognised the French decree annulling the marriage, eventhough parental consent is a formality under English law. Cf. Reed v. Reed [1969] 6 D.L.R. (3rd) 617, British Columbia award upholding the marriage, even if the marriage between first cousins was not permitted in Washington, i.e the place of celebration. The same view was taken in recent Bahamas case: Re

- Hewitt's Estate [1985] discussed by Bradshaw in 15 Ang. Amer. L. Rev 1986, 112.
- 102-** Ruding v. Smith [1821] 2 Hag. Con. 371 at p. 389.
- 103-** Westlake, Private international Law, 7th ed., §.25; See, Robertson, Characterisation in Conflict of Laws, 1940.
- 104-** Falconbridge, Essays on the conflict of laws, 2nd ed. 1954, p. 74; 53 Q. L. R. 235.
- 105-** Becket, [1934] 15 B. Y. B. I. L. 46.
- 106-** Falconbridge, *op.cit.*, 2nd ed., p. 89.
- 106a-** Anton, A.E., Private International Law, 2nd. ed., 1990, 420; See also, Francescakis, Ph. & Anton, A.E., [1958] Jur. Rev. 253.
- 106b-** Cheshire and North, Private International Law, 12th ed., by P.M. North & J.J. Fawcett, 1992, pp. 49-50. According to this view, a different decision should have been reached in Ogden v. Ogden since the purpose of article 148 of French Civil Code was to incapacitate the husband from matrimony unless he complied with these provisions. Cf. Simonin v. Mallac where the absence of the consent require by article 151 of the French civil code did not render that parties incapable of inter-marriage.
- 106c-** Scottish Law Commission, Report on Family Law, [Scot Law Com N° 135], 1992, paras. 14.8-14.10; See also, Scottish Law Commission, Discussion Paper N° 85: Family Law, Pre-consolidation reforms, March 1990, paras. 9.8-9.10.
- 107-** For discussion of these formalities, see, Marty, G. & Raynaud, P., Droit Civil, T2, 2nd ed., 1967, pp. 106-108; Batiffol & Lagarde, *op. cit.*, T2, 7th ed. 1983; Audinet, E., Les Conflits de Lois en Matière de Mariage et de Divorce. [1926] R.C.A.D.I., LAHAYE, 179, at p. 190.
- 108-** Audinet, E., *op. cit.*, pp.190-91; Palsson, L., Marriage and Divorce in Comparative Conflict of Laws, 1974, pp. 234-; French Civil Code, Article 170; However consular form is only considered as an alternative to the local law form; Scrimshire v. Scrimshire (1752) 2 Hag. Con.395; Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54; Berthiaume v. Dastous [1930] A.C. 79; Radwan v. Radwan [1973] Fam. 24.
- 109-** The Algerian Civil Status Code, Article 97 provides that Algerians may celebrate their marriage either within the local form or consular form. See, Issad, M., *op.cit.*, pp. 242-43; Soulieman, A.A., Commentaries in Algerian Private International Law, 1984, p. 73 [in Arabic]
- 110-** Batiffol & Lagarde, *op. cit.*, T1 n°294; Gerald Legier, La Règle Locus Regit Actum et le Conflits de Lois en Matière de Forme des Actes, These, Aix Marseille university, 1976, p. 258.
- 111-** Gerald legier, *op. cit.*, p. 267; Paris 22/12/1921: Clunet 1922, p.135; Seine 9/12/1921: [1922] Clunet 116; Audinet, note S. 1924, II, 65; Cluzel, G., Le Mariage et le Divorce Confessionnels des Étranger en France, [1909] Clunet 1, 5.
- 112-** Delaporte, *op. cit.*, p. 489.
- 113-** Palsson, L., *op. cit.*, p. 232; Audinet, E., *op. cit.*, p. 196; Maridakis, Le Mariage Des Grecs Orthodoxe Hors de Grèce, [1952] R.C.D.I.P. 662; Krispi-Nico Letopoulou, [1967] Rev. Hellenique dr. int., 114; Gerald Legier, *op. cit.*, pp. 261-62.
- 114-** Hague Convention on Marriage 1902, article 5, para. 2. However, this provision has been abolished in the Hague Convention on Marriage 1978.
- 115-** Miller v. Deakin 1912 1 S.L.T. 253; Tallarico v. The Lord Advocate 1923 S.L.T. 272; Re

- Allisson's Trust (1874) L.T. 638; See France, Trib. Seine 28/3/1900, Rev. dr. int., 1906, p. 751.
- 116- See, supra note 9, Berthiaume v. Dastous [1930] A.C. 79; Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395.
- 117- See, Marriage ( Scotland ) Act 1977.
- 118- For the preliminaries of marriage in accordance to Scottish law, see Marriage (Scotland) Act 1977, Sections 2 & 3; Clive, E.M., The Law of Husband And Wife in Scotland, 3rd ed., 1992, pp. 24-38.
- 119- Apt v. Apt [1948] P. 83
- 120- Ibid, at p.88; see, U. N. Convention on Consent to Marriage 1962, article 1, para. 2.
- 121- See, Ponticelli v. Ponticelli [1958] P. 204; Lorenzen, Marriage by Proxy and The Conflict of Laws [1932] 32 H. L. R. 473; Palsson, L., *op. cit.* p. 220-; Batiffol & Lagarde, *op. cit.*, T.II, p. 54.
- 122- Palsson, L., *op. cit.*, pp.225-6.
- 123- Ibid, pp. 226-7.
- 124- Sottomayer v DeBarros (1977) 3 P.D. 1; Berthiaume v Dastous, supra, p.7.
- 125- Cheshire and North, P.I.L. 11th Ed. 1987, pp 558-9, Now see, 12th ed.,1992, p. 572; Maddaugh, P.D. Validity of Marriage and the Conflict of Laws, [1973], U.T.L.J., 117 at 118; Swan, J. A New Approach to Marriage and Divorce in the Conflict of Laws, [1974], 24 U.T.L.J. 1974, 17 at p. 19; Dicey and Morris, The Conflict of Law, 11th Ed., V. 2, 1987, pp 601-5, Now see, 12th ed., 1993, p. 641; Scrimshire v Scrimshire, supra, page 4; Dalrymple v. Dalrymple (1821) 2 Hag. Con. 54; Rex's Marriage (1983) 65 F.L.R. 132; Burke v Burke 1983 S.L.T. 331 at 333.
- 126- Story, Commentaries on the Conflict of Laws, 8th Ed. 1883, para. 261; Niboyet, J.D. Traité D.I.P. Français, 1944, T3, p. 207; Gerald Legier. Locus Regit actum et les Conflits de lois en matière de Forme des Actes, These Aix, 1976, p. 332-56; Cluzel, Le Mariage et le Divorce Confessionnels des Etrangers en France, [1909] Clunet 5.
- 127- See Naquet, La Regle Locus regit actum Est-Elle imperative ou Facultative? [1904] Clunet 39-58.
- 128- Genin-Meric, R., La Maxime Locus Regit Actum"Nature et Fondement" 1976, pp. 100, 123; Gendrel, M. "Les Mariage in Extremis" B.D.P. T. 1X, 1958; Despagnet, F. L'ordre Public en D.I.P., Clunet, 1889, pp. 65-66.
- 129- Geralde, L. *op. cit.*, 353 - 59; Bartin, Principles D.I.P. selon la loi et la jurisprudence, T.2, 1930, p. 176; Genin-Meric, R., *op. cit.*, pp. 137-58; Audinet, S. 1924, II, 65; Audinet expressed: "Qu'il ne s'agit pas ici de la règle facultative formulée pas l'adage *locus regit actum* mais d'une prescription d'ordre public qui s'impose aux etrangers quelleque soit leur loi nationale."
- 130- Pillet, A., Principes D.I.P., Paris 1903, p483; Rigaux, Repertoire Droit.International., Paris 1968, Vo: Actes, N°: 28 & 24; Arminjon, Precis D.I.P., 1947, T2, p. 194; Palsson, L., *op. cit.*, p. 179; Rabel, The Conflict of Laws: A Comparative Study, 2nd Ed., 1958, p. 234; Niboyet, J.P., *op. cit.*, p. 198, n° 119.

- 131- Pillet, A., *Op. Cit.*, T1, n° 259; Geni-Meric, R., *Op. Cit.*, p. 106, Despagnet, *Precis D.I.P.*, Paris, 1886, 275; Lerebourg-Pigeonniere, *Op. Cit.*, n° 347; 434, 436; Touati, *Le caractère religieux de la formation du mariage en D.I.P.*, These, Paris, 1963, p. 157; Cheshire and North, *Op. Cit.*, p. 479.
- 132- This is confirmed by the Law Com. and Scots Law Com. [N°:165, N°:105]; see Jaffey, A.J.E. *Introduction to Conflict of Law*, 1988, p. 45; Cheshire and North, *op. cit.*, pp. 558-59, see also, 12th ed., 1992, pp. 572-73; Dicey and Morris, *op. cit.*, pp. 601-05, see also, 12th ed., 1993, pp. 641-45; Scottish Law Commission [Scots Law Com. N° 135], Report on Family Law, 1992, para. 14.4, and see, Discussion Paper N° 85, 1990, para. 9.4; Berthiaume v. Dastous [1930] A. C. 79.
- 133- MacCulloch v. MacCulloch (1759) 2 Pat. 33; Johnstone v. Godet (1813) Ferg. Con. L. R. 8; Miller v. Deakin 1912 S.L.T. 253; Tallarico v. The Lord Advocate 1923 S.L.T. 272; Gray v. Gray 1941 S.C. 461; Elbaz v. Elbaz [1966] 110 sol. J. 287; Anton, A., *Op. Cit.*, pp. 283-90.
- 134- Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395 at p. 417; See Gravesson, *op. cit.* p.269; Re Alison's Trust (1874) 31T.L.R. 638; Sottomayer v. DeBarros (1877) 3 P.D. 1.
- 135- *Ibid*, (Scrimshire)
- 136- See Naquet, *op. cit.*, 47.
- 137- Taczanowska v. Taczanowski [1957] P. 301.
- 138- Kochanski v Kochanska [1957] W.L.R. 619.
- 139- Mendes Da Costa, *op. cit.*, pp. 227-30.
- 140- The Algerian Civil Code 1976, Article 19; The Algerian Civil Status Code, Article 97; Lerebourg-Pigeonniere, *Precis D.I.P.* 9th Edition Paris 1970, par Loussouarne, Y., n° 346; p. 433; Savatier, M. R., *Cours D.I.P.* 2nd Ed.1953; p. 211; Vincent, J. and Ponsard, A., *Jel. Droit International*, Fasc. 546 B., n°: 59 at 11; Bischoff, M. J. M., *Rep. Dr. Int.*, V: mariage.
- 141- Bischoff, M. J. M., *Rep. Dr. Int.*, V: marriage, n°120.
- 142- Lindon, R., *La nouvelle legislation sur le Divorce*, *J.C.P.* 1975, 1, 27/28; Goyon, Y., *De l'obligation de sincerite dans le mariage*, *R. Trim. droit, civil*, 1964, 486; Foulon-Piganiol, I. *Marriage simule ou mariage a effects limites*, D. 1965, *Chronique IX*; see Cass. Civ: 10171, 1973; Magro et autres c/ dame Magro et autres. R. 1974; p.640, note Nissard, M.; cas. civ. 15151 1974 consorts Matinelli c/ Dame Benkhalifa R. 1975, p. 261 note Nissard, M.
- 143- Vincent, J. and Ponsard, A., *op.cit.*, Fasc 546B, n° 72-74; Patarin, J. *Rep. Dr. Int.*, Vo: Publicite des Actes, n°14-15; Neboyet, J.P., *Traite D.I.P.*, T.5, n°1487; Lerebourg-Pigeonniere, D., *op. cit.*, 1970, n° 441, p. 583, Bischoff, M. J. M., *op. cit.*, n° 56.
- 144- Dicey and Morris, *op. cit.*, p. 605, Now see, 12th ed., 1993, p. 647; Anton, A., *op. cit.* pp 288-89, Now see, 2nd ed., 1990, p. 428; see Wolfenden v. Wolfenden [1946] P. 61; Lord Doncurry's case (1811) cited by Cruise, *Dignities and Titles of Honour*, 276. Sussex Peerage Case (1844) 11 cl. and Fin. 85 at 92. 104; Penhas v. Tansoo Eng (1953) A.C. 304; Phillips v. Phillips (1921) 38 T.L.R. 150.
- 145- The Algerian Code Civil 1976, Section 19.
- 146- Algerian Civil Status Code 1970, Article 71.
- 147- Issa^ad, M., *Op. Cit.*, pp. 241-42
- 148- See Hague Convention on Marriage 1902, Section 7.

- 149- Hague Convention on the celebration and recognition of validity of marriage 1978, Article 2.
- 150- Roehrich, Ch.M., La Convention de LA HAYE Du 1er Octobre 1977, [1977-1978] Trav. Com. Fr. D.I.P. 5.
- 151- Savigny, supra Section 1.
- 152- See Papadopolos v. Papadopolos [1930] P. 55; MacCullok v. Maccullok (1759) 2 Pat. 33; Chapelle v. Chapelle [1950] P. 134.
- 153- Anton, A., *op. cit.*, p 289 , see now 2nd., 1990, pp. 421-23; Clive, M., *op. cit.*, pp 145, 156-57, See now 3rd ed., 1992, p.131; Countess of Strathmore v. Forbes (1751) 6 Pat. supp. 684; Sassen v. Campbell (1824) 3S. 159; Macdonald v. Macdonald (1863)1M. 854; Gray v. Gray 1941 S.L.T. 361; Cooke v. Taylor 1941 S.C. 461.
- 154- Issad, M., *op. cit.*, p 421, Soulieman, A. A., *op. cit.*, pp 72-73 [in arabic];see, The Algerian Civil Code 1976, Article 19; The Algerian Civil Status Code 1970, Section 71 and 97.
- 155- Anton, A., *op. cit.*, pp. 273, 289, see now, 2nd. ed., 1990, pp. 421-23; Clive, M., *op.cit.*, p 145, See now 3rd ed., 1992, p. 131.
- 156- Miller v. Deakin 1912 1 S.L.T. 253; see Wylre v. Laye (1834) 9 Fac. 495, Longworth v. Yelverton (1862) 1M. 161; Linke v. VanAerde (1894) T.L.R. 426.
- 157- Marriage (Scotland) Act 1856 [19 and 20 vict. cap. 96.], Section 1; it is worth mentioning the requirement of residence before marriage was abolished by the Marriage (Scotland) Act 1939. See, now Marriage (Scotland) Act 1977.
- 158- Tallarico v. The Lord Advocate 1923 S.L.T. 272.
- 159- Clive, M., *op. cit.*, p. 92; Anton, A., *op. cit.*, pp. 289-90.
- 160- Bradley v. Mochrie 1947 S.L.T. (Notes) 27.
- 161- Marriage (Scotland) Act 1939, Section 1(4); see, Gall v. Gall 1968 S.C. 332, Clive, M., *op. cit.*, p. 92.
- 162- Marriage (Scotland) Act 1977, Section 23(A) inserted by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, Section 22.
- 163- Marriage (Scotland) Act 1977, Section 3(4) and Schedule 2(5); see, Clive, M., *op. cit.*, p. 140, See now 3rd ed., 1992, p.124.
- 164- Ibid, Secton 3(5); Clive, M., *op. & loc. cit*, See now 3rd ed., 1992, p. 125.
- 165- Clive, M., *op. cit.*, p. 37, See now 3rd ed., 1992, p. 26. However, If the certificate of no impediment is not submitted, without giving any good reason for that, it may not be possible for the parties to get married in Scotland. See Leaflet RM1. From the stand point of logic, I think that requiring a certificate of capacity, to be issued by a competent authority of the state of parties domicile or nationality, should be incorporated in all legal systems and in international conventions concerning the validity of marriages. The main reason for this, is that it facilitates respect of the personal law of the parties by the 'forum locus actum', as far asit does not offend the forum *locus actum* concepts.
- 166- Marriage (Scotland) Act 1977, Section 3(5)(b) inserted by the Family Law Act 1986, Schedule 1, para. 21.
- 167- See, supra note (09)(Section1), The Algerian Civil Code 1976, Article 19; Issad, M., *op. cit.*, pp. 240-241; Souliemann, A. A., *op. cit.*,pp. 72-73.

- 168-** The Algerian Civil Status Code 1970, Article 71. However it might be said that the Registrar or "Cadi" will refuse to celebrate a marriage between foreigners unless the parties produce to him, a certificate of residence or domicile in Algeria, or they made a declaration certifying that they are domiciliary of Algeria or they resided for a month before the ceremony. See Article 75 and 77/2 of the same code.
- 169-** Ibid, Article 77 alinea 2.
- 170-** Ibid, Article 75 alinea 2. The Registrar or "Cadi" may refuse to celebrate marriage of a foreign woman, if she does not produce, either the decree of dissolution of her former marriage, or the death certificate of the former spouse. It is unlikely that the Registrar will proceed with celebrating a marriage between a man and a foreign woman without submission of such certificate, if it is proved before him that she was a married woman before, according to Article 77, alinea 2 of Algerian Civil Status Code.
- 171-** See, Benmelha, Gh., *op. cit.*, pp. 97-8; Ch. de rev. mus. 27/4/1927, Recueil Nores n°; 489, Rev. Alg. 1931, 2, 139.
- 172-** See, Ordonnance n°: 71 - 65, 22/09/1971, Article 1.
- 173-** See, Section 1, supra note 97.
- 174-** See, Section 1, supra note 65.
- 175-** Anton, A., *op. cit.*, p 283-, See now 2nd ed., 1990, p. 423; Clive, M., *op. cit.*, See now 3rd ed., 1992, pp. 131, & 146; Walton, Husband and Wife, pp. 332-33; Gravesson, R., H., *op. cit.*, p. 269; Dicey and Morris, *Op. Cit.*, p. 600; Jaffey, A.J.E., *op. cit.*, p. 45; Collier, J. G., Conflict of Laws, 1988, p. 253; R. v. Millis (1844) 10 Cl. & Fin. 534; Hooper v. Hooper [1959] 1 W.L.R. 1021.
- 176-** Warrender v. Warrender (1835) 11 C1 and F. 1239.
- 177-** Apt v. Apt [1948] P. 83; Anton, A., *op. cit.*, p. 283, See now, 2nd ed., 1990, p. 423.
- 178-** MacCulloch v. MacCulloch (1759) 2 Pat. 33; See Sassen v. Campbell (1824) 3 S. 159, [1926] 2 Sw and s. 309; Cullen v. Gossage (1850) 12 D. 633; AB v. CD 1957 S.C. 415; Kenward v. Kenward [1951] P. 124; Hooper v. Hooper (1959) 1 W.L.R. 1021; Burke v. Burke 1983 S.L.T. 331.
- 179-** Johnstone v. Godet (1813) Ferg. Cons. L. R., App. of Reports. p 8; Macdonald v. Macdonald (1863) 1M. 854; Berthiaume v. Dastous [1930] A.C. 79; Burke v. Burke The Times, March 17, 1955; Ponticelli v. Ponticelli [1958] P. 204.
- 180-** Elbaz v. Elbaz [1966] 110 S.J. 287, The Times March 5, 1966; The same view was reached in Re Alison's Trusts case (1874) 31 T.L.R. 638.
- 181-** See, Re Alison's Trusts (1874) 31 T.L.R. 638; Usher (1912) 2 I.R. 455; Papadopoulos v. Papadopoulos [1930] P. 55; Hooper v. Hooper [1959] 1 W.L.R. 1021; Gray v. Formosa [1963] P. 259.
- 182-** Salvesen (or Von Lorang) v. Adm. of Austrian Property [1927] A.P. 641; See the cases referred to in this case, Niboyet v. Niboyet (1878) 4 P.D.1, Pemberton v. Hughes (1899) 1 Ch. 781, 790; Sinclair v. Sinclair (1798) 1 Hag.Con. 294.
- 183-** Marriage (Scotland) Act 1977, Section 7.
- 184-** Dicey and Morris, *op. cit.*, pp. 601-02; Morris, J.H.C., The Conflict of Laws, 3rd Edition 1984, p. 477; Collier, J.G., *op. cit.*, p. 254; Jaffey, A.J.E., *op. cit.*, p. 50.

- 185-** The Algerian Civil Code 1976, Article 19.
- 186-** See, Morris, J.H.C., *op. cit.*, pp. 151, 477; Clive, M., *op. cit.*, p. 148, See now, 3rd ed., 1992, p. 133, stated that "If a country allows foreigners to marry according to the form of the law of their domicile or nationality, it would be unreasonable to hold a marriage invalid merely because the parties had availed themselves of this privilege"; Graveson, *op. cit.*, p. 270.
- 187-** Taczanowska v. Taczanowski [1957] P. 301. It is worth noting that the marriage, in this case, was held valid, on the basis of the provision of Foreign Marriage Acts 1892, 1947, even though it was valid neither under Italian law, nor according to the parties' personal law. See Mendes da Costa, *op. cit.*, p 221.
- 188-** Hooper v. Hooper [1959] 1 W.L.R. 1021; See Gravesson, *op. & loc. cit.*
- 189-** Marriage Act 1949, Section 25.
- 190-** The Law Com. [N<sup>o</sup>:89] and the Scots Law Com. [N<sup>o</sup>:64]. Choice of Law Rule in Marriage, 1985, paras: 2.12, 2.13, 2.39- 2.42, Scottish Law Commission [Scot Law Com. N<sup>o</sup> 135], Report on Family Law, 1992, para. 14.4.
- 191-** Ibid, para. 2.39
- 192-** Ibid.
- 193-** Ibid, para. 2.42; Cf. Dicey and Morris *op. cit.*, 10th Ed., p. 76, See now 12th ed., 1993, p. 643; Cheshire and North, *op. cit.*, 10th Ed, p 76, See now, 12th ed., 1992, p. 577.
- 194-** Ibid, para. 2.42
- 195-** Ibid, para 2.42, and p.153.
- 195a-** Scottish Law Commission [Scot Law Com. N<sup>o</sup> 135], Report on Family Law, 1992, para. 14.4.
- 196-** Dicey and Morris, *op. cit.*, 10th Ed., p. 75; See Palsson, L., Int. Ency. Comp. L., Vol III, p. 30; Mendes da Costa, *op. cit.*, pp. 260 -261.
- 197-** See The Algerian Civil Status Code 1976, Article 97.
- 198-** See The Algerian Civil Code 1976, Article 19
- 199-** Souliemann, A. A., *op. cit.*, p 73 [in Arabic], see ordonnance N<sup>o</sup>:71/65 du 22/09/1971, Article 1 states: "...Les unions anterieurs a la promulgation de la presente ordonnance qui n'ont fait l'objet d'auncune formalite', ni d'aucun acte dressé ou transcrit sur les registres de l'elat civil, peuvent être inscrites sur le vu d'un jugement rendu dans les conditions ci-apres."
- 200-** See, supra note 198.
- 201-** Issad, M., *op. cit.*, 1980, p. 243
- 202-** Ibid, pp. 242-43.
- 203-** Article 97 provides: "le mariage Contracte en pay etranger entre Algeriens ou entre Algerien et étrangère...". The word "Algerien" refers only to men, because which refers to Algerian women, in French language, is: "Algerienne".
- 204-** Issad, M., *op. cit.*, p. 243, See now Algerian Family Code 1984, Article 31 provides:"La musulmane ne peut epouser un non-musulmam ..." Scots law might regard this rule as a penal condition of status. McDougall v. Chitnavis 1937 S.C. 390; Chetti v. Chetti [1909] P 67.
- 205-** Castel, J.G., Comments on Ambrose v Ambrose, [1961] 39 CAN. Bar Rev., 605; see also Mann, F.A., The Time Element in the Conflict of Laws. [1954] 31 B.Y.B.I.L., 217; Grodecki,

- J.K., Conflict of Laws in Time, [1959] 35 B.Y.B.I.L., 58, Jaffey, A.J.E., The Foundation of Rules for the Choice of Law, [1982] 2 Ox.J.L.S., 368; Dicey and Morris, *op. cit.*, 11th Ed., p. 70.
- 206-** Gravesson, Conflict of Laws, 3rd Ed., p. 265; Mendes da Costa, *op. cit.*, p. 251.
- 207-** Cheshire and North, *op. cit.*, p. 559, see now 12th ed., 1992, p. 573; Mendes da Costa, *op. & loc. cit.*; Anton, A. E., *op. cit.*, p. 285; see also Scrimshire v. Scrimshire (1752) 2Hag. Con. 393; Dalrymple v. Dalrymple (1811) 2 Hag. con. 54; MacCulloch v. MacCulloch (1759) 2 Pat. 33; Berthiaume v. Dastous [1936] A.C. 79.
- 208-** Starkowski v. Att. Gen. [1954] A.C. 155; see also Re Pozot's Settlement Trusts [1952] 1 All.E.R. 1107 (C.A.); Cf. Lynch v. Prov. Government of Paraguay (1871) L.R. 2 P. & D. 268; Ambrose v. Ambrose [1960] 21 D.L.R. (2d) 722.
- 209-** *Ibid.*, pp. 169, 210, 174. It was argued that such legislation was primarily concerned with formalities of marriage, and have only indirect or consequential effect on status. Therefore, the alleged principle is only applicable only when the subsequent legislation operates directly on the status. See, Re Luck's Settlement Trust [1940] Ch. 864; Mendes da Costa *op. cit.*, p. 252.
- 211-** Starkowski v. Att. Gen. [1954] A.C. 155, 171, 172. Lord Reid maintained that acceptance of retrospective legislation in this case, does not lead to uncertainty, because it is difficult "to suppose that in any country there would be a substantial delay in deciding whether to legislate retrospectively once the reason for invalidity had come to light." *Ibid.*, 172.
- 212-** *Ibid.*, p. 172.
- 212a-** Scottish Law Commission [Scot Law Com. N° 135], Report on Family Law, 1992, para. 14.4.
- 213-** Grodecki, J.K., Intertemporal Conflict of Laws, Int. Ency. Comp. L., Vol., III, ch. 8, p.18; See Lynch v. Prov. Government of Paraguay (1871) L.R. 2 P. & D. 268; Re Aganoor's Trusts (1895) 64 L.J. Ch. 521.
- 214-** Cheshire and North, *op. cit.*, p. 560, See now 12th ed., 1992, p. 574; Law Com. [N°:89] and Scots Law Com. [N°:64] paras. 2.10, 2.11, 4.11, 4.13. It is worth pointing out that recognition of foreign retrospective legislation has been left to judicial development. However, to the effect of invalidating a valid marriage, Lord Reid said:"it is certainly unusual that foreign legislation should have the effect of altering status whether it purports to be retrospective or not..." Therefore his Lordship is of the opinion that it cannot be laid as a universal rule that the retrospective legislation can never have that effect, however consideration of each case circumstances is the appropriate way to decide whether it will have effect or not., p. 170.
- 215-** See supra note 212.
- 216-** Berthiaume v. Dastous [1930] A.C. 79.
- 217-** At first instance, Barnard, J. said: "Before the petitioner's mother went through the ceremony of marriage with Starkowski at the Registry Office at Croydon she has not only disclosed the fact of her former marriage to the Registrar, but inquired of the Registrar at Kitzbuhel in Austria, whether her former marriage was void or not and received a reply dated June 30th, 1949 to the effect that she was not married at all in Kitzbuhel." See Judgement of Barnard, J. (1952) P. 135, 147. Mendes da Costa, *op. cit.*, p. 235.

- 218- Mendes da Costa, *op. cit.*, p. 254, stated that the time when the subsequent legislation came into force was not considered by the court as the material time.
- 219- Pilinski v. Pilinski [1955] 1 W.L.R. 329.
- 220- Mann, F.A., *op. cit.*, pp. 243-44.
- 221- Grodecki, J.K., [1959] 35 B.Y.B.I.L. 58, at pp. 75-76.
- 222- Cheshire and North, *op. cit.*, p. 560, See now 12th ed., 1992, p. 574; Dicey and Morris, *op.cit.*, p. 70, See now 12th ed., 1993, p. 643; Mendes da Costa, *op. cit.*, p 257; Anton A.E., *op. cit.*, 285, See now 2nd ed., 1990, p. 423; Clive, M., *op. cit.*, p. 118, See now 3rd ed., 1992, p. 144; Mann, F.A., *op. cit.*, p 243; Morris, J.H.C., *op. cit.*, p. 502.
- 223- Mann, F.A., *op. cit.*, p 243; A support for this conclusion can be found in Ambrose v. Ambrose [1961] 25 D.L.R. (2d)1, See also Castel, J.G., *op. cit.*,p 604.
- 224- See Man, F.A., *op. cit.*, p. 243.
- 225- See, Jaffey, A.J.E., *op. cit.*, [1982] 2 Ox. J. L. S. 368; Mendes da Costa, *op. cit.*, pp. 258-59.
- 226- Mann, F.A., *op. & loc. cit.*; Grodecki, J.K., [1959] 35 B.Y.B.I.L., p 74, *Idem*, Int.Ency.Comp.L., Vol: III, ch. 8, p. 20; Dicey and Morris, *op. cit.*, p. 71, See now 12th ed., 1993, p. 662 & pp. 67-68; Cheshire & North, *op. & loc cit.*, See now 12th ed., 1992, p. 574; Morris, J.H.C. *op. cit.*, p. 502.
- 227- See, supra, note 226. It is worth noting that the retrospective invalidating legislation was accepted before French Court, on the basis that "L'application rigoureuse du droit espagnol a des ressortissants espagnols ne semble en rein contraire a l'ordre public Francais." See, Trib. de Tulle, Jan, 6th 1944, [1947] R.C.D.I.P., 304; La pradelle, [1944] Nouv. Rev. dr. int. pr., p.94. A dissimilar decision had been reached where a French element was involved. See, Trib. Montpellier, March 24th, 1944. [1947] R.C.D.I.P., 188; Trib. Seine, November 7th, 1958, [1962] Clunet, 114; Grulich, Conflit des lois dans le temps. Repertoire I n°117-18; Cf. Cour AIX, Feb 14th, 1950, [1951] R.C.D.I.P., 140, where the retrospective invalidating legislation was denied even though no French element was involved thereof.
- 228- See Palsson, L., Marriage and Divorce, Int. Ency. Comp. Law. Vol: III, Ch.16, p. 29.
- 229- *Ibid*
- 230- Parkasho v. Singh [1968] P. 233, see, Regina v. SaGoo [1975] Q.B. 885; Cheni v. Cheni [1965] P. 85; Onobrauche v. Onobrauche [1978] 8 Fam. Law. 107; Ali v. Ali [1968]P. 564 Drammeh v. Drammeh [1970] 78 Cey. L. W. 55.
- 231- *Ibid*, p. 253, see Cheni v. Cheni [1965] P. 85; Lee v. Lau [1967] P. 14.
- 232- The Algerian Civil Code, Article 6 provides that: "Les lois relative a la capacite s'appliquent a toutes les personnes qui remplissent les condition prevues. Lorsqu'une personne ayant la capacite juridique aux termes de l'ancien loi, devient incapable d'après la loi nouvelle, cette incapacite n'affecte pas les actes anterieurement accomplit par elle."
- 233- See, The Algerian Family Code, Article 33 which provides that: "Contracte sans la presence du tuteur matrimonial, les deux temoins ou la dot, le mariage est declare entache de nullite avant consommation et n'ouvre pas droit a la dot. Après Consommation, il est confirmé moyennant a la dot de parité (Sadaq el mithl) si l'un des element constitutif est vicie..."

- 234- See supra note 232.
- 235- The term "consular marriage" is used here for expressing a marriage celebrated either at a consulate or an embassy.
- 236- See, supra, Section 2.
- 237- This is, in particular, the rule found in most common law systems, such as English and Scots laws. See The Consular Marriage Act 1849; Foreign Marriage Acts 1892-1947 as amended by The Foreign Marriage (Amendment) Act 1988; The Foreign Marriage Order 1970, S.I. 1970, n°:1539.
- 238- See supra note 236.
- 239- See Palsson, L., Marriage and Divorce in Comparative Conflict of Laws, p 258; Cheshire and North, *op. cit.*, 11th Ed., p. 561, See now 12th ed., 1992, pp. 577-78; Batiffol et Lagarde, *op. cit.*, p. 54; Issad, M., *op. cit.*, p. 256.
- 240- See Fenwick, International Law, 3rd Ed., New York 1948, p 268; Romberg, The Immunity of Embassy Premises, [1959] 35 B.Y.B.I.L., 235; Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, [1951] 28 B.Y.B.I.L., 220; Roydon on Divorce, 11th Ed., 1971, p. 132; Hamick, The Marriage Law of England, 2nd Ed., 1887, p. 203.
- 241- Audinet, E., *op. cit.*, p. 205; Gerald, L., *op. cit.*, p. 374; Cheshire and North, *op. cit.*, p. 562; Wolff, *op. cit.*, p. 346; Palsson, L., *op. cit.*, p 260.
- 242- Geary, Law of Marriage and Family Relations, year see also Lauterpacht, Oppenheim's International Law, 8th Ed., 1955, pp. 792-793; Satow's Guide to Diplomatic Practice, 4th Ed. 1971; The Collected Papers of Sir Cecil Hurst, 1950; Radwan v. Radwan [1973] Fam. 24 at p 30. Cf. Quershi v. Quershi [1972] Fam. 173 at 200.
- 243- Hay v. Northcote [1900] 2 ch. 262; see Pertreis v. Tondear [1790] 1 Hag. Con 136.
- 244- Ibid, p 266; see also Bailet v. Bailet [1901] T.L.R. 317; see Varanand v. Varanand [1964] 108 sol. Jo. 693.
- 245- It is worth noting that at that time the law relating to the recognition of foreign nullity decrees was in its infancy and far from definite. The English and Scottish courts would recognise the decree on the basis of Salveson v. Austrian Property Administrator [1927] A.C. 641.
- 246- Gerald, L., *op. cit.*, p. 374; Larurent, F., Droit Civil International, Paris, 1880, T.4 n°:241; Cheshire and North, *op. cit.*, p. 562, See now 12th ed., 1992, pp. 575-76; Radwan v. Radwan [N°:2] [1973] Fam. 35.
- 247- I think that the authorities cited for the doctrine are not convincing. However, the protection provided by, and the right of, the receiving state, to search the diplomatic premises are in favour of the view that considering diplomatic premises as territorially part of the receiving state.
- 248- See, International Law Commission, [1959] 53 Am. Jour. Int. L., , p 268; see also Vienna Convention on consular relation, 1963, Cmnd 2113, xxxvi, p 157, Article 1; Vienna Convention on diplomatic relations 1963, Cmnd 2365, Article 22 (1).
- 249- Radwan v. Radwan [N°:1] [1973] Fam. 24. The court referred to the following works of academic writers: Starke, Introduction to International Law, 7th Ed., 1972, Lauterpacht, Oppenheim's International Law, 8th Ed., 1955, p. 792-93; Fawcett, J.E.S., The Law of Nations, 1971, p. 64; O'Connell, International Law, 2nd Ed., 1970, Vol. 2; Trochanof's case [1909], 37 Clunet 551; Vienna Convention on Diplomatic Relations (1965) Cmnd 2565.

- 250-** See Foreign Marriage Order, 1970, S.I. 1970/1339, Section 3(1)(d).
- 251-** The Algerian Civil Status Code, 1970, Article 97: "le mariage contracté en pays étranger entre Algériens ou entre Algérien et étrangère, est valable, s'il a été célébré dans les formes usitées dans le pays. Il en sera de même du mariage contracté en pays étranger entre un Algérien et une étrangère, s'il a été célébré par les agents diplomatiques pourvus d'une circonscription consulaire ou par les Consuls d'Algérie, conformément aux lois Algériennes." See, also Issad, M., *op. cit.*, 1986, 2 Ed., Vol. 2, pp. 255-56.
- 252-** Palsson, L., *op. cit.*, p. 259.
- 253-** Palsson, L., *op. & loc. cit.*; Audinet, E., *op. cit.*, p. 208; Mestre, J., Droit International Français "Mariage" (Conditions de Forme), Jurisqueur (Droit International), Fasc. 546-B, 1983, p. 13; Francescakis, Ph., [1969] Rep. Dr. Int., 294, 296; Battifol et Lagarde, *op. cit.*, p. 57.
- 254-** Palsson, L., *op. & loc. cit.*; Audinet, E., *op. & loc. cit.*; Rabel, *op. cit.*, p. 234.
- 255-** See, *supra* note 239.
- 256-** French Civil Code, Article 170; Gerald, L., *op. cit.*, p. 374; Battifol et Lagarde, *op. cit.*, T II n° 424-425, pp. 56-7; Issad, M., *op. cit.*, p. 256, The Algerian Civil Status Code 1970, Arts. 96 & 97.
- 257-** Hague Convention on Marriage 1902, Article 6 (31 Marlene 706, 191 CTS 253), see also C.I.E.C. Convention 1964, designed to facilitate the celebration of marriage.
- 258-** The Algerian Civil Status Code 1970, Article 96 and 97.
- 259-** See, Issad, M., *op. cit.*, p. 256.
- 260-** Vienna Convention on Consular Regulations 1963, Ratified by décret n° 64/85 de 4 Mars 1964, J.O.R.A., 1964, p.485; Convention France-Algeria 24/5/1974, Ratified by ordonnance n° 74/75 de 12/7/1974, J.O.R.A., 1974, p. 670.
- 261-** Hay v. Northcote [1900] 2 Ch. 262.
- 262-** See, Collet v. Collet [1968] P. 482, see also, Dicey and Morris, *op. cit.*, p. 612; Cheshire and North, *op. cit.*, p. 563; Gravesson, *op. cit.*, p. 277.
- 263-** Foreign Marriage Act 1892 as amended by The Foreign Marriage (Amendment) Act 1988, Sections 4, 2, 3, 9. As to parental consent, Law Commission has suggested that no consent shall be required to a marriage of a party domiciled in Scotland. Therefore, the matter of consent shall be determined by the parties' domicile law. See Law Com. [N° 89] and Scot.Law Com. [N° 64], 1985, paras.2.49-2.50.
- 264-** Foreign Marriage Act 1892, Section 8 as substituted by section 4 of the 1988 Act. Relying on the fact that the Act does not preclude the solemnisation according to a form of ceremony recognised by the Church of Scotland, it has been suggested that rites of Church of Scotland should be placed on an equal footing as rites of Church of England. See Law Com. [N° 89] and Scot.Law Com. [N° 64], 1985, para 2.51.
- 265-** *Ibid*; see also Foreign Marriage Order, S.I. 1971/1539, Sec. 5 which defines the official house of the marriage officer.
- 266-** Collet v. Collet [1968] P.482; see also: The 1970 Order in Council, S.R. and O (No:1535), Article 4(1); Holmes v. Simmons (1868) L.R. 1P.D 523; Plummer v.Plummer [1917] P. 163

- (C.A); Greaves v. Greaves (1872) L.R. 2P.D. 423.
- 267-** Section 13 of the 1892 Act.
- 268-** Foreign Marriage Act 1892, Section 19; see also, The Foreign Marriage Order 1964, Art.1(2); Dicey thinks that this phrase is imprecise, and "it can hardly mean that the invalidity of the marriage by the local law is a sufficient ground for refusing to solemnise it" Dicey and Morris, *op. cit.*, p. 613, See now 12 th ed., 1993, pp. 654-55.
- 269-** Radwan v. Radwan [No:2] [1973] Fam. 35; see also, Cheshire and North, *op. cit.*, p. 562, see now 12 th ed., 1992, p. 575..
- 270-** Radwan v. Radwan [N° 1] [1973] Fam. 24.
- 271-** Radwan v. Radwan [N° 2], at p 45, see also, Russell v. Att. Gen. [1949] P.391, 394; R v. Turnbull ex p Petroff [1971] 17 F.L.R. 438.
- 272-** see, Pertreis v. Tondear [1790] 1 Hag. Con. 136, 161 E.R., 502; Bailet v. Bailet [1901] 17 T.L.R. 317; Ruding v. Smith [1921] 2 Hag. Con. 371 at 386.
- 273-** Parry, 8 B.D.I.L., pp. 631-645; Cheshire and North, *op.cit.*, p. 562, See now 12th ed., 1992, p. 576; see also, Law Com. [N° 89] and Scot. Law. Com. [N° 64], para. 2.9.
- 274-** Foreign Marriage Order, S.I. 1970/1539, Sec. 3 (1)(b) as amended by The Foreign Marriage (Amendment) Order S.I. 1990 N° 598
- 275-** See Trib. Civ Seine 15/3/1932, [1934] D.I., II, 75, [1939] Rev., 635. The Tribunal held invalid a marriage celebrated before a consul not being authorised by the country; See also, Delaporte, V., *op. cit.*, p. 191; Gerald, L., *op. cit.*, p. 375.
- 276-** See Foreign Marriage Act 1892, Sec. 11 (1) (2); Dicey and Morris, *op. cit.*, p. 612, See now 12th ed., 1993, p. 653; Cheshire and North, *op. cit.*, p. 563, See now 12th ed., 1992, p. 577; and see also Law Commission Working Paper N° 89, para. 2.15.
- 277-** See The 1913 Order in Council, S.R and O [N° 1270], cf. The Foreign Marriage Order, 1964, S.I. 1964/926, Secs. 19 & 20.
- 278-** Under the law before 1892, warrants were granted to the person and lapsed with the death or transfer of their possessor. See, Memorandum, Mr. G. Hertslet, Foreign Office, 12/10/1912; Library Memoranda [N° 8207].
- 279-** See, Foreign Marriage Act 1892, Section 11(3).
- 280-** Algerian Civil Status Code 1970, Art. 96 provides: "Toute acte de l'etat civil des Algeriens en pay étranger est valable, s'il a été recu Confermement aux lois Algeriennes, par les agents diplomatiques ou par les consuls." See also, Article 97, alenia 2; Issad, M., *op. cit.*, 2nd Ed., p. 256.
- 281-** Ibid, Article 1 provides: "sont officiers de l'etat civil... a l'etranger, les chefs des missions diplomatiques pourvus d'une circonscription consulaire et les chefs des postes consulaires."
- 282-** Ibid, Article 2: "A l'etranger, les chefs des missions diplomatiques pourvus d'une circonscription consulaire et les chefs des postes consulaires peuvent être supplées dans les conditions prévues a l'article 104." Article 104 enacts: "les Vice-Consuls peuvent être autorise a suppléer, d'une maniere permanente, le chef de poste consulaire, par decision du ministre des affaires étrangères. Les agents consulaires peuvent être autorisés, par arrêté du ministre des affaires étrangères, soit a recevoir les declaration de naissance, et de décès, soit a exercer les pouvoirs complet d'officier

de l'état civil. En cas d'empêchement momentané de l'agent exerçant les fonctions d'officier de l'état civil, ses pouvoirs passent à l'agent désigné à cet effet, par le ministre des affaires étrangères, sous réserve qu'il s'agisse d'un agent de carrière."

- 283-** See, Foreign Marriage Act 1892, Section 13 (2).
- 284-** See Palsson, L., *op. cit.*, p. 266
- 285-** This condition is expressed in numerous bilateral treaties, as for instance, Algerian-French Convention, 24 /05/ 1974, Art. 32 (8)(b); Italy-U.K. 01/06/1954, Art. 20 (1)(c)(ii).
- 286-** Foreign Marriage Act 1892, Sec. 1 as amended by The Foreign Marriage (Amendment) Act 1988, s. 1 (1) which provides that at least one party to the marriage must be a United Kingdom national. This is defined in s.1 (2) of the 1988 Act. The Words "United Kingdom national" are also substituted for "British subject" in ss. 18 (1) and 21 (1) (a) of the 1892 Act.; Dicey and Morris, *op. cit.*, p. 612, See now 12th ed., 1993, p. 653; Cheshire and North, *op. cit.* p. 563, See now 12th ed., 1992, p. 577, Gravesson, *op. cit.*, p. 277; Parry, 8 B.D.I.L. 513-581; see also, French Civil Code, Article 170; the Algerian Civil Status Code 1970, Article 97/2.
- 287-** Foreign Marriage Act 1892, Sec. 1 as amended by The Foreign Marriage (Amendment) Act 1988, s. 1 (1); See also, Holdowanski v. Holdowanska [1957] P. 301; [1956] 3 All.E.R. 457 at 463.
- 288-** See, Parry, 8 B.D.I.L. pp 544-45; Palsson, L., *op. cit.*, p 269; Simon Depitre, Consuls (Attributions), Rep. dr. Int. I. N° 192; Travers, Marriage, II, p. 142; Spain-U.K. Convention 30/05/1961, Article 29(2); C.I.E.C. Convention 10/09/1964, Article 5 para.1; The European Convention on Consular Functions, 11/12/1967, Article 13(1)(b).
- 289-** Hague Convention on Marriage 1902, Article 6.
- 290-** See Issad, M., *op. cit.* p. 256; The Algerian Civil Status, Article 96 & 97, *supra* note 260, 252.
- 291-** Batiffol et Lagarde, *op. cit.*, vol:II, pp. 54-56; Gerald, L., *op. cit.* p. 389.
- 292-** See Issad, M., *op. cit.*, p. 256; The Algerian Nationality Code [101 No: 86/70, 15/12/1970], Article 18/3: "la femme algérienne qui épousant un étranger acquiert effectivement du fait de son mariage la nationalité de son mari, et a été autorisée par décret, préalablement à la célébration de l'union, à renoncer à la nationalité Algérienne."
- 293-** See Foreign Marriage Order 1970, Section 3(1)(c) as amended by S.I. 1990 N° 598, art. 3.
- 294-** See, Hall, A Treatise on the Foreign Powers and Jurisdiction of the British Crown, 1894, p 108; Parry, 8 B.D.I.L., pp. 543-44.
- 295-** See Palsson, L., *op. cit.*, p. 261.
- 296-** S.I. 1990 N° 598, art. 3, and see Law Com. [N° 89] and Scot. Law Com. [N° 64], 1985 paras: 2.52, 2.97; See Palsson, L., *op. cit.*, p. 260; Audinet, *op. cit.*, p. 207.
- 298-** See, Hague Convention on Marriage 1902, Article 6.
- 299-** Such as Hague Convention 1902, Article 6; C.I.E.C. Convention 10/91 1964.
- 300-** Palsson, L., *op. cit.*, p. 261; Audinet, *op.cit.*, p. 207.
- 301-** Foreign Marriage Order 1970, S. 3(1)(b) as amended by S.I. 1990 N° 598, art. 3; Parry, 8 B.D.I.L., p. 560; Palsson, L., *op.cit.*, p. 270-71.
- 302-** Convention Consulaire France-Algerie 24/8/1974, Article 32 (8)(b).
- 303-** See, Palsson, L., *op. cit.*, p. 261.

- 304-** The 1868 Royal Commission cited at 8 B.D.I.L., p. 636, 638.
- 305-** Cheshire and North, *op. cit.*, p. 562, See now 12 th ed., 1992, p. 576.
- 306-** Petreis v. Tondear (1790) 1 Hag. Con 136 at 137, see also, Bailet v. Bailet [1901] 17 T.L.R. 317.
- 307-** Law Com. [N° 89] and Scot. Law Com. [N° 64], 1985, para. 2.9.
- 308-** Foreign Marriage Act 1892-1947, Sec. 1 as amended by The Foreign Marriage (Amendment) Act 1988, S. 1, C.I.E.C. Convention 10/09/1964, Art. 5, para. 1; Spain-U.K. 30/5/ 1961, Art. 29 (2).
- 309-** See, Parry, 8 B.D.I.L., p. 636.
- 310-** See, *supra*, Section 3.
- 311-** The Civil Status Code 1970, Article 97/2.
- 312-** See, Issad, M., *op. cit.*, p 256; Batiffol et Lagarde, *op.cit.*, pp 54-59.
- 313-** See Mendes Da Costa, *op. cit.*, pp. 243-45; Graveson, *op. cit.*, p 276; 8 B.D.I.L., pp. 611-12; Lerebourg-Pigeonniere et Loussouarn, D.I.P., 9th ed. p. 584; Cheshire & North, *op. cit.*, pp. 568-70.
- 314-** R. v. Brampton (1808) 10 East. 282 at p 288; see also, Burn v. Farar (1819) 2 Hag. Con. 369; Ruding v. Smith (1821) 2 Hag. Con. 371; Hall v. Campbell (1774) 1 Voep. 204, 208; Mendes Da Costa, *op. & loc. cit.*; 8 B.D.I.L., pp. 611-621. The same view was expressed under French law: "ou est le drapeu, la est la france"; see Palsson, L., *op. cit.*, p 282; Lerebourg-Pigeonniere, *op. cit.*, 9th Ed., p. 584.
- 315-** See, *supra* note 314.
- 316-** See, R. v. Millis (1844) 10 C1 & F. 534, 8 E. R. 844.
- 317-** See Foreign Marriage Act 1892-1947, S. 22 as amended by The Froeign Marriage (Amendment) Act 1988, s. 6, and The Marriage (Scotland) act 1977, Sched. 2.
- 318-** In Waldegrave Peerge case (1837) 4 C1 & F. 649, the words "within the lines", was interpreted as to refer to the place where the troops were quartered. Section 1(1) of the 1947 Act provides that reference to "the British Lines" shall be construed as referring to any place at which any part of the said forces serving abroad was stationed. See Jackson, J., The Formation and Annulment of Marriage, 2nd Ed., 1969, p. 24. Gutteridge, J.A.C., [1948] 25 B.Y.B.I.L., p. 391.
- 319-** Section (1) of 1947 Act provides that reference to a "British army abroad" were construed as to refer to any part of the naval, military, or air forces of Her Majesty so serving. See, House of Lords debates 1946-1947, Honsard Vol 146 at 1033-4; Vol 147 at 128-35, 224-5; Gutteridge, J. A. C., *op. & loc. cit.*.
- 320-** The term "officiating under the orders" was cleared up in that it refers to other persons which should be authorised by the Commanding Officer; Waldgrave Peerge case (1837) 4 C1 & F. 649 at 657.
- 321-** Foreign Marriage Act 1947, Sec. 2 (2)(3), Sec. 4; Dicey and Morris, *op. cit.*, p. 610, See now 12th ed., 1993, pp. 652-53; Gutteridge, *op. & loc. cit.*; Cheshire and North, *op. cit.*, p. 565, See now 12th ed., 1992, p. 579.
- 322-** See Foreign Marriage Acts 1892, 1947 and 1988, s. 22 ; The Foreign Marriage Order in Council 1947, The Foreign Marriage (Armed Forces) Order, S.I. 1964/1000, Art. 3 as amended by S.I.

- 1990 N° 2592, Art. 3; Palsson, L., *op. cit.*, p. 284; Dicey and Morris, *op. & cit.*.
- 323-** See Foreign Marriage Act 1892, Sec. 2 (5).
- 324-** Taczanowska v. Taczanowski [1957] 3 W.L. R. 141, p 301.
- 325-** See Palsson, L., *op. cit.*, p 285; Foreign Marriage Act 1892, Sec. 22 as amended by 1988 Act; Cf. French Law under which the nationality is material. Lererbourg-Pigeonniere et Loussouarn, D.I.P., 9th Ed., p. 583,84.
- 326-** Law Com. [N° 89] and Scot. Law Com. [N° 64], 1985, para. 2.53; The Foreign Marriage (Amendment) Act 1988, s. 6.
- 327-** See, *supra*, note 324.
- 328-** See, Dicey and Morris, *op. cit.*, p. 611, Cheshire and North, *op. cit.*, p. 565.
- 329-** Taczanowska v. Taczanowski [1957] P. 301 at 325; See, Kochanski v. Kochanska [1958] P. 147; Merker v. Merker [1962] 3 W.L.R. 1389; Preston v. Preston [1963] P. 141.
- 330-** *Ibid*, at p. 326; Cf. Pilinska v. Pilinska [1955] 1 W.L.R. 329; see also Cheshire and North, *op. cit.*, p. 570, See now 12th ed., 1992, pp. 582-85; Lazarenicz v. Lazarenicz [1962] P. 171.
- 331-** See, Cheshire and North, *op. cit.*, p. 571, See now 12th ed., 1992, pp. 582-85; Stone, [1957] 2 M.L.R., p 50; Hodson, Common Law Marriage, [1958] 7 I.C.L.Q., p 205 at 215; Mendes da Costa, *op. cit.*, at 221; Carter, [1963] B.Y.B.I.L., 457; Dicey and Morris, *op. cit.*, p 610; Andrews, Common Law Marriages, [1959] M.L.R., 396 at 403; Cheshire, Formality of Celebration, [1962] R.C.A.D.I., 157.
- 332-** Scrimshire v. Scrimshire (1752) 2 Hag. Con. 393; See also, Ruding v. Smith (1821) 2 Hag. Con. 371; Savenis v. Savenis [1950] S.A.S.R. 309.
- 333-** *Ibid*, p. 412.
- 334-** *Ibid*, p. 417; See Mendes da Costa, *op. cit.*, p. 228.
- 335-** See, Wolfenden v. Wolfenden [1946] P. 61; Ruding v. Smith (1821) 2 Hag. Con. 371; Penhas v. Tan soo Eng [1953] A.C. 304.
- 336-** Dicey's Conflict of Laws, 6th Ed. p 772; Dicey and Morris, *op. cit.*, 10th ed., p 271, and see now 12th ed., 1993, pp. 651-52; see also, Falcombridge, Conflict of Laws, 1947, p. 647; Wolff, Conflicts of Laws, 1945, p. 352; Westlake, Conflict of Laws, 5th Ed., p. 68; Mendes da Costa, *op. cit.*, pp. 247-250.
- 337-** Taczanowska v. Taczanowski [1957] P. 301, 331; Cf. Fokas v. Fokas [1952] S.A.S.R. 152; Maksymec v. Maksymec [1956] 72 W.N. (M.S.W) 552; Kochanski v. Kochanska [1958] P. 147 at 154.
- 338-** See Mendes da Costa, *op. cit.*, pp. 249-250; Gravesson, The Conflict of Laws, 3rd Ed., p. 169.
- 339-** *Ibid*, p. 326.
- 340-** Dicey and Morris, *op. cit.*, p. 610, See now 12th ed., 1993, p. 651.
- 341-** Cheshire and North, *op. cit.*, p. 571.
- 342-** See Dicey and Morris, *op. cit.*, pp. 605-08, see now 12th ed., 1993, pp. 647-50; Cheshire and North, *op. cit.*, pp. 566-68, see now 12th ed., 1992, pp. 581-82; Mendes da Costa, *op. cit.*, p. 238; Anton, *op. cit.*, pp. 288-89, See now 2nd ed., 1990, p. 428.
- 343-** Lord Cloncurry's case cited by Cruise, Dignities and Titles of Honour, p. 276; See also, Sussex Peerage case (1844) 11 C1 & Fin. 85 at 92, 102; Ruding v. Smith (1821) 2 Hag. Con. 371; Phillips v. Phillips [1921] 38 T.L.R. 150.

- 344-** Wolfenden v. Wolfenden [1946] P. 61; See also, Catterall v. Catterall (1847) L. Rob. Eccl. 580; Maclean v. Cristall (1849) 7 Notes of cases supplement 17; Penhas v. Tan soo Eng [1953] A.C. 304.
- 345-** Ibid, p. 66; See Mendes da Costa, *op. cit.*, pp 239-49; Dicey and Morris, *op. cit.*, p. 606, see now 12th ed., 1993, pp. 647-50. It has been suggested that the requirement of celebration by an episcopally ordained priest should be observed if there is no difficulty in obtaining his services. See Taczanowska v. Taczanowski [1937] P. 301 at 326; Preston v. Preston [1963] P. 411 at 436; Collet v. Collet [1968] P. 482 at 484.
- 346-** Kent v. Burgess (1840) 11 sim. 361; See Mendes da Costa, *op. & loc. cit.*
- 347-** See, supra, note 342.
- 348-** Dicey and Morris, *op. cit.*, p. 605, see now 12th ed., 1993, pp. 647.
- 349-** Foreign Marriage Order 197, Section 3.

## Chapter Two

### Essential Validity of Marriage in Conflict of laws

#### Introduction

It is worthy of note that the consideration of marriage as a matter of contract before the 19th century, both in common and civil law countries, has led to the application of the *lex loci celebrationis* as the most appropriate law to determine the entire validity of marriage in conflict cases.<sup>(1)</sup> This rule was applied in a number of early cases in which it was held that the universal validity of a marriage is to be based upon its validity in the place of celebration.<sup>(2)</sup> The reference of the questions involved in these cases to the *lex loci* rule was subsequently explained and justified through their recognition as matters relating to the formal validity. Although this rule has the "undoubted attraction of simplicity", and provides a clear and certain solution easily ascertainable in practice, the submission to it of matters of essential validity would promote limping marriages, since it would enable the parties to evade the restrictions imposed on them by their personal law. Furthermore, it would render the parties' freedom to choose a place of celebration not only as a mere fact, but as the main basis for determining the governing law upon the validity of marriage, a matter which concerns the society to which the parties belong.<sup>(3)</sup>

However, it was only much later, with consideration of marriage as a matter of status, that most legal systems saw the need for applying the parties' personal law (to determine the substantive aspects of marriage) arising out of the more enduring interest that the country to which the parties belong has on marriage as being a family matter affecting the morals and ethical well-being of society.<sup>(4)</sup> Although it is now universally acknowledged that capacity and essential validity is a matter determinable by the personal law of the parties, the practical difference between common and civil law countries lies in the criterion that is to be used for determining the personal law. While

domicile is used as the most appropriate connecting factor in common law [i.e. English and Scots laws],<sup>(5)</sup> nationality as a connecting factor deserves preference in the continental law system [i.e. French and Algerian laws].<sup>(6)</sup> Moreover, the acceptance of the duality of the choice of law rules governing marriage carried with it the implementation of the distinction between formal and essential validity. It must be pointed out that the practical significance of such a distinction varies considerably, since each legal system adopts its domestic law distinction within the sphere of private international law. Perhaps the best existing example that clearly illustrates such difference is the requirement of parental consent which the English courts characterise as a mere formality in deciding conflict cases, regardless of its characterisation by the relevant foreign law.<sup>(7)</sup> Nevertheless, the category of essential validity is generally regarded as embracing certain important issues, viz. non-age, prohibited degrees of relationships, previous marriage and physical incapacity, and lack of parties and parental consent.

It is the purpose of this chapter to analyse the reasons for the special significance of using domicile and nationality as connecting factors, and their appropriateness for determining the personal law of the parties. The application of the personal law as a choice of law rule, however, involves peculiar and crucial questions which need to be scrutinised here in order to define the better view leading to certainty and predictability, as well as the stability of marital status. One of the most important issues arising here is whether the change of *lex causae*, or subsequent changes in the *lex causae* affects the validity of marriage celebrated before the occurrence of the changes. Another question which requires consideration is whether a marriage should be held void on the sole ground of failure to comply with the rules as to essential validity of the law of the place of celebration. In the light of the more recent English decisions, it has been suggested that a party who has obtained a decree of divorce or annulment entitled to recognition in England is free to remarry even if the divorce or the nullity decree is not

recognised in the country of the domicile as defined by the English law (a rule confirmed by statute).<sup>(8)</sup> Therefore, it is interesting to analyse the problem of the incidental question which gives rise to many difficulties in our subject matter. As regards the view that the parties' personal laws apply in cumulation where a bilateral impediment is in issue, examination of the substantive requirements individually is highly desirable for defining the scope of bilateral impediments. Finally, it is interesting to note that the existing views are concerned with the determination of the validity of marriage at the time of the proceeding. However, it is the present writer's intention to base the present thesis on the determination of the capacity to marry at the time of the celebration so as to empower the marriage officer with a discretion for refusing to celebrate a marriage if he is satisfied that one of the parties is under incapacity according to his or her personal law. But if the incapacity imposed by the parties' personal law is contrary to the public policy of the *lex loci celebrationis*, the marriage officer must celebrate the marriage. Furthermore, international uniformity upon the governing law, and harmonisation of decision within this field are matters of great importance in private international law. Therefore, the thesis which will here be submitted is that the choice of law rule governing the essential validity should have a preventive function in order to gain a certain uniformity of decisions, since the international conventions, in particular the Hague convention of 1902 and 1976 which have been adopted to bring about uniformity and coordination in this subject have resulted neither in the success anticipated by their promoters, nor in the fiasco claimed by their opponents.

## Section One

### The Doctrine of Personal law And The Ambiguity on The Criterion used For Its Determination

#### A- Domicile as a Connecting Factor in English and Scots. laws

It is only with the decision in Brook v. Brook<sup>(9)</sup> that domicile has been clearly established as the main connecting factor according to which the personal law of the parties is determined. The House of Lords, therefore, held that while the interest of the *lex loci celebrationis* in determining formal validity remains unchallengeable, the essential validity of marriage must depend on the *lex domicilii*, "the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated".<sup>(10)</sup>

The inconclusiveness of this decision, as it is submitted,<sup>(11)</sup> has caused some controversy over the years as to whether the *lex domicilii* in this context refers to the domicile of the parties at the time of the marriage, or to the matrimonial domicile. Academic authorities, however, have convassed two theories within the sphere of English and Scots conflict of laws, i.e. the dual domicile theory, and the intended matrimonial home theory. Moreover, in the light of the more recent English decisions the determination of the governing law upon essential validity has become even more complicated and unclear. This is because the English Courts are moving towards a mere flexible choice of law rule according to which the essentials of marriage should be determined by the law of the country with which the marriage has its real and substantial connection.<sup>(12)</sup>

The point which will be submitted here to evaluate these theories is that the marital status requires stability and certainty not only because of considerations in the individual case, but also because of its being a matter of public concern. The desire to

establish a policy preventing marriage conflicts that may arise at the time of the proceeding clearly demands the adoption of a rule that may ascertain the validity of the marriage at the time of the marriage ceremony. It is, however, necessary to analyse the existing views in the light of the various policy objectives for choice of law rules to determine how far they have gained the judicial authorities' support.

### **1- Dual Domicile Theory and the English and Scots' Judicial Practice**

According to the orthodox view, which appears to be adopted by the overwhelming majority of courts and writers, the essential validity of marriage is a matter to be determined by the parties' antenuptial domiciliary laws. Professor Dicey indicates, however, that the parties' prenuptial domiciliary laws are applied distributively where the parties have separate domiciles: each party must comply with the essentials required by his or her own law. It is therefore Dicey's claim that:

"Capacity to marry is governed by the law of each party's antenuptial domicile... A marriage is valid as regards capacity when each party has, according to his or her antenuptial domicile, the capacity to marry the other...No marriage is valid as regards capacity when either party has not, according to his or her antenuptial domicile, the capacity to marry the other."<sup>(13)</sup>

Suppose that an English domiciliary celebrated a marriage in Germany with his deceased wife's sister, a German domiciliary, under whose law the marriage is valid. According to this view, the marriage is invalid since the husband has no capacity to marry his deceased wife's sister under his prenuptial domiciliary law, i.e. English law.<sup>(14)</sup>

Dr. Morris has noticed that there are policy arguments which clearly indicate the legal significance of the dual domicile theory. Indeed, it has been argued that the law of each party's premarital domicile is the most appropriate law here because a person's status is a matter of public concern, and therefore, the country to which each party belongs at the time of marriage has a more enduring interest to decide by what means the protection of

public and parties' interests will be fully asserted.<sup>(15)</sup> Hence, the protection of the English public interest was obviously the main reason upon which Brook v. Brook was decided. Lord Campbell has expressly stated that:

"It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions".<sup>(16)</sup>

Moreover, it is reasonably clear that a forum's court applies a foreign rule of essential validity out of comity, and the desire to gain uniformity of status and decisions.<sup>(17)</sup>

Subsequently, Jaffey in a stimulating recent article has noted that the law of the parties prenuptial domicile has no interest to be applied for protecting the public interest if the matrimonial home is established in a third country. "If for instance the public interest which a particular country's domestic rule is designed to protect can only be affected if the matrimonial home is in that country, then a choice of law rule which requires the application of that domestic rule on the basis that one of the parties was domiciled in the country before the marriage, although the parties do not live there after it, will nullify marriages quite unnecessarily."<sup>(18)</sup> Certainly, this view holds true in the case where a marriage officer under his discretion has permitted the celebration of the marriage on the basis that the impediment imposed by the parties' antenuptial domiciliary law is contrary to the public policy of the *lex loci celebrationis* as being of discriminatory nature, and where the marriage validity is questioned *ex post*. But the obvious objection to this view is that it debilitates the possibilities of implementing a choice of law rule that may prevent conflicts in marriage cases straight away at the time of the ceremony.

Furthermore, certainty and predictability are frequently adduced as basic policy

considerations underlying the advantages of the dual domicile test, as being a test which permits the parties to ascertain their marriage validity at the time of the ceremony, especially if one considers that a void marriage needs no decree to be declared null and void.<sup>(19)</sup> To this extent, it has been submitted that:

"Any rule under which it is impossible to predicate at the date of the marriage with knowledge of all material facts whether it is valid or invalid is,...undesirable, especially in view of the fact that the destination of interest in property may depend on the validity of the marriage."<sup>(20)</sup>

However, the present writer believes that the requirements of certainty and security of legal relations are likely to be advanced as arguments for the implementation of a choice of law rule under which a marriage officer has a discretion by which he may refuse to celebrate a marriage if he is satisfied that that parties are known to be subject to any legal impediment under their personal law or laws. Therefore, the only rule under which it is possible for the marriage officer to carry out, at the time of the marriage "with knowledge of all material facts", the uniformity of status and decisions, and the prevention of limping relations is the parties' premarital personal laws.

Undoubtedly, the dual domicile rule deserves preference even in the world of today, where the sex equality principle is clearly established, and where the common rule of law that the wife acquires automatically the husband's domicile on marriage has been abolished because of its being based on a "completely outmoded legal concept", i.e consideration of the husband's country as the "true seat of the marriage relation".<sup>(21)</sup> This is because it gives equal right for the parties' antenuptial domiciliary laws to protect their public interests. A choice of law rule governing essentials of marriage should provide an answer to the question whether the parties have capacity to marry each other; a question which requires, in the view of the policy objectives of choice of law rules, examination at the time of the ceremony.

An additional argument in support of this rule is deducible from the Brook's

decision.<sup>(22)</sup> The House of Lords' view surely suggests that this test would render the evasion of the restrictions imposed by the parties' premarital domiciliary laws exceedingly difficult, if not impossible. Lord Campbell pointed out:

"If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils; I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state..."<sup>(23)</sup>

On the authorities so far, English and Scots laws clearly favour the dual domicile rule, though some recent decisions appear to reject it under some special circumstances. In Brook v. Brook,<sup>(24)</sup> for instance, the invalidity of a marriage celebrated in Denmark between an English domiciliary and his deceased wife's sister, whose domicile was also English, was upheld before English courts, although the *lex loci celebrationis* recognised the marriage as valid. English law was decisive in this case by reason of its being the law of the parties' prenuptial domicile. Dr. Cheshire has strongly submitted that the Brook's decision is "rather inconclusive", insofar as the marriage in issue was void both by the parties' antenuptial domiciliary laws, and their intended matrimonial home as being congruent.<sup>(25)</sup>

But Cheshire's view is not easily reconcilable with any sound reasoning on the basis that Lord Campbell conceded that no civilised country can allow its subjects to celebrate a marriage whenever it is forbidden by its own law.<sup>(26)</sup> It is legally understood, however, that a person cannot be a domiciled of choice in a certain country until he or she settles there with the intention of residing as far as he can see ahead.<sup>(27)</sup> A party to a marriage can be considered to be subject only to the personal law of his or her domicile (being the domicile at the time of the marriage). Therefore, the country where the parties intended to settle their matrimonial home cannot claim them as its subjects, nor to have an interest in determining their marital status, since determination of the

matrimonial domicile relies, *prima facie*, on the decision whether the parties are validly married. It is reasonably clear that:

"In Brook v. Brook, the references in Lord Campbell's judgement to the law of the matrimonial residence were merely incidental, and if they were intended to add anything they were not supported by Lord Cranworth and Lord St. Leonards, who in their judgements in the case laid down the dual domicile rule in unqualified terms."<sup>(28)</sup>

Even if we concede that Cheshire's view of Brook's decision is right, the subsequent cases<sup>(29)</sup> have proved beyond any doubt that the dual domicile theory deserves preference according to English and Scots laws. In Sottomayer v. De Barros [N° 1],<sup>(30)</sup> the dispute concerned the validity of a purported marriage celebrated in England between first cousins. On the evidence, it appears that the parties were domiciled in Portugal the law of which considers the marriage of first cousins illegal as being incestuous. Conton, L. J. reasoned that essentials of marriage, "as in other contract" must depend on the law of the domicile, and the marriage therefore ought to be declared null and void.<sup>(31)</sup> The ambiguity surrounding the applicable law upon essentials, where the parties have separate domiciles, has been clarified in the case of Re Paine.<sup>(32)</sup> The Facts in this case were as follows: an English woman domiciled in England went through a ceremony of marriage with her deceased sister's husband, a German domiciliary, in Germany by which law such marriage were valid. Bennett, J., in his judgement expressly adverted to the decision in Mette v. Mette,<sup>(33)</sup> and took the view that the disability of either party to the marriage invalidated the marriage. On the proof that the wife was under incapacity according to her law of domicile, the learned Judge held the marriage void because by English law "...the lady had not the capacity to contract it."<sup>(34)</sup>

Moreover, the decision in Pugh v. Pugh,<sup>(35)</sup> where a marriage between an English domiciliary and a domiciled Hungarian girl, 15 years of age, had been concluded in

Austria, lends even more supports to the dual domicile test. This is because Pearce, J. held that the marriage was void, "since by the law of the husband's domicile it was a marriage into which he could not lawfully enter."<sup>(36)</sup> The decision, it is submitted, looks weak as an authority in support of the dual domicile test, as it is quite simply based on the statutory interpretation of the Age of Marriage Act 1929.<sup>(37)</sup> Indeed, the case was decided in the first place through a direct reference to this Act, but it was confirmed as in accordance with the rules of English conflict of laws, inasmuch as the learned Judge had expressly adverted to Mette v. Mette, and also quoted the case of Re Paine the decision of which illustrated that the courts' concern is the application of the *lex domicilii* to the essentials, not only where it is English, but as the most appropriate law to govern the matter.<sup>(38)</sup>

It is undoubtedly true that the decision in Padolecchia v. Padolecchia<sup>(39)</sup> has prominently laid down the dual domicile as the most appropriate rule carrying out the policy objectives underlying English conflict of rules. In this case, a marriage between an Italian domiciliary and a domiciled Danish woman was celebrated in England. Sir Jocelyn Simon P. submitted that the marriage was void since the husband had no capacity to marry according to his premarital domiciliary law, i.e. Italian law, under which the divorce decree obtained by the husband in Mexico would not be recognised.

The Scots conflict of laws' position as regards capacity is broadly similar to that of English law. The almost unanimous view of academic authorities and of the courts is that capacity to marry is primarily ruled by the law of each party's premarital domicile. In Lendrum v. Chakravarti,<sup>(40)</sup> for instance, Lord Mackay has stressed the position of Scots law "on the question which really touches merely the capacity of a party to enter into the marriage in question, the capacity of each spouse is ruled primarily by the laws of his domicile, but also (agreeing on this with Westlake) he must be able to satisfy the law of capacity for marriage of the *lex loci celebrationis*." This view has been reaffirmed in Rojas case,<sup>(41)</sup> where the Sheriff court refused to grant a decree of

*mandamus*. This is because Italian law, as being the premarital domicile of the woman, at that time did not recognise the Mexican divorce. The learned Judge, however, had this to say:

"The fundamental principle of Scots law is that the law of domicile governs personal status. The relevant law in this case is Italian law. By that law, according to the evidence I have heard, the Mexican divorce is not recognised. The female applicant is therefore -and it seems too clear for argument- a married woman. That is a legal impediment to her going through a form of marriage with another man."<sup>(42)</sup>

It can be said that the dual domicile test has also gained support of the English and Scots' statutory provisions.<sup>(43)</sup> The first of these is the Marriage (Enabling) Act 1960 which has amended the English rules of affinity by permitting a man to marry his former wife's sister, aunt or niece, and a woman to marry her former husband's brother, uncle or nephew. Section 1(3) provides that nothing in this Act shall validate a marriage, if "either party to it is at the time of the marriage is domiciled in a country outside Great-Britain, and under the law of that country there cannot be a valid marriage between the parties."<sup>(44)</sup> Secondly, the Matrimonial Causes Act 1973 seems of added weight here, since it renders an actually or potentially polygamous union celebrated abroad void if "either party was domiciled in England at the time of marriage".<sup>(45)</sup> More recently, the Marriage (Scotland) Act 1977, though it does not contain express provisions adopting the dual domicile test, reinforces its position in Scots conflict of laws. Section 2 of this Act, for instance, stipulates that a marriage solemnised abroad is void if the parties are within the prohibited degrees of consanguinity according to Scots law, and either party was domiciled in Scotland at the time of the marriage.<sup>(46)</sup>

Professor Dicey's thesis has been criticised. Dr Cheshire has argued that the dual domicile test is greatly exaggerated and that it leans too heavily in favour of the invalidity of marriage.<sup>(47)</sup> Indeed, this is right if, and only if, the main concern of the choice of law rule governing essentials is the examination of the marriage validity *ex*

*post.* But it would not seem to be accurate to speak of invalidity as an undesirable effect to which the dual domicile test leads, since the parties' capacity to marry should be tested at the time of the marriage ceremony, and before the marriage relation comes into existence. Moreover, Dr. Cheshire believes that the dual domicile theory cannot provide a workable and practical test for the choice of law rule governing capacity, on the basis that it acknowledges its own evasion.<sup>(48)</sup> He openly states that it is sufficient for an English domiciliary who wishes to marry her uncle, a domiciled Egyptian, to acquire a domicile of choice in Egypt before the marriage. By so doing, the validity of the marriage will be upheld according to English conflict of laws. Thus, it has been said that the dual domicile test creates a certain anomaly because

"if the policy of the English rule is not infringed when she abandons her English domicile shortly before the marriage, it is scarcely infringed when she abandons it shortly after the marriage. Indeed, in such case, although the wife necessarily remains domiciled in England at the time of the marriage, she has already ceased, to all intents and purposes, to be a member of the English community."<sup>(49)</sup>

This is questionable, for the practical difference between the two proposed situations is that in the former she has already acquired a new domicile and severed all her relations with her English domicile. Whereas in the latter she has only an intention to acquire a new domicile which has no legal effect unless implemented, and therefore she will remain an English domiciliary until she acquires a new domicile according to English law, since intention is only one of the conditions of acquiring a domicile. Moreover, reliance on the intention of the parties to determine the applicable law upon a public matter will introduce the will of the parties as a basis of choice of law rule. It is reasonably clear that the intention of the parties does not suffice for the acquisition of domicile, as well as for being a basis upon which the marriage officer will test the parties' capacity to marry. However, in Scottish conflict rules, motive is not a bar, so the acquisition of a new domicile will be effective if only the test of *animus* and *factum* are satisfied. In the days when divorce was harder to obtain, the Scots court

accepted that the motive for change of domicile might be the obtaining of the divorce.<sup>(49A)</sup> However, the court had to be satisfied according to the normal rules, which were and remain, strict that domicile had been established *animo et facto*.

Hartley has remarked that English law of domicile "does not always indicate the country to which the parties really belong", because of unsatisfactory rules concerning the acquisition and loss of domicile, such as the revival of the domicile of origin. Thus, it has been suggested that the policy arguments for applying the law of domicile are deemed to wane away, since its application may lead to the examination of parties' capacity to marry by the law of a country they have never visited.<sup>(50)</sup> "Such criticism may, however, provide a reason for changing the rules relating to domicile, rather those concerning capacity to marry."<sup>(51)</sup>

The present writer believes that the purpose of a choice of law rule governing essential validity should be the ascertainment of the validity of the marriage with certainty at the time of the ceremony. Certainty, predictability, international uniformity of status and decisions, and the desire to eliminate limping marriages seem to demand this. The dual domicile theory, therefore, is the only test which applies the law to which the parties are subjected at the time of the ceremony; and it seems too clear for argument that it provides a workable and practical test for the choice of law to govern capacity to marry at the stage of the formation of the union.

## **2- Intended Matrimonial Home Theory and the Decision in Radwan v. Radwan**

The alternative theory, which is simply based on the presumption that marital capacity is governed by virtue of the husband's antenuptial domiciliary law, assumes that once it can be inferred that the parties at the time of the marriage have the intention to live elsewhere, the law of their intended matrimonial home should apply if, and only if, the intention has in fact been implemented within a reasonable time after the marriage.<sup>(52)</sup>

It is therefore reasonably clear that, according to this view, incapacity imposed by the wife's pre-nuptial domiciliary law has no effect on the validity of marriage unless it becomes the intended matrimonial home.<sup>(53)</sup> This is because the husband's domicile is regarded as the "true seat of marriage relation", since the husband is universally regarded as the head of the family, a fact which deprives the community to which the wife belonged to before the marriage from having any interest in the marriage.<sup>(54)</sup>

However, it is interesting to note that the original common law rule, according to which a woman acquires automatically her husband's domicile by the mere fact of marriage, has played a major role in the formulation of the present approach. The consideration underlying this is the basic presumption whereby the law of the husband's ante-nuptial domicile is declared to be decisive, where the genuine intention of the parties cannot be ascertained, or where the parties' intention have not been implemented shortly after marriage. Therefore, this view seems to suggest that the law of the husband's domicile is the normal rule determining essential validity, but its applicability is rebutted wherever the parties intended to set up their matrimonial home elsewhere.

Dr. Cheshire, the leading advocate of this view, has persuasively argued that the law of the parties' intended matrimonial home is the most appropriate law to govern essential validity, since marriage intimately concerns the public policy and social morality of the community in which the parties perform their duties and obligations of being husband and wife. The learned author believes that "whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reason is a question that affects the community in which the parties live together as man and wife."<sup>(55)</sup> In the course of his reasoning, he openly states that the Royal Commission on Marriage and Divorce has expressed the same view in their 1956 report:

"The status of marriage pre-eminently affects society in the country where the parties live together as husband and wife...It seems socially undesirable that a union which is regarded there as not detrimental to the community should be pronounced void,

merely because one or other or both of the parties were formerly connected with a country in which a different view prevails."<sup>(56)</sup>

Dr. Cheshire's statement as to the view of the Royal Commission is, however, somewhat doubtful, since there is ample evidence in the same report to the contrary, indicating that the Commission proposes the application of the law of the parties' intended matrimonial home, as being relevant only where the marriage would be invalid under the dual domicile test. To this extent, the Commission has expressly said:

"If the marriage is alleged to be void on ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of marriage...; provided that a marriage which was celebrated elsewhere than in England or Scotland should not be declared void if it is valid according to the law of the country in which the parties intended at the time of marriage to make their matrimonial home and such intention has in fact being carried out."<sup>(57)</sup>

Accordingly, it has been suggested that the law of the parties' intended matrimonial domicile avoids the difficulties arising when the parties, at the time of the marriage, are domiciled in different countries, and thus is more likely to lead to validation of the marital unions which have been contracted and performed in good faith. By contrast, it is obviously clear that the application of dual domicile test upon a case where an English woman, domiciled in England, married her Egyptian domiciliary uncle, and they have established their matrimonial home in Egypt the law of which recognised the validity of such union, will render the marriage void.<sup>(58)</sup> Moreover, the adoption of this single-law system rule, it is submitted, renders the distinction between unilateral and bilateral impediments, which is of vital importance under the dual domicile test, of no avail here on the ground that only one single law is applicable according to the present view.<sup>(59)</sup>

Furthermore, it has been argued that the policy of giving effects to the reasonable expectations of the parties as to the law governing their marital status is better achieved

by the application of the parties' intended matrimonial home, the law with reference to which the parties assume the validity of their marriage. This is apparently because when the parties enter into marriage they are looking forward to a married life in the country in which they intend to live together. It has been submitted that to destroy the assumption of the parties as to the validity of their marriage "unexpectedly can result in quite natural sense of injustice."<sup>(60)</sup> Besides that, the policy of upholding the validity of marriage (*Favor matrimonii*) is also adduced to support this view, as being more effectively achieved if the law of the parties' intended matrimonial home is applied to the essential validity of the marriage. To this extent, Jaffey believes that "choice of law rules as to the validity of marriage should, so far as possible, be such that a marriage, duly celebrated between willing parties, will not be held invalid without good reason."<sup>(61)</sup> Indeed, the intended matrimonial home test is the most convenient one to ascertain the essential validity *ex post*, for the purpose of protecting the reasonable expectations of the parties, and of achieving *Favor matrimonii* principle. But holding the greater chance of invalidity to be a basis for rejecting the dual domicile test is not easily reconcileable to any sound reasoning, since the present view may destroy the reasonable expectations of the parties, *Favor matrimonii* principle, and will lead to the invalidation of marriage if the parties, wrongly advised, establish their matrimonial home in a country the law of which regards the marriage as void. The suggested answer which leans towards the validity of marriage therefore is the recognition of the marriage as valid if it is so either by the intended matrimonial home, or by the law of the parties' premarital domicile.<sup>(62)</sup>

Authority, though scanty, exist for the proposition that the English and Scots courts have been prepared to apply the law of the parties' intended matrimonial home in determining the essential validity of marriage. In fact, most of the relevant decisions in our subject matter are reconcileable with the intended matrimonial home test, but it appears to be the *ratio decidendi* of none of them.<sup>(63)</sup> However, the law of the intended

matrimonial home test has been given further prominence in an important *dictum* of Lord Green M.R. in the case of De Reneville v. De Reneville. Lord Green M.R. has expressed himself thus:

"The validity of marriage so far as regards the observance of formalities is a matter for *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage."<sup>(64)</sup>

Moreover, Lord Bucknill has expressly stated the opinion of the courts, as to what law should govern essential validity, even more strongly:

"To hold that the law of the country where each spouse is domiciled before the marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be valid in one country and void in the other country. For this reason I think it is essential that the law of one country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together should be regarded as the law which controls the validity of their marriage."<sup>(65)</sup>

It is submitted, however, that De Reneville v. De Reneville decision has no effect on the existing choice of law rules relating to the essential validity of marriage, since it is a decision that concerns the jurisdiction of the English courts as to the nullity of marriage. Therefore, his Lordship's view has no bearing on the choice of law matters because it has not been considered as an important authority in the subsequent cases on capacity to marry.<sup>(66)</sup> Less comment is made upon the fact that Lord Bucknill refers to marriages which take place in a country where the parties intend to continue living as man and wife. The learned Lord, therefore, would appear to be more in favour of the law of the actual matrimonial home, rather than that of the intended matrimonial home, determining the substantive validity.

Dr Cheshire and North are of the opinion that some of Lord Denning L.J.'s comments in the case of Kenward v. Kenward<sup>(67)</sup> support the view that capacity to marry depends on the law of the parties' intended matrimonial home. Denning L.J., however, refers to the case where the parties belong to different countries, and has said that the essential validity of the marriage in this case is determined by the law of the country where they intend to live together. It must be emphasised that Denning L.J.'s *dictum* cannot be construed as supporting Dr Cheshire's contention suggesting the intended matrimonial home as a general choice of law rule, on the ground that his Lordship's *dictum* is confined to the case where the parties have separate domiciles and has no effect on the traditional choice of law rule in the case of common domicile.

Certain more recent English decisions have been inclined to favour the intended matrimonial home test. In Radwan v. Radwan [N°2],<sup>(68)</sup> the facts of which briefly are mentioned above, it was argued that the marriage was void on the ground that the wife's ante-nuptial domicile was in England the law by virtue of which the wife lacked capacity to enter into such a marriage as being of polygamous nature. Cumming-Bruce J. considered the line of cases supporting the dual domicile test as not being a safe guide to the case before him, and held that the intended matrimonial home rule applied to determine capacity to enter into a polygamous marriage.<sup>(69)</sup> His Lordship expressly stated that the wife, though her premarital domicile was English, "had capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the law of her domicile and make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage."<sup>(70)</sup> However, it is worthy of note that Radwan's decision is not a clear cut-authority providing support for the intended matrimonial home test as a universal rule governing essential validity: the learned judge confined his decision to the matter of capacity to enter into a polygamous marriage, for he openly states that: "Nothing in this judgement bears upon the capacity of minors, the law of affinity, or the effect of

bigamy upon capacity to enter into a monogamous marriage."<sup>(71)</sup>

Yet, this decision has been heavily criticised on the ground that capacity to contract polygamous marriage is only one facet of general capacity to marry, and thus there is no sound reason to distinguish it from the capacity to enter into a monogamous marriage which is, according to the overwhelming judicial and extrajudicial opinion, referred to the parties premarital domiciliary laws.<sup>(72)</sup> It is therefore reasonably clear that the practical significance of Cumming-Bruce, J.'s decision, if it has any, is that there is clearly a strong desire to uphold the validity of a long-standing relationship.<sup>(73)</sup>

Dr Cheshire's contention as to the intrinsic merits of the intended matrimonial home test as a universal rule determining essential validity has been strongly criticised. The obvious practical objection, it is submitted, is that it leads to uncertainty as to status, since it is a choice of law rule based on subsequent events occurring after the celebration of marriage. In fact it is impossible, according to this view, to predicate at the time of the marriage whether it is valid or invalid. It is therefore reasonably clear that the intended matrimonial home rule is an unacceptable choice of law rule on the ground that:

"very serious practical difficulties are likely to arise if the validity of a marriage has to remain in suspense while we wait and see [for an unspecified period] whether or not the parties implement their [unexpressed] antenuptial intention to acquire another domicile. This is especially true if interests in property depend on the validity of marriage, as for instance where a widow's pension ceases on her marriage."<sup>(74)</sup>

It has been argued that the present approach is bad in principle on the basis of its wide reliance on the parties' intentions which are generally considered as being irrelevant to the question of their legal capacity to enter into a marriage. Moreover, Cumming-Bruce J., in giving his judgement in Ali v. Ali, has pointed out that personal intention of the parties is irrelevant to the consequences of a validly solemnised marriage.<sup>(75)</sup> This is consistent with Lord Macnaghten's statement in Cooper v. Cooper's Trustees:<sup>(76)</sup>

"It is difficult to suppose that Mrs Cooper could confer capacity upon herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile."

The present writer believes that reliance on the parties' intention as a basis for choice of law rule governing essentials of a marriage, might lead to the deplorable result of introducing the proper law approach [loi d'autonomie] to govern the validity of marriage which is a matter of intense public concern as being a status affecting the social morality of the society to which the parties belong at the time of the marriage ceremony. The protection of public interest's policy would seem to demand the rejection of the parties' intention as a test, since it would lead to evasion and to a great movement of people from one country to another, undermining the purpose of the rule that essentials of marriage are based on religious and morals of each society, and are to be referred thereto for adjudication.

Indeed, the parties' intention is not a safe guide for determining the law governing essential validity of marriage. This is because the parties, though intending at the time of the marriage to set up their matrimonial home in a given country, may change their minds and settle down elsewhere, or the intention may remain unfulfilled at the time of the proceedings, or they may have no such intention at all or, possibly, the intentions of each party may not be the same. Furthermore, the intended matrimonial home rule is not a suitable rule in sham marriages cases.<sup>(77)</sup> The suggested answer, propounded by Cheshire, is simply that of reliance on the husband's pre-marital domiciliary law to govern capacity in these cases, as being the true seat of the marriage relation.<sup>(78)</sup> However, it is submitted that such a solution is arbitrary and unjustifiable in principle, since the common rule upon which it was formulated has been abolished in the world of today as being based on an "outmoded legal concept." It is therefore important to emphasise that this solution fits badly in modern legal systems as being a

discriminatory rule which is inconsistent with the modern established principles, i.e. equality between sexes, and the wife's freedom to acquire a separate domicile from her husband's domicile.<sup>(79)</sup>

It is equally true that the intended matrimonial home rule leans towards evasion of law, since it enables the parties to evade the law of their ante-nuptial domicile, which has a legitimate concern in their marital status, by contemplating their married life. However, Professor Palsson claimed that:

"Even if it is recognised that the interest of a country whose only contact with the marriage is that one of the parties was domiciled there until the time of the celebration is less significant than that of the country of the matrimonial home, however, it is hardly realistic to expect that the former country will be prepared to give up all claim to control, at all events if the question arises in that country itself."<sup>(80)</sup>

It is submitted that the dual domicile test is the most appropriate rule to govern the incapacities imposed in the interest of the parties, such as the age of marriage.<sup>(81)</sup> It is reasonably clear that the evasion to which the intended matrimonial home approach leads will promote limping marriages, and will create a great mobility of people from one state to another which will distort the specific rules containing impediments based on the social and religious background of each society.

Finally, it would be inaccurate to hold the intended matrimonial home rule as the most appropriate law to govern essential validity of marriage because of its ultimate concern with the examination of the marriage validity *ex post*. The advocates of the "intended matrimonial home" view, however, believe that the examination of the question of the validity of marriage hardly ever arises at the time of the marriage.<sup>(82)</sup> It has been suggested that the crucial question to which a choice of law rule should provide an answer, is whether the parties have capacity to marry each other or not at the time of the ceremony. Certainly, the consideration of the essential requirements at the stage of the

ceremony is of vital importance, inasmuch as it provides a satisfactory rule by which the policy of preventing conflicts will be established as far as the impediments imposed on the parties by their personal laws are not contrary to the public policy of the *lex loci celebrationis*. Therefore, any rule which concerns only the examination of essential validity *ex post* is bad in principle, since it does not provide an answer to the basic issue concerning the capacity of the parties to intermarry, and ignores the importance of the temporal dimension of choice of law rules.

### **3- Flexible approaches to the law governing essential validity of marriage**

It is worthy of note that there are judicial and extrajudicial opinions in more recent years indicating the departure of English and Scottish conflict of laws from the authoritative position that domicile, as a jurisdiction-selecting rule, holds at common law as being the main connecting factor determining the law governing essential validity of marriage. These opinions connote also the adoption of more flexible connecting factors that highlight the importance of the policy of *Favor matrimonii*, as well as the policy of giving effects to the parties' expectations. This is because domicile, it is submitted, is a complex and problematic connecting factor by reason of its notorious ambiguity and undesirable state in English and Scots conflict of laws.<sup>(83)</sup> These approaches, which will be discussed briefly below, incorporate the real and substantial connection test, alternative reference test, and elective domicile test.

#### **(i)- Real and substantial connection test:**

According to this view, the questions of essential validity are governed by the law of the country with which the marriage has its real and substantial connection. In Vervaeke v. Smith,<sup>(84)</sup> a Belgian decree annulling a sham marriage was refused recognition before the English court on the basis of public policy, since the marriage had substantial connection with England. Lord Simon endorsed the proper law approach, claiming that

"The criterion of a real and substantial connection seems to me to be useful and relevant in considering the choice of law for testing, if not all questions of essential validity, at least the question of the sort of quintessential validity in issue in this appeal -the question which law's public policy should determine the validity of the marriage."<sup>(85)</sup>

More recently, the same view has been applied in Lawrence v. Lawrence,<sup>(86)</sup> where the question of capacity to remarry after a foreign divorce was brought before the court. Antony Lincoln J., following Lord Simon, characterised the issue in question as a matter of quintessential validity, and adopted the proper law approach to govern the question of capacity to remarry after a foreign divorce. The learned Judge therefore held the marriage valid, on the ground that " In the eyes of [English] law the Nevada divorce is to be fully recognised and that the Nevada marriage had a real and substantial connection with England and is valid by the law of this country."<sup>(87)</sup>

As regards the criterion to be used for determining the best connected law, it is submitted that it is easily ascertainable where an established matrimonial home is visible, i.e. the law of the actual matrimonial home. This is because the country of the matrimonial home is intimately concerned with marriage by the reason of its being the country where the parties perform their matrimonial duties and obligations.<sup>(88)</sup> Moreover, it has been suggested that the parties' common domiciliary law seems to be the best connected law where no matrimonial home is visible. But the determination of the best connected law becomes increasingly difficult and doubtful where the parties have separate domiciles and no matrimonial home is discernible. Lord Simon, however, seems to suggest that the place of celebration and the domiciles of the parties are important factors for determining the best connected law in such cases. Therefore, his Lordship, in Vervaeke v. Smith where the question of sham marriage was at issue, decided that English law was the best connected law on the basis that the ceremony took place in England, the husband was a British national and domiciliary, and the wife was to become permanently resident in England.<sup>(89)</sup> However, the decision is

controversial, because there were strong connections between the wife and Belgium.

It has been argued that the present approach actually possesses a good measure of certainty, since the best connected law usually amounts to the law of the parties' established matrimonial home. Fentiman has claimed recently that "domicile is far less certain than a real and substantial connection test for marriage, at least in so far as the latter is represented by a matrimonial home."<sup>(90)</sup> This is questionable, in so far as the question whether the parties can marry each other must be examined at the time of the marriage. Fentiman has examined this question and has openly stated that "If the substantial connection test is available one might simply advise a couple to marry anyway and set up their home in a country which would validate the marriage; if the marriage came to be tested at a later stage it would then be valid."<sup>(91)</sup> However, one should note that Fentiman's opinion assumes that the purpose of a choice of law rule governing essential validity is whether the marriage is valid at the time of the proceeding. It is therefore reasonably clear that this view is misleading, as the purpose of a choice of law rule as to essential validity is the prospective situation, i.e. whether the parties can marry each other.

Subsequently, justice and the protection of the parties' reasonable expectations as to the validity of their marriage are, it is thought, interesting grounds supporting the substantial connection test.<sup>(92)</sup> To this extent, it has been submitted that the law of the matrimonial home is the appropriate governing law on the basis that the parties expect its application upon their marriage. From the social viewpoint, the law of the country in which the parties live together as husband and wife is the best connected law to govern and decide whether the parties are validly married.<sup>(93)</sup>

Finally, the Law Commissions have recently rejected the substantial connection test on grounds that

"[i]t is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e. a yardstick for future planning."<sup>(94)</sup>

Dr North, as a general editor for the most recent edition of Cheshire's private international law in 1992, has expressed the position in even stronger terms: "It does seem to be a retrograde step to introduce into the field of validity of marriage a test which, because of its inherent uncertainty, was abandoned in the field of divorce recognition in 1971".<sup>(95)</sup>

It is the view of the present writer that the substantial connection test does not provide a workable test in the prospective situation, i.e. whether the parties have legal capacity to marry each other. The main reason for that lies in the fact that the approach leads to very prolonged investigations, especially where no matrimonial home is visible, and most criteria advanced for assessing the best connected law have been rejected by the legal theorists in so far as they cannot constitute on their own a choice of law rule governing essential validity.<sup>(96)</sup>

**(ii)- Alternative Reference Test:**

Relying on the consideration of the dual domicile test as leaning towards the invalidity of the marriage, Jaffey has suggested that, apart from the incapacities imposed for protecting the parties' interest -such as non-age- the marriage's validity should be upheld if it is valid under either the dual domicile test or the intended matrimonial home test.<sup>(97)</sup> Accordingly, the validity of the marriage, wherever an incapacity designed in the interest of the parties is involved, should be exclusively determined by the dual domicile test. This is because determination of the protection which the parties require is solely the function of the domiciliary laws of the parties at the time of the marriage ceremony.<sup>(98)</sup> However, it appears that this approach is undoubtedly based on the

policy of giving effect to the parties' reasonable expectations and of upholding the validity of marriages. Lincoln, L.J., though he has left open the case where the marriage is valid under the dual domicile test and invalid under the substantial connection test, seems to be in favour of the alternative test.<sup>(99)</sup>

Certainly, this approach results in validating more marriages whenever there is no good reason to do otherwise; but it is an unacceptable test since it renders the process of investigation as to the governing law even more complicated as it requires the examination of the substantive rules of three legal systems. Moreover, it would be inaccurate to promote *Favor matrimonii* principle into a governing rule, because of its being only in favour of the validity of marriage whenever there is no good reason for the invalidation, and it is of no avail in prospective situation where the question is whether a marriage should be celebrated or not. More recently, the English and the Scottish Law Commissions were of the opinion that "it would be contrary to principle to adopt the dual domicile (or the intended matrimonial home) test and then to refuse to give effect to it if it results in the invalidity of the marriage."<sup>(100)</sup>

**(iii)- Elective Dual Domicile Test:**

As regards the importance of *Favor matrimonii* principle when the marriage validity is examined *ex post*, it has been suggested that the marriage, though essentially defective, should be declared valid if it is so under either party's domiciliary law. However, it is submitted that the dual domicile test, i.e. the application of the less favourable law to the marriage, should prevail where the question arises before the celebration of marriage. This is because the policy of validation is without significance at the time of the ceremony.<sup>(101)</sup> Hence, the elective dual domicile test promotes the policy of protecting the parties' reasonable expectation and of validation. This approach, however, has been criticised on the basis that it gives prominence to the favourable law without any policy justification that might be a fundamental basis of the

choice of law rules. Moreover, it is a test, though it leads to the validation of marriages, that results in evasion and limping marriages. It is therefore reasonably clear that the policies of promoting uniformity of status, and the desire to eliminate limping marriages outweigh the policy of validation.<sup>(102)</sup>

#### **4- Conclusion**

At the present date, Scottish and English cases and writing appears definitely to support the dual domicile theory, although there are occasional eruptions of interest in other approaches, which serve to cause a ripple on the surface.<sup>(103)</sup> According to the traditional approach, however, certainty, predictability, desire to eliminate limping marriages and the policy of promoting international uniformity should be the fundamental bases of the choice of law rule governing essential validity, whereas the alternative views, which are suggesting a flexible test accommodating the needs of each case, appear to elevate the policy of upholding the parties' expectations and of validation into a governing law. It is reasonably clear that the rival views have missed the point that a choice of law rule should provide an answer to the question whether the parties of a given proposed marriage have capacity to marry, and thus whether the celebration can take place. The main reason is undoubtedly that essential requirements are based on religious and morals grounds that require the prevention of illegal and immoral marriages at the time of celebration.

More recently, English and Scottish Law Commissions<sup>(104)</sup> have examined the choice of law rule for the essential validity of marriage and suggested the retention of domicile as a connecting factor for determining the personal law. Moreover, nationality as a connecting factor in this field has been considered and rejected on the basis of its undesirability in the United Kingdom where different laws exist [England & Wales, Scotland, and North Ireland]. Habitual residence as a connecting factor is also rejected on the basis that it "does not represent such a strong connection between a person and a

country as would always justify a person's civil status being determined according to the law of that country".<sup>(105)</sup> However, the possibility of discarding the personal law as the law governing essential validity and replacing it by some other connecting factors -such as the law of the *forum* or the *lex loci celebrationis*, has been considered and rejected. As to the law of the forum, it has been submitted that it is a vague and unpredictable choice of law rule which will introduce uncertainty into the law, and will promote limping marriage relationships. In explaining the undesirability of the *lex fori*, it has been said that:

"It would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicate on the issue... it is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony..., be consistently decided... and that consistency cannot be attained if the test is *lex fori*."<sup>(106)</sup>

Moreover, the *lex loci celebrationis* is regarded as an unacceptable connecting factor here, since it promotes the evasion of law and has no interest in marriage, except the interest that it has in governing formalities.<sup>(107)</sup>

However, the intended matrimonial test has been rejected on the basis that it leads to serious practical disadvantages, mainly, that it is an unworkable test at the time of the marriage ceremony. And the intentions of the parties are irrelevant to the question of essential validity of the marriage. Moreover, it has been suggested that the dual domicile deserves preference as being a workable test in the prospective situation which ascertains with certainty whether the parties have capacity to marry each other at the time of the marriage.<sup>(108)</sup>

#### **B- Nationality as a criterion determining the personal law of the parties**

Contrary to the widely held common law opinion which uses domicile as the most appropriate criterion for determining the personal law, civil law countries' position highlights the importance of nationality as the prominent connecting factor by which the

personal law is appropriately determined.<sup>(109)</sup> The predominance of nationality as the law governing the personal status and capacity of persons rests on the comparative ease of ascertaining nationality as compared with other criteria and its enduring nature. Moreover, the existence of unilateral legal systems, and the narrow sense of domicile, in civil law countries seems of added weight for the position that nationality holds as a connecting factor in those countries.<sup>(110)</sup> The Algerian law position is also explained by historical reasons: the French influence, and the consideration of the status and capacity of persons, according to the Islamic religion, as a matter governed by the religious law which becomes now one of the main bases of the legislation in Algeria.<sup>(111)</sup>

Since marriage belongs to the core of personal status, it is submitted that its essential validity must be determined by the parties' national law. This has been established in the Algerian civil code; article 10 provides that the laws concerning status and capacity of persons govern Algerians, whether they temporarily reside or have established their domiciles abroad.<sup>(112)</sup> Accordingly, the same unilateral rule has been expressed earlier in the article 97 of the Algerian civil status code which provides for the recognition of marriage celebrated abroad, between Algerians or between Algerians and foreigners, as being valid if, and only if, the essentials of marriage required by the Algerian law have been complied with.<sup>(113)</sup>

As regards French Law, the unilateral rule expressed in the article 3(3) of civil code has been interpreted by the overwhelming weight of judicial and extrajudicial opinion as being a bilateral rule in a sense that the status and capacity of foreigner is governed, *mutatis mutandis*, by their personal law.<sup>(114)</sup> It is therefore reasonably clear that the Algerian rule must be construed as to apply also for determining the essential validity of marriages of foreigners, since it is universally established that conflict rules are of bilateral nature. Thus, the rule should be extended by analogy for reasons of

reciprocity to call for the application of the national law of aliens to questions of their status and capacity.

This solution has been clearly expressed in article 11 of the Algerian civil code which provides that the conditions with relation to the validity of marriage are governed by each party's national law.<sup>(115)</sup> It is worthy of note that the rule contained in this article seems simple, but the question arises as to whether the expression "Les conditions relative à la validité du mariage" includes the formal requirements. However, it is believed, though the wording of the article's text is imprecise, that the national law of each party governs only the essential requirement of marriage, leaving aside the formal requirements to the well established rule, i.e. *lex loci celebrationis*. This may be inferred from the context of article 97 of the civil status code which states clearly the limitation of applying each party's national law within the sphere of the essential validity of marriage.<sup>(116)</sup>

Consequently, the application of the national law as to the essential validity of marriage may give rise to difficulties related to mixed marriages, and the determination of the appropriate national law in some special cases. These incorporate the case where one of the parties has a double nationality, the case where the parties belong to a federal country, and where the parties are stateless or refugees.

### **1- Mixed Marriages and the Law Governing Essential Validity:**

The mixed marriage phenomenon is a complicated problem which has led to difficulties in defining the applicable law for determining essential validity of marriage. Bartin has suggested that the husband's national law is the pre-eminent law which is intimately interested in the marriage relation, and thus that the capacity to marry of both spouses should be determined by that law alone. The main reason, however, is that the woman acquires automatically the husband's nationality by the mere fact of marriage.<sup>(117)</sup>

Bartin's thesis is questionable, since, according to the twentieth century trends in nationality law, women typically retain their nationality on marriage, unless they expressly renounce it. Moreover, a number of national constitutions and international conventions contain provisions as to equality of sexes, so that it would be difficult under modern conditions to justify adoption of such a rule in modern conflict of laws.<sup>(118)</sup> Moreover, the present writer therefore believes that giving preference to the husband's national law on the basis of its being the parties' common national law after the marriage is not easily reconcilable to any sound reasoning, since apart from other considerations the acquisition of the husband's nationality by the wife supposes, *a priori*, the validity of the marriage.<sup>(119)</sup>

Another view, propounded by Niboyet, consists of giving preference to the *lex fori* where that law is the national law of one of the parties.<sup>(120)</sup> This rule, though it is considered as being anomalous, still receives some support in some modern legal systems such as Algerian law. According to article 13 of the civil code, the essentials of marriage are determined by the Algerian law alone, except that capacity in a narrow sense remains determinable by each party's national law, if at the time of the marriage one of the spouses is Algerian.<sup>(121)</sup> However, the rule seems hard to justify in principle, since it leaves open the case where neither of the parties is a national of the forum, and it leads to limping marriages.<sup>(122)</sup> Moreover, consider the applications of Article 13 where the marriage of parties, one of whom at least is an Algerian national, takes place outside Algeria. The prevailing view, which is greatly espoused by the contemporary legal doctrine, is the distributive application of the parties' national laws, in a sense that each party must satisfy the essential requirements of his own law.<sup>(123)</sup> This rule, like the dual domicile rule, gives equal rights to the parties' national laws to determine essential validity as being the only laws to which the parties are clearly subjected at the time of marriage. However, it is unanimously the view of the French judges, though the unilateral nature of article 3(3) of the civil code, that the distributive

application of the parties' national laws should prevail, since it is relatively easy to apply in the prospective situation where the question is whether the marriage can be allowed to take place.<sup>(124)</sup> Hence, in accordance with the generally established system in private international law, the text of article 11 of the Algerian civil code suggests that the essentials of marriage are to be determined by each party's national law.<sup>(125)</sup>

Nevertheless, there are some difficulties with this solution, and it is scarcely to be expected that it will prevail in cases involving impediments which have been termed bilateral. The main reason for this is that such impediments concern the marriage relation itself more than the parties.<sup>(126)</sup> It is therefore reasonably clear that bilateral impediments are exceptionally determined by the application of the parties' national laws in cumulation, in a sense that it is sufficient to hold the marriage void if one of the laws involved imposes such kind of impediments. Suppose, for instance that an Algerian wishes to marry his niece, of Egyptian nationality. Although the Egyptian law permits uncle and niece marriage, the marriage will not take place for the reason that Algerian law imposes a bilateral impediment.<sup>(127)</sup> Hence, it seems that the Algerian law has adopted the prevailing solution in French law, i.e. the cumulative application of both parties' national laws in cases of bilateral impediments.<sup>(128)</sup>

## **2- Nationality And The Case Of Dual Nationality**

It is worthy of note that determination of essential validity of marriage by the parties' national law presents difficulties where one of the parties holds more than one nationality. The prevailing view, in French contemporary legal doctrine and in the Algerian law, suggests that essential validity of marriage must be determined by the *lex fori* whenever one of the nationalities involved thereof is that of the *forum* country.<sup>(129)</sup> Moreover, the doctrine of effective nationality is the most appropriate solution for determining the applicable national law if the competing nationalities are foreign.<sup>(130)</sup> However, the solution which gives preference to the *forum's* nationality

appears to be anomalous and hard to justify in principle because of its nationalistic bias. It is therefore submitted that the doctrine of effective nationality should prevail in all cases as being the most appropriate and less rigid rule, since it is based on objective criteria that outweigh all other dubious and discriminatory factors.<sup>(131)</sup>

### **3- Nationality and the Case of a Composite Legal System**

The principle of submitting the essential validity questions to the parties' national law provides no objective solution to the question of capacity of a person who possesses the nationality of a federal country the states of which have separate legal systems. However, it is the unanimous view of academic authorities that the applicable law here should be determined by the internal conflict of law rules at the federal level if they exist, or by using some other criteria, such as domicile or residence, which may ascertain the state with which the party is connected.<sup>(132)</sup> According to the Algerian civil code, article 23 provides that where the foreign national law to which the Algerian conflict rules point is the law of a composite legal system, the internal conflict rules of that system determine the applicable law.<sup>(133)</sup> One must emphasise that the rule embodied in this article of the civil code may lead to the deplorable result of denying justice, since the *renvoi* doctrine is rejected by the Algerian law.

Let us suppose that an Algerian court is asked to determine the validity of a marriage celebrated in Algeria between an American and a French national. In doing so, the court should rely on the American conflict rules to determine the state with which the American party is connected. According to the American conflict rules the entire validity of marriage must be determined by the *lex loci celebrationis*, and thus the Algerian law normally should apply in this case. Relying on the rejection of *renvoi* doctrine, however, the question will be left unsolved if there is no other adequate criteria which may clearly indicate the state to which the American party belongs, because of non-existence of Federal Law of marriage in the USA. Professor Issad has expressly argued that it would be difficult to apply Algerian law to an American, as in

this hypothetical example, since it is based on Islamic religious principles.<sup>(134)</sup>

#### **4- Domicile as an Alternative Connecting Factor: Statelessness and Refugees**

Nationality as a connecting factor has been proved beyond any doubt inadequate in cases involving the status and capacity of persons lacking any adherence to any nationality. The suggested answer, however, is the use of domicile or habitual residence in such cases, as alternative connecting factors. Hence, it is generally agreed that the law of domicile or habitual residence must determine the status and capacity of stateless persons.<sup>(135)</sup> Moreover, the New York convention 1954 adopted the same solution in its article 12.<sup>(136)</sup> It is interesting to note that the solution embodied in article 22(3) of Algerian civil code seems to be consistent with the New York convention 1954 which was ratified by the Algerian government in 1964, since it gives freedom to the judge to determine the applicable law in such cases. It is the view of the present writer that the Judge's freedom should be limited to the determination of the place of domicile or habitual residence of the stateless persons, and thus the law of that place exclusively determines their capacity to marry. Furthermore, the Algerian law *qua lex fori* applies alternatively in such cases if, and only if, no domicile or habitual residence is visible.<sup>(137)</sup>

The same solution has been universally suggested to apply as regards political refugees, though they still possess their nationalities, because they do not enjoy the protection of their government. The Geneva Convention, article 12 states clearly that status and capacity of political refugees must be determined by the law of their domicile, or their habitual residence.<sup>(138)</sup> It seems that the same solution prevails in Algerian law, since the Geneva Convention was ratified by Algeria in 1963.<sup>(139)</sup> However, the present writer believes that the validity of political refugees' marriages celebrated before the exile decision must be determined by their national laws at the time of marriage on the basis of *favor matrimonii* principle. This is because the law of their domicile after the

exile decision may invalidate their marriages.<sup>(140)</sup>

The principle of submission of essential validity to the parties' national law has been rigorously criticised on the basis of the many intricate problems arising in the course of its application; for example, in cases where the parties are subject to different personal laws.<sup>(141)</sup> In contrast to this principle, Le Doyen Louis-Lucas, being in favour of the seductive idea of a single law system has suggested that the *lex loci celebrationis* should govern the entire validity of marriage. Moreover, the learned writer seems to be aware of the possibility of the place of celebration being accidental, and thus suggested that the parties may naturalise their marriage as soon as they establish a domicile somewhere else.<sup>(142)</sup> However, it is interesting to note that the present view appears to be based partly on the "instruction générale relative à l'état civil 1955" under which French marriage officers are not required to take account of foreign law of their own motion, and partly on the principle according to which French judges are not required to apply foreign laws *ex officio*.<sup>(143)</sup> This view has been criticised on the basis that it elevates the parties' freedom to choose a place of celebration into a governing rule. Relying on the *lex loci* rule to determine essential validity is unsound, inasmuch as it may render application of certain essential requirements quite unnecessary, such as the prohibited degrees of consanguinity and affinity. It is a system which would enable parties to evade such restrictions.<sup>(144)</sup>

Influenced by the increase of immigration, Niboyet is in favour of adopting a rule which may permit the assimilation of foreign immigrants living permanently in France. However, he has suggested the continuation of the application of the existing rules to French citizens, as well as to the foreign immigrants residing in France temporarily. But the status and capacity of foreign immigrants residing permanently in France should be determined by the law of their domicile, i.e. French law.<sup>(145)</sup> It might be argued that this view embodies a unilateral preference for the law of domicile *qua lex*

*fori* and gives a nationalistic bias to French private international law. Furthermore, while French law applies when it is the domiciliary law of a foreign immigrant residing permanently in France, no corresponding preference for the foreign law is admitted in a case where a French national resides permanently in a foreign country. It is therefore reasonably clear that this rule is, to use Falconbridge's words, "unworthy of a place in a respectable system of the conflict of laws".

In conclusion, one might say that the seductive idea of submitting the entire validity to a single law system is anomalous, since the issue of capacity should be examined before the celebration of marriage. However, the only single law system existing at that time is the *lex loci celebrationis* which the overwhelming weight of judicial and extrajudicial opinions reject because of its inadequacy to govern a family matter affecting the moral and ethical well-being of a society. Hence, it is submitted that the existing rule, i.e. the parties' national law at the time of the marriage, should be maintained. The desire to prevent conflict between legal systems, to eliminate limping marriages, and to reach international uniformity of status and of decision would seem to demand this.

### **C- Conclusion And Evaluation Of The Conflict Approaches**

The determination of the choice of law rule as to the essential validity of marriage has attained special prominence in the doctrine and the practice of conflict of laws because marriage is so closely connected with the morals and religious attitudes which vary considerably from one state to another. However, consideration of marriage as a matter of great importance to the parties, as well as to society, has rendered the achievement of international uniformity even more difficult. It is interesting to note that the main initiatives at the international level have "proved a complete failure."<sup>(146)</sup> The Hague convention to regulate the conflict of laws in regard to marriage of 1902 was the first to result in serious controversy, the difficulties with its interpretation causing certain countries to denounce it.<sup>(147)</sup> The convention's main basis, namely the principle of

nationality, has led to its description as an endorsement of "continental European parochialism which mistook Europe for the world."<sup>(148)</sup>

Subsequently, the Hague convention of 1976, which promotes "*favor matrimonii*" principle, has been characterised as laying down choice of law rules as to essential validity which are "far from being a complete set of rules."<sup>(149)</sup> Article 3 of the convention is somewhat illusory, since it deprives the relevant foreign law from being applied, if the parties satisfy the substantive requirements of the *lex loci celebrationis*, and one of the parties is a national of, or habitually resides in, the country of celebration. It has been argued that the convention renders the extirpation of limping marriages difficult if not impossible. The application of the convention would create obvious difficulties both to common and civil law countries.<sup>(150)</sup>

As regards the existence of conflicting theories, the present writer believes that the difference in the conflict approaches is the product of a very fundamental difference in the interpretation of the nature and the purpose of essential requirements; in addition the importance of the time element has been completely ignored. It has been argued that the new approaches fail to provide a satisfactory solution which may promote international uniformity, extirpate limping marriages, and determine with certainty the law governing substantive validity at the time of the celebration. This is because of their being strongly influenced by policy considerations which should not be raised to the higher purpose of determining the applicable law. Certainly, the idea of submitting essential validity to a single law system rule existing at the time of the marriage, i.e. *lex loci* rule, is highly undesirable. It has been submitted that reliance on the law of the place of celebration enables the parties to evade their personal laws, and would oblige the countries to which the parties belong to recognise the validity of the marriage notwithstanding its being contrary to their public policy.<sup>(151)</sup>

Furthermore, the policy of upholding the reasonable expectations of the parties and of

upholding the validity of marriage are inappropriate, since it would be inaccurate to speak of validity or invalidity at the time of the ceremony where the question is whether the parties have satisfied the legal requirements of bringing a marriage into existence. Reliance on the intended matrimonial home and the real and substantial connection test would open the door widely for a great movement of people from one state to another in order to defeat the restrictions imposed on them by the law of their home state. This movement would render useless the non-universal restrictions, and would even undermine, to some extent, the universal restrictions, such as the age of marriage which varies considerably. Hence, the new approaches would be a danger to the preservation of morals and religious attitudes of all societies. If two English domiciliaries, uncle and niece, celebrate a marriage abroad, they would be obliged to settle in a country where such a union would be valid. They would be fortunate in the sense that the rules of domicile permit them to achieve their aim, but their freedom of choice of home would be circumscribed.<sup>(152)</sup>

It is sufficient, for the purpose of determining the most appropriate law, to base the arguments on the proposition that the fundamental conflict approach must reflect the basic preventive nature of the substantive requirements of marriage. However, the choice of law rule as to the essential validity should be, as far as possible, a rule that provides an answer to the question of what legal requirements the parties must satisfy at the time of the marriage ceremony in order to contract a valid marriage. The existing personal laws of the parties at the time of the marriage, whether determined by domicile or nationality, seem to be the appropriate laws to govern the substantive validity of marriage effectively as they recognise the preventive nature of such requirements. The great merits of the test is, that it provides an effective and helpful guide for marriage registrars to determine with certainty whether the parties have complied with the essential requirements of the personal laws of each. In R. v. Brentwood Marriage Registrar, for instance, the English Court prevented the creation of a limping marriage,

since the Italian party had no capacity to marry, as being of a married person's status according to Italian law.<sup>(153)</sup> The test would necessarily entail a certain respect between legal systems, promote international uniformity, and would eliminate limping marriages. Furthermore, the idea that essential validity may legitimately be referred to the parties' personal law is well supported by authority.<sup>(154)</sup>

Accordingly, it is interesting to note that the impotent role of marriage registrars, under the present legislation, render the purposes of applying the parties' personal law exceedingly difficult to achieve. The existing French rule is a good illustration. According to this rule, French marriage registrars are required to celebrate marriages whenever French domestic law requirements are fulfilled, notwithstanding that the certificate of customs (*Le certificat de coutume*) produced by the parties reveals the existence of any impediment under the relevant foreign law.<sup>(155)</sup> The greatest objection is that this rule seems to diminish the preventive function of the relevant conflict rules, since it substitutes the *lex loci celebrationis* for the parties' personal law.<sup>(156)</sup> Moreover, it is assumed that, though there is no statutory provision to that effect, it is not the normal practice for marriage registrars in England to seek to satisfy themselves that there is no legal impediment to the marriage under the parties' domiciliary laws. The English position is rather different from the French rule on the ground that the marriage registrar is required to give effect to any legal impediment brought to his notice if, and only if, it is one which, according to English conflicts rules, would invalidate the marriage.

Marriage registrars must play an effective role as to prevent illegal and incestuous marriages. This is because invalidation of marriage *ex post* may have undesirable effects, as many issues' validity depend upon whether persons are married or not. Hence, it is necessary to stop the coming into existence of such marriages, since the usual sanction for failure to meet the requirements of marriage at the time of celebration

is limited to the denial of celebration. Marriage registrars must be required to inquire into the relevant foreign law by their own motion to find out whether the parties' personal law permits such unions or not. Being aware of the marriage registrar's disfavourable position for carrying investigations into foreign law, many legal systems have created certain devices by which the registrar can easily ascertain the question whether the parties have satisfied the essentials of marriage under their personal law.<sup>(157)</sup> The most important of these devices is the certificate of capacity by which the marriage officer transfers the burden of inquiring into foreign law to the foreign country authorities. Unfortunately, the status of such devices in the present legislation, and its non-universal character would result neither in the correct application of the relevant foreign law, nor in the achievements of international uniformity and harmonisation of decisions.<sup>(158)</sup>

Yet, creation of a coherent and completely satisfactory solution is only possible if each legal system shows its willingness to respect foreign laws, and to provide foreign registrars with a survey of the proposed marriage, in every case, which may help them to apply its rules without misinterpretations. However, a marriage must not be celebrated if it is unlikely to be recognised by the *lex causae*. Suppose that a foreigner wishes to marry his first cousin, a Scots domiciliary, in Scotland the law of which recognises such a marriage.<sup>(159)</sup> According to the relevant foreign law (of the man), the parties have no capacity to intermarry as being within the prohibited degrees of consanguinity. Hence, the marriage officer should not celebrate the marriage, since it would create a limping marriage. Acceptance of such impediment might be thought to work injustice to the local party, and thus it should be disregarded.<sup>(160)</sup> But, the celebration of marriage would work injustice even more to the local party as depriving him or her from remarrying, if the other party has succeeded in obtaining a decree of nullity which is not recognised by the local law. In other words, the only satisfactory approach is the proper adherence to the Dual Domicile Theory.

However, it is submitted that the marriage registrar should proceed nevertheless with the celebration of marriage if, and only if, the foreign impediment by the domicile is fundamentally contrary to the *lex loci* public policy. The question which should be answered here is whether the parties' personal laws at the time of marriage will receive application, if the validity of such marriages is raised before the court *ex post*. There is every reason of policy and logic to sustain the marriage once it has come into existence, if it is valid according to the law of their matrimonial home, or their nationality at the time of the proceeding. *Favor matrimonii* principle and the policy of upholding the reasonable expectations of the parties seem to demand this. For instance, the decision reached in Radwan v. Radwan seems to be consistent with the consideration of marriage as a long-standing relation which requires recognition.<sup>(161)</sup> Penal and religious restrictions would seem to fall under the head of public policy, but, since the aim of this thesis is the desirability of having a rule designed to permit testing of a marriage's validity at the point of celebration (or refusal of celebration), the incidence of such "policy" exceptions would be small, it is hoped.

## Section Two

### Special Issues And The Law Governing Essential Validity

#### A- The Rule In Sottomayer v. De Barros [No.2] And The Article 13 of Algerian Civil Code

The general principle, both in common and civil law countries, is certainly that the parties' personal law, which is determined by domicile and nationality respectively, governs the essential validity of marriage. It is therefore submitted that the disability of either party, under his/her personal law, may render the marriage void, or may preclude its celebration, provided that the impediment is not contrary to the *lex loci celebrationis* public policy.<sup>(162)</sup> The decisions in Mette v. Mette and Sottomayer v. De Barros [No.1]<sup>(163)</sup> favour this rule, although the decision in the latter case has been confined to the case where both parties have at the time of the marriage a common domicile the law of which prohibits their marriage. However, the Learned Judge has expressly said that the decision in Sottomayer v. De Barros [No.1] cannot be "relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of a personal incapacity not recognised by the law of this country", if the acceptance of such a foreign incapacity would work injustice to the English subjects.<sup>(164)</sup>

Accordingly, the general principle in English law has undergone a modification to the effect that a marriage celebrated in England between parties, one of whom is an English domiciliary, is not affected by any incapacity flowing from the foreign party's personal law if it does not exist under English law *qua lex loci celebrationis and lex domicilii* of one of the parties. This is the rule in Sottomayer v. De Barros [No.2],<sup>(165)</sup> where a marriage between first cousins was celebrated in England. On the evidence, it appears that the husband's domicile was English, whereas the wife's domicile was in Portugal, the law of which prohibits first cousins' marriages as being incestuous unless a papal

dispensation was granted. Sir James Hannen, P., being concerned with the injustice which would be done to an English party, held the marriage valid, despite the wife's disability under her domiciliary law, i.e. the law of Portugal.<sup>(166)</sup> The learned Judge, however, has ignored the vital distinction between formal and essential requirements drawn in Brook v. Brook and Sottomayer v. De Barros [No.1], and thus the decision seems to be based on the earlier decisions reflecting the supremacy of *lex loci celebrationis* as the law governing the entire validity of marriage.<sup>(167)</sup> Moreover, it is interesting to note that the alleged prohibition in this case seems to be considered as being contrary to the *forum's* public policy, insofar as it is compared with prohibition based on race or religion.<sup>(168)</sup> Such reasoning is unfortunate, since the wide *ratio* of invoking public policy as a ground for rejecting foreign rules accommodates all cases whenever they are alien to the *forum's* conception of status and capacity.<sup>(169)</sup>

The existence of Sottomayer v. De Barros [No.2] exception in Scots law, though there is some suggestions in the Scottish authorities to that effect, is a matter of great uncertainty.<sup>(170)</sup> It is understood from Professors Anton and Clive that the decision in Macdougall v. Chitnavis appears to be an endorsement of the second Sottomayer rule in Scots law, since it approves the English decision in Chetti v. Chetti as being in conformity with the law of Scotland.<sup>(171)</sup> In MacDougall v. Chitnavis, a marriage was celebrated in Scotland between a Scottish domiciliary and a Hindu man domiciled in India, the law of which prohibits the marriage of a Hindu person with a non-Hindu. Although the decision approves Chetti v. Chetti, it is clear that the foreign incapacity is denied recognition because of its being alien to the Scots law and the Scottish conceptions of status and capacity.<sup>(172)</sup>

Conversely, Lord Mackay has clearly rejected the second Sottomayer decision in Lendrum v. Chakravarti where he applied the general rule as to capacity to marry.<sup>(173)</sup> Assisting this viewpoint are the persuasive provisions of Marriage (Scotland) Act 1977

in which no recognition has been given to this exception. According to Section 5 (4) (f), for instance, a marriage between two parties one of whom is not domiciled in Scotland would be *void ab initio* on a ground, other than one mentioned in paragraphs (a) to (e), existing under the law of the domicile of that party.<sup>(174)</sup> Furthermore, the Scottish Law Commission has recently recommended that the Sottomayer v. De Barros rule should have no place in any future statutory restatement of the choice of law rules in marriage.<sup>(174a)</sup>

Although Dicey has emphasised the absurdity of the second Sottomayer decision, he is of opinion that it must be recognised to be good law, which forms an ungainly exception to the dual domicile rule:

"The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England."<sup>(175)</sup>

This exception has been subject to severe criticism as being anomalous and "unworthy of a place in a respectable system of the conflict of laws,"<sup>(176)</sup> on the basis of its nationalistic bias. Moreover, it is respectfully submitted that it is a unilateral rule which gives no preference to the foreign law when it is the *lex loci celebrationis et lex domicilii* of either party. In Re Paine,<sup>(177)</sup> for instance, a marriage celebrated in Germany between an English domiciliary and her deceased sister's husband, a German domiciliary, was deemed void, even though it was valid under German Law *qua lex loci celebrationis et lex domicilii* of the husband. The most notable defect of the rule is that it leads to the promotion of limping marriages which undermine the purpose of coordination between legal systems that the international community so desires to achieve.<sup>(178)</sup> Thus, the failure of the Hague Convention of 1976 might be explained, it is thought, on the basis that it preserves this undesirable rule.<sup>(179)</sup>

More recently, the Law Commissions have criticised the illogical nature of this rule on the ground that it renders the structure of the choice of law rules unduly complex. In explaining the complexity of this rule, it is said:

"Where the marriage is celebrated in England and neither party is domiciled here, the law applicable to questions of capacity is the law of domicile. Thus, if one (or both) of the parties is domiciled in a country where first cousin marriages are prohibited, the marriage will be void, even though such incapacity does not exist under English law. If, however, one party is domiciled in England and marriage takes place here, the issue of capacity will be governed by English law. Thus, in the example given above, the marriage will be valid, even though it is void under the foreign domiciliary law of the other party. Further, if the marriage takes place abroad, the essential validity will be determined by the parties' domiciliary laws..."<sup>(180)</sup>

Hence, it has been submitted that: "The rule in Sottomayer v. DeBarros [No.2] should be abolished."<sup>(181)</sup> In line with this view, the present writer believes that the reason of the fear of injustice which would be done to the *forum's* subject, as a basis for rejecting foreign rules invalidating the marriage, is dubious on general principles, if the rule is not contrary to the *forum's* public policy. This is in view of the fact that ignorance of foreign incapacity would work even more injustice to the *forum's* subject as to deprive him of his rights, especially if the foreign courts should declare the marriage void and null, and such a decree is not recognised in the *forum*.

There is a rule in Algerian Law to the effect that the *lex fori* should prevail whenever it is the *lex patriae* of one of the parties, no matter where the marriage is celebrated. To this end, article 13 of the Algerian Civil Code<sup>(182)</sup> provides that the essential validity of marriage, save capacity to marry in a narrow sense which remains under the competence of each party's national law, is governed by the Algerian law alone, if one of the parties is an Algerian national at the time of marriage. However, it is interesting to emphasise that the acceptability of this unilateral rule is debatable as it gives a nationalistic bias to Algerian private international law, and it seems quite unnecessary since the application of the general rules as to capacity would achieve the same result.

For instance, the application of the rule in the article 97 of civil status 1970 suffices for refusing recognition to a marriage celebrated abroad between an Algerian woman and a non-Muslim, before Algerian courts, insofar as the prohibition of such marriages is an essential requirement.<sup>(183)</sup> The introduction of such a rule in favour of the *lex fori*, as being the *lex patriae* of either party, would seem to be a sign of an exaggerated mistrust as regards the role of the general conflict of law rules. It is equally true that there is no sound reason for applying the Algerian law at the stage of the formation of the union since nothing exists between the said spouses; hence the uselessness of article 13.<sup>(184)</sup> Accordingly, the determination of essential validity according to Algerian law in such cases would lead to a deplorable result of submitting non-Muslim foreigners to a law which is, *prima facie*, based on Islamic religion. Therefore, there is every reason of logic and convenience suggesting the abrogation of the rule, inasmuch as its illogical and arbitrary nature would result neither in the extirpation of limping marriages, nor in the achievement of international uniformity of status and decisions.

#### **B- Capacity To Marry And The Relevance Of The *Lex Loci Celebrationis***

The overwhelming weight of judicial and extrajudicial opinions suggest that non-compliance of the parties with essential requirements of their antenuptial personal laws, whether determined by domicile or nationality, suffices for rendering the marriage void, notwithstanding that the rules of the *lex loci celebrationis* as to essentials have been satisfied.<sup>(185)</sup> For instance, the marriage in Re Paine,<sup>(186)</sup> though valid by the law of the place of celebration, was held void since the woman lacked capacity to marry her deceased sister's husband under her domiciliary law, i.e. English law. However, the question which arises is whether a marriage is invalid if the parties, though they have capacity to marry by their premarital personal laws, lack capacity under the law of the place of celebration. More fundamentally, the question arises whether the parties are obliged to satisfy the essentials of marriage required by the *lex loci celebrationis* in addition to those of their prenuptial personal law.

As regards English and Scottish laws, it has been submitted that there is no clear-cut authority to the effect that the parties to a marriage must have capacity to marry by the law of the place of celebration as well as by their respective premarital domiciliary laws, insofar as a foreign marriage is concerned.<sup>(187)</sup> Nevertheless, Dr. Morris has suggested that Karminski, J. in Breen v. Breen "was prepared to hold that incapacity by the *lex loci* was fatal to the validity of marriage."<sup>(188)</sup> In Breen v. Breen,<sup>(189)</sup> two English domiciliaries celebrated a marriage in 1953 in the Republic of Ireland during the lifetime of the husband's former wife. The husband had obtained in England a decree of divorce dissolving his first marriage in 1952. The second wife argued that the marriage was null and void since her alleged husband's first marriage was subsisting at the time of the second marriage according to Irish law, insofar as the English divorce could not be recognised in the Republic of Ireland.<sup>(190)</sup> However, Karminski J., convinced that Irish law recognised the English divorce decree, decided that the marriage was valid.<sup>(191)</sup> It is remarkable that the learned judge in this case devoted so much of his judgement to providing an answer to the allegation of the petitioner as to the effect of Irish constitutional law on the marriage's validity without giving the reasons which render that law at all relevant for determining the capacity of English domiciliaries. However, Dicey states that "it is unlikely that Karminski J. would have dealt with what was a difficult question of Irish constitutional law unless he had been of opinion that capacity by the *lex loci celebrationis* is necessary for the validity of a marriage."<sup>(192)</sup>

Bradshaw,<sup>(193)</sup> in a stimulating recent article, has submitted that there is no clear evidence in Karminski J.'s judgement which might be construed to the effect that incapacity "imposed by a foreign *lex loci celebrationis* is apparently fatal to the validity of the marriage". Moreover, it may be argued that Dr. Morris' contention is ill-founded on the basis that the learned judge did not examine the effect of a party's incapacity by the *lex loci celebrationis* on the marriage validity, as he ignored the

decision in the will of Swan's case<sup>(194)</sup> in which the question of the relevance of the *lex loci celebrationis* as to capacity to marry was directly in issue. In this case, the marriage, though the husband lacked capacity to marry his deceased wife's niece by the *lex loci*, was held valid. It is therefore reasonably clear that Breen's decision is "a sorry and inarticulate precedent [which] should be considered insufficient to establish a rule of a very doubtful merit".<sup>(195)</sup>

Conversely, it has been submitted that the *lex loci celebrationis* "must be looked at to see if the parties were capable of marrying in that country because, if not, they had no right to use the forms of marriage prescribed by that country".<sup>(196)</sup> Professor Anton believes that this rule has the practical merit "of reducing the possible occasions for limping marriages".<sup>(197)</sup> Certainly, the suggested view seems to be right to the extent of applying the rule at the time of the marriage celebration, as the only effect which would result, if the marriage registrar refused to perform the ceremony, is the denial of celebration. Relying on the fact that the parties may have no more than a transient connection with the country of celebration, application of this rule, when the marriage validity is examined *ex post*, would rather promote limping marriages. The main reason is that it is unlikely that the country of the parties' domicile would be prepared to invalidate the marriage merely because they lacked capacity to marry by the *lex loci celebrationis*.

However, the almost unanimous judicial view in commonwealth countries appears to be in favour of rejecting completely the relevance of the *lex loci celebrationis* as to essentials of marriage. Thus in Reed v. Reed,<sup>(198)</sup> two first cousins married in the state of Washington whose law prohibits such marriages. Although the marriage was invalid in the place of celebration, it was held valid since the parties had capacity to marry by their domiciliary laws.<sup>(199)</sup> It is interesting to note that Harvey Co. Ct. J. expressly stated that Karminski J.'s judgement in Breen's case "in no way supports the

proposition that incapacity by the *lex loci celebrationis*...is fatal to the validity of a marriage".<sup>(200)</sup> Moreover, the more recent decision of the Bahamas Supreme Court in Re Estate of Hewitt<sup>(201)</sup> has been inclined in favour of ignoring any incapacity imposed by the law of the place of celebration. In this case, a man domiciled in Ontario married his first cousin Laura in the state of Ohio, in 1985. The marriage was valid in Ontario, but was invalid in the state of Ohio, whereby first cousins had no capacity to marry each other. Adams J. concluded that "the law of the domicile is sufficient to determine marriage capacity". Therefore, the marriage was held valid simply because "consanguinity was a matter of capacity which was governed by the *lex domicilii*, ...and the parties were legally capable of inter-marrying".<sup>(202)</sup>

As far as marriages celebrated in England and Scotland are concerned, it has been suggested, though there is no binding authority (though consider the requirements of the Marriage (Scotland) Act 1997, *infra*), that the parties must satisfy the essentials of marriage of the *lex loci qua lex fori* as well as those of their prenuptial domiciliary laws. This is because "the English court could hardly disregard its own law on such a vital matter and hold valid a marriage which that law prohibited, even if it was valid by the law of the parties domicile".<sup>(203)</sup> However, it is significant to note that this view is exclusively based on Westlake's doctrine which renders compliance with the *lex loci* rules as to capacity absolutely necessary for the validity of a marriage.<sup>(204)</sup> Viewed in its historical context, this view evinces the enduring influence of the principle, which was prevailing in English law before Brook's decision; of the ascendancy of the *lex loci celebrationis* as being the ultimate law governing the entire validity of marriage. The rule also preserves the notion of the predominance of the *lex fori* in English and Scottish laws, since its application is confined to locally celebrated marriages.

The only existing commonwealth authority, in which a locally celebrated marriage was in issue, is apparently opposed to it. In Schewebel v. Ungar,<sup>(205)</sup> a man domiciled in

Ontario married there a divorced Israeli domiciliary whose divorce was valid by Israeli law. It was urged before the Ontario court of appeal that the marriage was void, since the woman's divorce did not meet the condition for recognition under Ontario law. The marriage was held valid, despite the fact that the woman lacked capacity by the *lex loci celebrationis et lex fori*. Nevertheless, Professor Graveson has argued that the rule is relevant on the ground that its effect "is to maintain minimum, not maximum, English standards of essentials of marriage".<sup>(206)</sup> Accordingly, it is submitted that assuming that there is no incapacity under the English or Scottish laws, the marriage will be declared valid if, and only if, it is considered as such by the parties' prenuptial domiciliary laws. The Marriage (Scotland) Act 1977 contains provisions which are in accordance with, and reinforces, this rule. Thus it is interesting to note that section 1(2) of that Act provides clearly that: "A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void".<sup>(207)</sup> Furthermore, a marriage celebrated in Scotland is void if the parties are within Scottish prohibited degrees set out in the schedule (1) of the 1977 Act.<sup>(208)</sup> Here it is contained a clear demonstration of the Scottish requirement of compliance with its rules *qua lex loci*.

The same results are achieved in certain countries, where the public policy reasoning is always accorded "a broad sphere of operation" so as to invalidate a marriage celebrated in the country of the forum even if the parties have capacity by their national laws. In French law, for instance, a marriage celebrated in France between parties under the age required by the domestic law, or within the prohibited degrees there, is void on the basis of public policy.<sup>(209)</sup> As regards the Algerian law, the same solutions would seem to be retained by the Algerian courts for protecting the domestic conceptions of marriage. It is interesting to note that the intervention of Algerian public policy is of a limited scope, as the Algerian law permits polygamy.<sup>(210)</sup>

In conclusion, it may be argued that a rule, requiring the application of *lex loci* rules as

to capacity merely because it coincides with the *lex fori*, seems undesirable as being of illogical and discriminatory nature which may create limping marriages, a situation unacceptable both in the forum and the parties' *lex domicilii*. Moreover, the overriding effect of the *lex fori* public policy may achieve the same results, and thus the existence of such a rule is quite unnecessary. The English and Scottish Law Commissions, being convinced that international comity considerations denote the genuine interest of a foreign *lex loci*, have recently recommended that "[a] marriage, whether celebrated in the United Kingdom or abroad, should not be regarded as valid in the United Kingdom if either of the parties is, according to the law of the country of celebration, under an incapacity to marry the other".<sup>(211)</sup> It is worth noting that the rule (requiring capacity by *lex loci*), though in its generalised form, has little to recommend it, in so far as it invalidates marriages actually celebrated and performed in good faith. Such a rule is hard to justify in principle, "since essential validity is not a matter of ensuring certainty or publicity, but it is concerned with upholding social policies and, in certain cases, protecting the interests of the parties". Hence, "there is no policy justification for applying this rule which would create an additional obstacle to the validity of the marriage".<sup>(212)</sup> Accordingly, it is sufficient to establish that before the solemnisation of marriage, the registrar must not celebrate a marriage unless he is satisfied that there is no obstacle to its celebration in the *lex loci*. It is therefore reasonably clear that once the marriage has in fact been performed and the parties lived in the reasonable belief that they are husband and wife, there is every reason both of logic and of convenience for holding the marriage valid, notwithstanding that the parties lacked capacity under *lex loci celebrationis*. The policy of validation and the desire to prevent limping marriages would seem to demand this.

### **C- Time Factor: Retrospective Changes in the Law Governing Capacity to Marry**

A problem identical to that examined earlier in relation to the formal validity of marriage<sup>(213)</sup> arises where the substantive rules of the personal law governing the

capacity of one or both of the parties have been changed after the celebration of marriage by a new legislation purporting to have retroactive effect. The question arises whether such subsequent legislation should be given effect, before the *forum's* courts, to operate retrospectively for validating or invalidating marriages solemnised before its promulgation. It is well established in most countries that the governing foreign law should be applied as it stands at the time of the proceeding, inclusive of its transitional rules. This is because, it is thought, the specific reference to time in the conflict rule as to capacity to marry serves solely to clarify that "the relevant domicile or nationality is that at the point of celebration, but it does not purport to "petrify" the designated law as they were at that time".<sup>(214)</sup>

Although the decisions in which this view has been followed as to capacity to marry are scarce, it is suggested that a subsequent legislation should have effect, in the situation most commonly occurring in practice, i.e. where it validates an initially invalid marriage. The almost unanimous view among English and Scottish writers is that the marriage will be regarded as valid, even though the parties were incapable of marrying under their pre-marital domiciliary laws, if it is subsequently validated by retrospective legislation enacted after the celebration of marriage in the state of domicile.<sup>(215)</sup> Certainly, the acceptance of a subsequent validating legislation is consistent with the balance of justice, "*Favor matrimonii*" principle and the desire to eliminate limping marriages. Accordingly, the application of subsequent validating legislation is strongly supported in the case where the marriage has been celebrated, even though an impediment exists under the premarital personal law of the parties on the basis of its being contrary to the *lex loci celebrationis* public policy. For instance, an Algerian woman wishes to marry a non-Muslim in Scotland. Notwithstanding the existing prohibition in the Algerian law,<sup>(216)</sup> the marriage will be solemnised in Scotland, since the prohibition of marriage between a Muslim woman and a non-Muslim is contrary to the Scottish public policy. Suppose that, after the celebration of the marriage but before

its validity is called in issue, retroactive validating legislation has been enacted in Algeria. Certainly, the application of that legislation would promote international uniformity, as well as eliminate an existing limping marriage as between Scotland and Algeria.

On the other hand, the overwhelming weight of opinion among commentators suggests that retrospective validating legislation should have no effect at all, if the parties had obtained a decree of nullity before its enactment. This is because the finality of the decree "may appear to call more imperatively for the setting in motion of the doctrine of public policy", if it is granted or recognised by the *lex fori*.<sup>(217)</sup> An analogous solution applies in the event of a retroactive validating legislation being preceded by the remarriage of one or both of the parties, if the first marriage was void *ab initio*.<sup>(218)</sup> These exceptions are strongly justified in principle, on the basis that the acceptance of the retrospective validating legislation here would be productive of injustice, and would leave the validity of marriage in suspense. Moreover, it may lead to the deplorable result of holding the second marriage of either party void, although at the time of its celebration there is no compelling reasons to hold it as such.

It is interesting to note that the unfortunate decision in Ambrose v. Ambrose<sup>(219)</sup> seems to be in favour of refusing recognition to retroactive legislation validating a decree of divorce, the application of which leads to the validation of a second marriage celebrated by one of the parties. In this case, a woman had obtained an interlocutory decree of divorce from her first husband in the court of California, where they were domiciled in 1930. By some oversight, the decree was not made final until 1939 - without retroactivity-on the court's own motion. In 1935 while the first marriage was still subsisting, she went through a ceremony of marriage with her second husband, who was domiciled in British Columbia, in Washington. After the ceremony, the parties lived as husband and wife in British Columbia until they separated in 1956. The wife, being then aware of the true state of her divorce, took advantage of the 1941

Californian statute and obtained a *nunc protunc* order from the court of California, by which the divorce was retrospectively backdated to 1931. Meanwhile, the second husband alleged before the court in British Columbia that his marriage was bigamous, and thus ought to be declared null and void. The marriage was therefore held void on the ground that the retroactive validating Californian statute ought not to be applied in this case, since neither party was domiciled in California at the time of its enactment, nor did it precede the Washington ceremony.

It is undoubtedly clear that the court failed to weigh the effect of the Californian legislation removing retroactively an impediment to the second marriage, as the wife's divorce was made retrospectively final. The fundamental defect of the decision in terms of the policy issues relevant in marriage is that it fails to recognise the significance which the policy of validation has when the validity of marriage is examined *ex post*. However, the grounds relied on by the court would seem perfectly justifiable, if the Californian statute concerned the validation of the first marriage rather than the divorce decree.<sup>(220)</sup> But, the effect of the retroactive Californian legislation was to make it quite clear that there was no reason to hold the marriage which took place in 1935 invalid. Hence, the decision to the contrary in this case has been stigmatised as "unfortunate examples of mechanical jurisprudence",<sup>(221)</sup> which "demonstrates clearly the complete inability of the courts to handle conflicts problems when there is no guiding principle provided either by the courts themselves or by commentators".<sup>(222)</sup>

It remains to consider whether a foreign retrospective legislation purporting to *invalidate* an initially valid marriage, for reasons of essence, should be recognised in the *forum*. Although there is no direct decisions on this question, the balance of academic opinion is that the foreign invalidating legislation should not be recognised in the forum on the basis that it would be unjust to deprive a couple of their married status

once they had satisfied the existing conditions of their personal law at the time of the marriage, merely because the legislation has been changed. As a general rule, the acceptance of retroactive invalidating legislation is undesirable since it would make every valid marriage conditionally invalid.<sup>(223)</sup> Public policy considerations buttressed by the prevailing policy of validation (*favor matrimonii*) suggest strongly the rejection of such foreign legislations.<sup>(224)</sup> Nevertheless, a retroactive invalidating legislation may be recognised where the parties remain subjects of the legislating country, if it is in no way contrary to the *forum's* public policy.<sup>(225)</sup>

#### **D- Renvoi**

A special problem arises where the choice of law rule of the foreign law, which is designated as the *lex domicilii* by the *forum's* conflict rules, renvoi the issue in question either to the *lex fori* or to a third law as being the *lex patriae* of the parties or vice versa. The question which arises is whether the *forum's* reference to the foreign law should be taken as a reference to the whole of that law, inclusive of its conflict rules. The overwhelming weight of opinion generally is in favour of applying the relevant foreign law, including its choice of law rules. It follows that the forum must give effect to the relevant foreign conflict rule whenever it refers either to the domestic law of that country, or to another law which it regards as the appropriate law by which the issue of capacity must be determined.<sup>(226)</sup> It is interesting to note that limping marriages and conflicting decisions will ensue, if the *forum's* authorities apply the domestic law of the designated *lex causae* without taking into consideration its relevant choice of law rule.

The practical significance of using renvoi has been argued on the basis that it achieves international uniformity of status and decisions. Furthermore, the desire to prevent creation of limping marriages appears to be a dominant motive in favour of accepting renvoi, so the *forum's* authorities should permit the celebration of a marriage or hold it

as valid if, and only if, it is recognised as such by the relevant *lex causae*. "Since such recognition depends, in the first place, on the conflict rules of the relevant foreign law, those rules must be taken into account by the *forum*."<sup>(227)</sup> It is respectfully submitted that the acceptance of renvoi is perfectly justified if the "purpose and the policy of the *forum's* reference to the personal law...is to prevent the creation of limping status", and to achieve uniformity of decisions.<sup>(228)</sup>

Although there is no binding Scottish authority, Section 3 (5) of the Marriage (Scotland) Act 1977 implies that renvoi might be used as far as essential validity of marriage is concerned. A person domiciled outside the United Kingdom "may, where under the law of the state in which he is domiciled his personal law is that of another foreign state, submit in lieu of the said certificate [of capacity] a like certificate issued by a competent authority in that other state."<sup>(229)</sup> Moreover, the English decision in *R. v. Brentwood registrar*<sup>(230)</sup> demonstrates clearly that English courts accept renvoi as to essential validity of marriage. In this case, an Italian citizen domiciled in Switzerland, where he had obtained a divorce from his first wife, wished to marry in England a Spanish national also domiciled in Switzerland. The registrar refused to celebrate the marriage on the ground that the husband lacked capacity to remarry by Swiss law, the law of his domicile referring the question to Italian law, as being his *lex patriae*, under which the husband's divorce was not recognised. The parties then applied to the Divisional Court for an order of *mandamus* against the registrar ordering him to issue a certificate and licence enabling the marriage to be solemnised. Accepting renvoi from Swiss law to the Italian law, the English court upheld the registrar's decision, and thus dismissed the petition since the husband's remarriage would be void everywhere. The possibility that a marriage solemnised in England between the would-be spouses might be recognised in Switzerland was rejected as the Swiss reference to Italian law is compulsory, notwithstanding the divorce recognition in Switzerland.<sup>(231)</sup> Thus, it appears that the desire to gain uniformity of status and decisions as well as

international comity are the main basis of this decision.<sup>(232)</sup>

The decision has been criticised on the basis that "comity requires only the recognition of a country's claim to the application of its own law, not its right to designate the law of a third country."<sup>(233)</sup> Accordingly, it has been suggested that the decision should not be considered as authority for the acceptance of renvoi as a general rule for validating and invalidating a marriage. Certainly, application of renvoi may well produce uniformity of status and decisions, but they may be with the wrong countries if the parties have changed their domicile after the celebration. This is because "it is more desirable to obtain uniformity with the country in which the parties are domiciled at the time of the proceeding than with the country of a previous domicile."<sup>(234)</sup> Relying on the significance of the validation policy, it has been submitted that renvoi must only be accepted to allow the celebration, or to uphold the validity of a marriage.<sup>(235)</sup> This is questionable on the basis that the essentials must be determined at the time of the marriage, as the purpose of such requirements is to prevent the creation of illegal and incestuous marriages. Since the effects of refusing celebration are minimal, there is every reason both of logic and convenience for the acceptance of renvoi, whether it permits or prevents the celebration at the time of the ceremony before the marriage comes into existence. More recently, the English and Scots Law Commissions have recommended, without putting forward any restrictions, that "a reference to the law of domicile should be construed as a reference to the whole of that country (including its private international law) and not merely to its domestic rules".<sup>(236)</sup>

Conversely, the application of renvoi as to essential validity of marriage has been rejected by the Algerian law. Since Algerian family law is mainly based on religious principles, the acceptance of renvoi, where the *lex causae* refers back to the Algerian law, will lead to the undesirable result of applying a religious law to determine the status of persons belonging to a religious denomination other than Islam.<sup>(237)</sup>

Furthermore, it may also promote limping status, and may undermine uniformity of status and decisions. Suppose that a married British national, originally domiciled in England, wishes to marry an Egyptian woman in Algeria, where they are domiciled. The Algerian choice of law rule indicates English law, but under English conflict rules capacity to marry is governed by the *lex domicilii*. However, if the case came before English court, the English domestic law would be applied, and thus the marriage is invalid on the basis that it is contrary to the English conceptions of status. Suppose that the Algerian court accepts renvoi, the marriage will be valid since polygamy is permitted by the Algerian law; there will be a limping marriage. Thus, if the Algerian court refuses renvoi, it will decide the case exactly as the English court would do, applying English domestic law to hold the marriage invalid. This is true if the application of English domestic law has not been refused as being against the Algerian conception of status.

#### **E- Capacity To Enter Into A Polygamous Marriage**

It is worth noting that the concept of polygamy in English and Scottish private international law covers not only actually polygamous unions, but also a marriage which is celebrated abroad in a polygamous form, as being potentially polygamous, even though it is a *de facto* monogamous union and the parties belong to a monogamous country. Until recently, the prevailing view in common law is that the determination of the polygamous or monogamous nature of a marriage was entirely a matter for the *lex loci celebrationis*, irrespective of whether the husband has, under his personal law, capacity to contract a polygamous marriage.<sup>(238)</sup>

It has been respectfully submitted that such a view, which is the outcome of the earlier English decisions in which *de facto* monogamous marriage were refused recognition, is justified on the basis that the nature of a marriage should depend on the parties' intentions. Thus, if the parties' celebrate a marriage in the local form of a country

where polygamy is the cornerstone of matrimonial law, it would be presumed that the parties in question intended the marriage to be of polygamous nature.<sup>(239)</sup> Undoubtedly, this submission appears to be inconsistent with a *dictum* of Lord Brougham in Warrender v. Warrender:

"The marriage-contract is emphatically one which parties make with immediate view to the usual place of their residence. An English man marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he marries with a view of being a married man and having a wife in England, and for English purposes..."<sup>(240)</sup>

On the other hand, one might argue that this view of classifying the marriage according to its nature in the *lex loci* fails to give adequate consideration to the fact that the issue of whether the husband is entitled to take a plurality of wives is a question of capacity and ought to be determined by the parties' personal laws. If this view is taken, then characterisation of a marriage as being potentially polygamous on the sole ground of its being celebrated in a polygamous form is anomalous, as it would promote limping status. The application of the latter view, as we shall see below, has had an important effect on the English and Scottish view as to capacity to enter into a polygamous marriage <sup>(241)</sup>

According to a widely held opinion, the question of capacity to contract a polygamous marriage is, like capacity to marry generally, governed by the parties' antenuptial personal laws.<sup>(242)</sup> It has been widely assumed that an English or Scottish domiciliary at common law lacks capacity to enter into a valid marriage which is, under the *lex loci celebrationis* either potentially or actually polygamous.<sup>(243)</sup> It is submitted that several common law authorities seem to indicate that the dual domicile rule applies to capacity to contract a polygamous marriage. The decision in the Re Bethel case which is not concerned with capacity, it is thought, implies that an English domiciliary cannot validly contract a polygamous marriage, on the basis that this is the only interpretation through which it can be reconciled with the other English decisions.<sup>(244)</sup> Similarly,

Chitly J. in Re Ullee has expressly said that a marriage celebrated in England between a married Indian domiciliary and a domiciled English woman is "not a marriage binding on any spouse of English domicile".<sup>(245)</sup>

Moreover, Dr. Morris has pointed out that Lord Mackay's statements in Lendrum v. Chackravarti<sup>(246)</sup> indicates a preference for the same choice of law rule. In this case, the marriage was solemnised in Glasgow between a man of Indian domicile and single status and a domiciled Scots woman. The wife alleged that under Scots law, as the law of her domicile, she lacked capacity to enter into such a marriage although the husband's domiciliary law permitted polygamy. The Learned Judge, holding the marriage monogamous and invalid on other grounds, said *obiter* that:

"if the contract between these two [persons] parties was one which recognised the defender's right to enter into subsequent and co-incident marriages, then it was not a Christian marriage or a monogamous one, and it would offend the law of capacity of the wife. She could not entertain such a contract."<sup>(247)</sup>

It seems clear that a woman domiciled in Scotland cannot enter into a marriage which is characterised, by Scottish law, as being polygamous in nature. A further support to this view, it is submitted, may be inferred from Mohamed v. Knott<sup>(248)</sup> in which the court has recognised the validity of a marriage celebrated abroad in a polygamous form on the sole ground that it was valid by the parties' prenuptial domiciliary laws, notwithstanding that the parties had, soon after the ceremony, established their matrimonial home in England. It is worth mentioning that the Matrimonial Causes Act 1973 contains provisions which are in accordance, and reinforces the common law rule. Section 11(d) of this Act provides clearly that a marriage solemnised in polygamous form abroad after 31st July 1971 is void *ab initio* if either party was at the time of the marriage domiciled in England, notwithstanding its being a *de facto* monogamous marriage.<sup>(249)</sup>

Conversely, in Radwan v. Radwan [No.2]<sup>(250)</sup> capacity to contract a polygamous marriage was distinguished from capacity to contract a monogamous marriage and held to be governed by the law of the intended matrimonial domicile. In this case, a marriage between a domiciled English woman and a domiciled Egyptian man, who was already married polygamously, took place in 1951 at the Egyptian Consulate in Paris. At that date he had had two wives already, but only one of those marriages was still subsisting. The parties had previously agreed to live in Egypt the law of which permitted polygamy, and subsequently established their matrimonial home there until they moved to England in 1956. It was argued that the marriage was void, since the wife lacked, by the law of her prenuptial domicile, capacity to enter into a polygamous marriage. Cumming-Bruce J., being attracted by the desire to uphold a long-standing relationship, believed that in common law capacity to contract a polygamous marriage depended upon the law of the intended matrimonial domicile; and since the wife had capacity by virtue of her decision to separate herself from the land of her domicile, the marriage was valid.<sup>(251)</sup>

The learned Judge rejected the contention of counsel for the Queen's Proctor that Parliament had declared the dual domicile test as the only test applicable, on the basis that the common law rights of the wife "are not to be cut down by any misapprehension about the common law entertained by the law commission, by the government, or by parliament".<sup>(252)</sup> Accordingly, it has been submitted that the decision would have been the same even if the marriage had been celebrated after July 31st 1971, since Section 4 of the 1972 Act<sup>(253)</sup> is a rule of English domestic law, and it is, under Section 4(1) of the 1971 Act,<sup>(254)</sup> inoperative, if the validity of marriage is by the English conflict rules governed by a foreign law.<sup>(255)</sup> This is questionable because Section 4(1) of the 1971 Act [re-enacted by s.14(1) of 1973 Act] does not imply precisely that the intended matrimonial home test governs capacity to enter into a polygamous marriage. But it does simply mean that English courts cannot invalidate a

marriage on the sole ground of Section 1 of the 1971 Act [as amended by s.4 of 1972 Act]<sup>(256)</sup> if the parties belong to a foreign country the law of which recognises the validity of the polygamous marriage. Certainly, the decision would have been more attractive if the marriage had been upheld on the basis that it had become monogamous, as the husband divorced his second wife before he moved with the petitioner to England in 1956.<sup>(257)</sup> This decision has been strongly criticised, mainly on the ground that there is no substantial policy considerations requiring the submission of capacity to contract a polygamous marriage to a different choice of law rule from that which applies generally to the question of capacity to marry. This is because a woman's ability to marry her cousin or uncle raises the same issues as her capacity to marry a married man.<sup>(258)</sup>

As stated above, Section 11(d) of the Matrimonial Causes Act 1973 provides that no person domiciled in England has capacity to contract a polygamous marriage, whether the marriage is actually or potentially polygamous. There is no doubt that this view is solely based on the dubious common law rule according to which the nature of a marriage is exclusively determined by the *lex loci celebrationis*, notwithstanding that that matter is affected by the *lex domicilii*, the rule which determines the question of capacity to marry.<sup>(259)</sup> It is clear that all marriages celebrated abroad by persons domiciled in England in accordance with the local law would be void if that law permitted polygamy, regardless of the fact that English law prohibits polygamy. Accordingly, it might be argued that the policy objective behind this rule seems to be the prevention of an English domiciliary, whose religious or cultural traditions permit polygamy, and who wishes to seek a bride from his country of origin, from marrying in his own manner abroad, inasmuch as this affects the strict policy of immigration adopted by the government.

The rule in Section 11(d) of the 1973 Act has been described as "a legislative error,"

and has been criticised by academic commentators, most notably by Poulter, who stigmatised it as being "a serious interference with the customs of ethnic minority communities, especially those from the Indian sub-continent whose practice of arranged marriages quite often involves seeking a bribe from a family still living in that part of the world".<sup>(260)</sup> The rule seems hard to justify in principle since it ignores, though its phraseology seems to indicate, that capacity to marry polygamously is a matter for the *lex domicilii* of the parties, and that this should have an effect upon the character of the marriage. Thus, it is difficult to see why a marriage should be categorised as a polygamous marriage in nature and invalidated simply because it is solemnised in a polygamous form, if neither of the parties has capacity to contract a subsequent marriage during its subsistence. Moreover, it would be incongruous to categorise a marriage, which is potentially polygamous at its inception, as a valid monogamous marriage simply because the husband has acquired a domicile of choice in England afterwards, if the English domicile of that husband at the time of the marriage cannot confer on it an initially monogamous character.<sup>(261)</sup> A rule which makes the validity and the nature of a marriage depend on the form in which it happens to be celebrated in the country of celebration seems highly unsatisfactory and undesirable.

In the more recent English decision in Hussain v. Hussain,<sup>(262)</sup> the Court of Appeal has considered, and fully shown the unjust and socially undesirable consequences of, the rule in Section 11(d) of the 1973 Act. In 1979 a marriage was solemnised in Pakistan in accordance with the Muslim Family Laws Ordinance 1961 between a domiciled English man and a woman domiciled in Pakistan. On the breakdown of the marriage, the wife petitioned the English court for a decree of judicial separation. Counsel for the husband argued that the wife is not entitled to the decree she sought, since the marriage having been solemnised in a polygamous form, it was a polygamous marriage within the meaning of Section 11(d) of the 1973 Act, and void because the husband was domiciled in England at the time of the marriage. However, the Court of

Appeal rejected this line of reasoning, and held that as a result of the husband's English domicile the marriage was monogamous and valid. Accordingly, the decree of judicial separation was granted.<sup>(263)</sup> Ormrod L.J., who pronounced the judgement, assumed that the nature of a marriage at its inception is affected by both the *lex loci celebrationis* and the husband's domiciliary law. However, the Learned Lord Justice has submitted that a marriage can only be potentially polygamous if one, or both of the parties has capacity to marry again during the subsistence of the first marriage.

As under the Muslim law the wife cannot take a second spouse, and the husband is similarly incapacitated by his personal law, i.e. English law, the marriage is not even potentially polygamous since neither party has capacity to enter into a subsequent and co-incident marriage.<sup>(264)</sup> His Lordship, therefore, concluded that the rule in Section 11(d) of the 1973 Act is designed to prevent the celebration of a marriage abroad in a polygamous form between a domiciled English woman and a man whose personal law at the time of the marriage permits polygamy. Nevertheless, as a matter of practical significance, it may be argued that such a marriage must be held monogamous and valid if the husband, without having remarried and before the validity of the marriage is called in issue, acquires a domicile of choice in England.<sup>(265)</sup> Moreover, if it is admitted that the consequences of applying the invalidating rule would be far-reaching and very serious, with wide spread and profound repercussions on the Muslim community, it is difficult to imagine any sound reason why Parliament, in an increasingly pluralistic society, should have thought it necessary to prevent persons, whose religious traditions permit polygamy, from marrying in their own manner abroad simply because they are domiciled in England. Having assessed the relevant facts, the Learned Lord Justice concluded that it was not the purpose of the Act to prohibit English domiciliaries "from entering into marriages under the Muslim Family Laws ordinance or under similar laws which permit polygamy",<sup>(266)</sup> provided that neither party has capacity to marry polygamously.

Yet, it is beyond any doubt that the decision has remarkably alleviated the vast majority of practical problems to which the unfortunate concept of potentially polygamous marriage may give rise. Nevertheless, the Law Commission and Scottish Law Commissions have recently submitted that the decision cannot form the basis of any sound statutory reform for various reasons. In the first place, it has been argued that the reasoning in Hussain v. Hussain differentiates between the sexes for no seemingly good reason, as Section 11(d) remains operative to invalidate a marriage celebrated in a polygamous form between a domiciled English woman and a man the law of whose domicile permits polygamy.<sup>(267)</sup> Therefore, it has been suggested that this result is anomalous, discriminatory and undesirable because it is inconsistent with the modern notions of sexual equality, and may infringe the provisions of the European Convention on Human Rights which prohibit any discrimination based on sexual grounds.<sup>(268)</sup> Hence, it has been proposed that a marriage which is entered into by a man or a woman domiciled in England should not (if English law is applicable thereto in accordance with English conflict of law rules) be invalidated by reason of the fact that it is entered into under a law which permits polygamy, provided that neither party to the marriage is already married.<sup>(269)</sup> Secondly, it is further pointed out that the decision in the Hussain case concerns only marriages falling within the scope of Section 11(d), which has no application in England to marriages celebrated before 31st July 1971. Since these marriages are governed by previous common law, it is uncertain whether the English courts would achieve the same conclusion as the Court of Appeal. Therefore, the proposed legislation, it is thought, should be retrospective so as to validate marriages celebrated before the date of its coming into existence. Nevertheless, a marriage solemnised before the retrospective legislation comes into force should not be validated if it has been declared void by a decree of nullity, or if either party to the marriage has subsequently contracted another marriage with a different partner which would be rendered invalid by the retrospective validation of the first marriage.<sup>(270)</sup>

Similarly, it has been argued that the Scottish courts, as there is no provision in Scots law equivalent to Section 11(d), may not achieve the same result as the Court of Appeal in Hussain v. Hussain, inasmuch as the common law governing capacity to enter into a polygamous marriage is uncertain and undeveloped.<sup>(271)</sup> Hence, it is proposed that a person domiciled in Scotland should not lack capacity to contract a marriage by the sole reason that the marriage is entered into under a law which permit polygamy.<sup>(272)</sup>

In conclusion, it is interesting to note that the English and the Scots Law Commissions in their 1985 combined report have proposed a uniform approach within the United Kingdom by suggesting that a man and a woman domiciled in England, or in Scotland, should have capacity to contract a marriage in a polygamous form abroad, provided that neither party to the marriage is already married.<sup>(273)</sup> These recommendations would, if implemented, introduce some rationality and certainty into what has become a somewhat confused area of conflict of laws. In fact, the Private International Law (Miscellaneous provisions) Act 1995 has been enacted to that effect. As regards English law, section 5(1) of this Act provides clearly that: "A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and wales...".<sup>(273a)</sup> Further, Section 7 of this Act has also clarified the Scottish position within the present subject. This section provides that: "(1) A person domiciled in Scotland does not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permit polygamy...".<sup>(273b)</sup> It is thus clear that a marriage is valid in Scotland and will be treated in the same way as a union entered into in a monogamy-insisting country as long as neither parties remarries during the subsistence of the marriage, irrespective that it has been entered into under a law which permits polygamy. These statutory changes are to be welcomed for they bring about

the English and Scottish positions in line with the rest of Western legal systems, eliminate limping marriages, and they are consistent with the policy considerations relevant in marriage.

### Section Three

#### Determination of the Substantive Requirements of the Marriage

It is universally established that the essential validity of mixed marriages is determined by applying the parties' personal laws distributively, in a sense that each party should only satisfy the requirements imposed by his own law and not those of the other party's personal law. It is therefore sufficient for holding a mixed marriage valid if each party has capacity to marry by his own law, according to the dual domicile [nationality] doctrine.<sup>(274)</sup> Nevertheless, it is generally believed that there are policy considerations requiring the application of the parties' personal laws in cumulation, inasmuch as certain substantive requirements are characterised as bilateral impediments the objective of which cannot be achieved if the parties' prenuptial personal laws are applied distributively.<sup>(275)</sup> Suppose, for instance, that an Algerian subject wishes to marry her uncle who is an Egyptian national. While Egyptian law permits such marriages, the Algerian law provides that a marriage between uncle and niece is prohibited on the ground of consanguinity.<sup>(276)</sup> If the Algerian provision is, however, interpreted as simply preventing the uncle who is an Algerian subject from marrying his niece, the distributive application remains possible and the marriage will be valid. But, if it is interpreted as prohibiting the marriage of uncle and niece, in other words neither of them has capacity to marry the other under the Algerian law, the marriage cannot be validly celebrated.

The concept of bilateral impediments, under the continental law system, connotes the existence of certain marriage impediments which affect both parties, so they must be considered not only when they exist in relation to the party subject to the law imposing

it but also when they exist in regard to the other party, notwithstanding that the personal law of that party itself ignores those impediments.<sup>(277)</sup> The obvious result of this view, however, is that each party must comply not only with the essentials of marriage required by his own law but also with those requirements, characterised as bilateral impediments, of the other party's personal law. It is interesting to underline that there is no objective test by which the unilateral and bilateral character of any particular impediment can easily be ascertained, and this is in view of the fact that an impediment existing in one legal system is not necessarily the same as that of an identical impediment in another legal system. The distinction in question, it is submitted, depends generally on the interpretation of the objective policies of the domestic law laying down the respective impediments. Arguably, the impediments which are solely designed to protect the parties' interests are to be considered unilateral, and thus must be satisfied by the party who is subject to the law establishing them. On the other hand, the impediments concerning the public interests and the marriage relationship itself are termed bilateral, as they apply even to the party who is not subject to the law of which the respective impediments form part.<sup>(278)</sup>

Professor Issad assumes that the present distinction is maintained under the Algerian law, and stresses that the fundamental problem consists of classifying the impediments in one of the two categories. However, the learned author suggests while the essential requirements of age, parental consent and parties' consent are beyond any doubt unilateral impediments, as they concern the individual ability of each party to enter into a marriage. The prohibited degrees of consanguinity, affinity and fosterage, and the monogamous or polygamous character of marriage are generally classified as bilateral impediments.<sup>(279)</sup> It is thus reasonably clear that the bilateral or unilateral character of any impediment must be determined by the law imposing it, provided that it is not within the scope of article 13 of the civil code or, contrary to the Algerian public policy.<sup>(280)</sup>

Although the unilateral-bilateral dichotomy is not commonly used in the common law countries, there are statutory provisions and judicial authorities to the effect that the realism of this distinction is also recognised in English and Scots laws endorsing the dual domicile rule. However, it is a rule of English and Scots laws that a person domiciled in England and Scotland is not only prohibited from remarrying while he is bound by a previous, valid and subsisting marriage, but also from marrying a married person, even though the marriage is recognised as valid by the married person's personal law which accepts polygamy.<sup>(281)</sup> Furthermore, Sir Jocelyn Simon P. has expressly pointed out *obiter*, in Padolechia v. Padolechia,<sup>(282)</sup> that neither a married person can validly contract a marriage in a monogamous country, nor can a single person validly contract a marriage with a married person in a monogamous country, if either party is already married by either's personal law. It is also interesting to note that Mr. Stone, in his note on Pugh v. Pugh, seemingly endorses the approach in question, for he said:

"Cases of prohibited degrees involve a pre-existing relationship between the parties of consanguinity or, more usually (since most of the cases concerned marriage with the surviving spouse of a deceased sister or brother), of affinity, whereas in Pugh v. Pugh the incapacity was peculiar to one party to the marriage alone."<sup>(283)</sup>

Certainly, the unilateral-bilateral dichotomy expresses the existing divergences between legal systems as to various impediments' construction, and covers a reality recognised nearly by all legal systems adopting the dual domicile [nationality] rule. Nonetheless, the present approach has been stigmatised as being too conceptualistic, for it ignores the complexity of the problem requiring consideration of various circumstances.<sup>(284)</sup> It is, however, anomalous to base the distinction in question on the interpretation of the relevant domestic law rules which are generally enacted with the view to the domestic situations and to those involving foreign elements. It is therefore inconceivable to rely on the context of domestic provisions for classifying marriage impediments within the

sphere of conflict of laws. Moreover, reliance on the objective and the policy of the provision establishing the impediment give rise to difficulties not only because the purpose of the policy behind the same impediment may vary considerably from one legal system to another, but also the same prohibition may have several functions within one legal system.<sup>(285)</sup>

#### **A- Age of Marriage Requirement**

It is worth noting that the minimum age for marriage varies considerably among legal systems, as much as many years for persons of the same sex, and it varies in the domestic laws of several countries between members of the different sexes. Generally speaking, these variations seem partly to bear out the "differences in the natural conditions affecting the age at which physical and mental maturity is reached, but in part they are only explicable against the background of historical tradition, in particular a strong influence of religious law and concepts."<sup>(286)</sup> However, the minimum age established in many legal systems usually reflects a legislative decision as to the age at which almost sexually normal children of the particular sex will have reached puberty and as to the age of informed consent, for they prohibit marriages below that age. Conversely, the minimum age established in some other legal systems can be construed as reflecting not the age of puberty, but the age at which a person is capable of giving true consent to the marriage, since they provide for dispensations allowing persons below that age to marry in case of serious reasons.

It is well settled, both in common and civil law countries, that the marriageable age is a matter affecting capacity to marry, and thus fall to be determined by the parties' domiciliary, or national, law respectively in accordance with the personal law doctrine. The justification for referring to the personal laws of the parties is that the policy and the purpose of the marriage age requirement is the protection of immature persons from the "stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth", and thus the country to which the parties belong at the time of the marriage

is the most appropriate law to determine what protection they require.<sup>(287)</sup> Accordingly, the almost unanimous view in continental law countries is that the age of marriage requirement is a unilateral impediment, so each party must satisfy the minimum age for marriage prescribed by his own law, notwithstanding the marriageable age established by the other party's personal law.<sup>(288)</sup> It is worth noting that a different view has been taken in the main English authority on choice of law in the case of non-age, even though the overwhelming weight of English academic opinion has been inclined to be in favour of treating the requirement in question as a unilateral impediment.<sup>(289)</sup> In Pugh v. Pugh,<sup>(290)</sup> a marriage between a domiciled Englishman and a girl of 15 years, whose domicile was Hungarian, was celebrated in Austria in 1946. Although the marriage was valid by the wife's domiciliary law and by the *lex loci celebrationis*, it was held to be void on the ground that: " by the law of the husband's domicile it was a marriage into which he [though he was of full age] could not lawfully enter."<sup>(291)</sup> The decision was mainly based upon section 1 of the Age Marriage Act 1929,<sup>(292)</sup> the wording and the context of which was interpreted, by Pearce J., as stipulating that a marriage is void if either of the parties, not necessarily the party whose domicile was English, is under the age of sixteen (16), regardless of the place where the marriage was performed. Pearce J.'s judgement is not easily reconcilable to any sound reasoning, on the basis that there is no sufficient reason for English law to protect foreigners whose own law deemed such protection unnecessary, and also the policy of the age rule should not be extended to protect " middle-aged colonels from the wiles of designing hungarian teenagers."<sup>(293)</sup> Since children may develop socially, emotionally and even physically at different rates in different environments, it seem therefore sensible for English court to rely on the judgement of the law of the country to which a party belongs for the decision whether he/she is mature enough to marry.<sup>(294)</sup>

On this point, however, Scots law is different in so far as a Scottish domiciliary who is

over the age of 16 has capacity to marry a foreign domiciliary who is under that age, provided that the ceremony takes place abroad and the foreign party has capacity under his or her *lex domicilii* and, probably, under the *lex loci celebrationis*. The reason is that the rule in section 1(1) of the Marriage (Scotland) Act 1977 demonstrates clearly that the minimum age set out in that section affects only the capacity of Scots domiciliaries, for it provides: "No person domiciled in Scotland may marry before he attains the age of sixteen"<sup>(295)</sup> Thus, a person of 15 years of age, whose domicile is Scottish, has no capacity to contract a marriage anywhere in the world, even if the law of the foreign *lex loci celebrationis* permits the celebration of marriage between persons who are under the age of 16. Moreover, section 1(2) of the 1977 Act states that a marriage solemnised in Scotland between persons either of whom is under the age of 16 is void.<sup>(296)</sup> Accordingly, a foreigner who is under the age of 16 has no capacity to enter into a marriage in Scotland, even if he or she has such capacity under his or her *lex domicilii*, in accordance with the general rule that each party must have capacity to marry both by the *lex domicilii* and the *lex loci celebrationis*. It is further submitted that although the parties are over the age of 16, they cannot celebrate a marriage in Scotland if one or both of them are under the age required by their *lex domicilii*.<sup>(297)</sup> Since the 1977 Act refers specifically to a marriage celebrated in Scotland, it is too clear for arguments that a marriage celebrated abroad between foreigners either of whom is under the age of 16 is recognised as valid in Scotland, provided that it is as such under the parties' antenuptial domiciliary laws. The same view has been taken in a recent English case, i.e. Mohamed v. Knott,<sup>(298)</sup> where a marriage between a man and a girl of 13 years, both domiciliaries and nationals of Nigeria, was celebrated there and shortly afterwards they moved to England. Although the wife was under the age required by the *lex fori*, the marriage was held to be valid in England because the wife had capacity to marry by her *lex domicilii*, i.e. Nigerian law.

As regards Algerian law, the minimum age for marriage is set out above the age of 16,

and varies between members of different sexes. However, article 7 of the Algerian family code provides that an Algerian man and an Algerian woman have no capacity to marry before he and she attains the age of 21 and 18 respectively. Nevertheless, a judge [the competent authority] may grant a dispensation as to age, for serious reasons, in the interest of the intending spouse.<sup>(299)</sup> It is interesting to underline that the age of marriage under the Algerian law is an aspect of capacity to marry referable to the national law of the parties, so that each party must have capacity by the law of his or her antenuptial national law. As in Scottish law, it may be conceded that a marriage solemnised abroad between foreigners who have capacity by their respective national laws is recognised in Algeria, even if the parties are under the age required by the forum. Moreover, the application of the personal law of a foreigner who wants to celebrate a marriage in Algeria must be accepted by the competent authority celebrating the marriage and by the courts if, and only if, that law requires a higher age for marriage than the minimum age required by the forum. Conversely, if the personal law of that foreigner permits marriage at a lower age than the forum, the marriage can never be sanctioned by the marriage officer, or upheld by the courts, on ground of public policy.<sup>(300)</sup> The present writer believes that this view is too strict, since the age for marriage required by the Algerian law is subject to dispensation in domestic cases. Hence, the limit below which the application of more liberal foreign laws will not be tolerated should be fixed at the age below which the Algerian law does not provide for the possibility of dispensation from the requirement in question.<sup>(301)</sup>

#### **B- Consent of the Parties**

It is generally agreed that the reality of consent, as distinct from the manner of expression of consent, is a basic element, and a matter of the essential validity of marriage.<sup>(302)</sup> However, a marriage will not be valid if either party has not freely and truly consented to it, whether in consequence of duress, fear, fraud, error, coercion, misrepresentation, etc., or if the parties have consented to enter into it not for living

together in matrimony but for some extraneous purpose, e.g. to avoid immigration rules. Although the defects of consent are nearly the same everywhere, it is interesting to underline that domestic laws of different countries are at considerable variance as to the fact constituting these defects which may vitiate the consent.<sup>(303)</sup>

It is clear that, under the Algerian domestic law, there can be no valid marriage unless each party consented to marry the other. As a matter of principle, a marriage will be void if either party's consent is vitiated by error, or obtained as a result of duress [violence] or fraud [dol].<sup>(304)</sup> Professor Issâd has pointed out that matters affecting the parties' consent are to be treated as unilateral, so that each party is only subject to the conditions of consent established by his own personal law, and not to those of the other party's personal law. Since consent of the parties is a matter of the essential validity, and the rules as to the defects of consent exist, *prima facie*, in the interest of the parties, the question of whether the consent of either party is defective should be determined by reference to that party's *lex patriae*.<sup>(305)</sup> Thus, for example, a French person goes through a ceremony of marriage in Algeria with a Scottish woman, believing it to be merely a betrothal ceremony. Supposing that the mistake as to the nature of the ceremony is not a defect of consent under French law, the French party cannot rely on such mistake to invoke the nullity of the marriage, even if that mistake renders consent defective under Scottish law.<sup>(306)</sup>

The application of the relevant foreign law designated by the Algerian conflict rule does not raise any problems where it is more stringent than the Algerian law as being the *lex fori*. Suppose, for instance, a marriage was celebrated in Algeria between an English domiciliary and an Egyptian national under whose law the error to the qualities of a party to the marriage operates to vitiate consent. Although, mistake as to the moral and social qualities, under the Algerian law, is not a defect of consent unless it is induced

by the fraudulent misrepresentation or concealment of facts by the spouse concerned, the Egyptian law will be applied as being more exacting than the *lex fori*, and thus the marriage is void.<sup>(307)</sup>

Conversely, if the relevant personal law is less exacting than the *lex fori*, public policy is likely to be concerned, especially where the marriage is solemnised in the forum. However, it has been submitted that such a marriage can never be solemnised by the marriage officer or upheld by the *Forum's* courts, if either party's consent is overborne by duress or fraud under the *lex fori*, regardless of the personal law of the party whose consent is alleged to be defective. This is because the consent requirement of the Algerian law "are considered to represent a minimum level below which it is not possible to go when the marriage takes place in that country." Accordingly, the validity of a marriage celebrated abroad in compliance with the relevant foreign laws will be recognised before the Algerian courts, even if the consent of the parties, or one of them, is defective by the standards of the *lex fori* provided that it is recognised as such by the parties' personal laws. To this extent, "it seems reasonable to assume that public policy will not interfere to require the annulment of such marriage."<sup>(308)</sup>

So far as Scottish law is concerned, the overwhelming weight of judicial opinion is that a marriage shall be void if either party did not freely and truly consented to it, whether by reason of insanity, intoxication, force, error, fear or otherwise.<sup>(309)</sup> In Johnstone v. Brown,<sup>(310)</sup> for instance, the marriage was held to be void on the basis that the petitioner at the time of the ceremony was so inebriated, and thus lacked capacity to consent truly to the marriage. The Scottish decisions on the choice of law governing the validity of marriage, which is alleged to be void on some grounds vitiating the true consent of the parties, present a rather confused picture. The question what law governs defects in consent is not conclusively answered, since Scots law was applied in all decided cases without giving indication as to the ground on which it was applied.<sup>(311)</sup> Professor Clive has pointed out that in all cases where consent of the

parties was in issue, the Scottish law "was the law of the place of celebration, the law of the forum and the law of the domicile of a party whose consent was allegedly defective."<sup>(312)</sup>

It is worth noting that here as in the part of the conflict of laws relating to the legal capacity, the judicial and extrajudicial authorities, both in England and Scotland, indicate preference for various choice of law rules, namely the *lex loci*, the *lex fori*, the *lex domicilii*, and the law of the country with which marriage has the most real and substantial connection. In the first instance, it has been argued that the reality of the parties' consent is to be determined by the *lex loci celebrationis*, on the basis that the respective issue is a contractual defect invalidating the parties' agreement, as well as the ceremony if it is overborne by duress, force and fear, etc.<sup>(313)</sup> In Di Rollo v. Di Rollo, the only Scottish case in which the issue of choice of law was discussed, Lord Ordinary expressly stated that "the question whether the pursuer gave a true consent to the marriage is to be decided by the law of Scotland as the *lex loci celebrationis*."<sup>(314)</sup> This view has been strongly criticised, mainly on the ground that "to say that the ceremony is nullified seems to be simply another way of saying that the marriage is void." However, the proposed rule is in glaring inconsistency with the reason given for many of the relevant judgements, and fails to take into consideration the distinction made between the mode of giving consent and the fact of consent itself.<sup>(315)</sup> Thus, "The method of giving consent as distinct from the fact of consent is essentially a matter for the *lex loci celebrationis*, and does not raise a question of capacity or essential validity."<sup>(316)</sup> The application of the *lex loci* to the defect of consent would prevent the parties from relying on the defects of consent existing under their domiciliary laws, if such defects do not constitute a part of the domestic law of the country of celebration, to invoke the nullity of their marriage.<sup>(317)</sup> It is therefore beyond any doubt that this view would promote limping marriages, since the courts of the domicile would strike down a foreign marriage entered into under duress, fraud, and fear, etc., where that

defect was considered as fundamental under their own law, whether or not a nullity decree would have been granted by the the *Lex loci celebrationis*. Since the proposed rule is not accepted as a choice of law rule with regard to the legal capacity issues, and since the fact of consent is a substantive issue, it would be inappropriate and undesirable "to refer a substantive issue exclusively to the law of a country with which the parties may only have a fortuitous or fleeting connection."<sup>(318)</sup>

Conversely, Professor Clive has suggested that the consent of the parties is to be governed by the law of the *forum*, since its application generally seems to be consistent with the actual English and Scottish decisions on the respective issue, even though the reasons given by the courts in some cases contravene such a rule. As Dicey has pointed out, the main reason for referring to the *lex fori* is that "the question whether a union is voluntary is a matter of fact, and that, before considering the legal effect of a marriage ceremony, the court must first be satisfied as to the fact of marriage".<sup>(319)</sup> This is questionable and less than convincing on the ground that the reality of consent, though it is a matter of fact, involves also "the legal issues of whether the facts found amount to a defect in consent and of the effect of this on the validity of the marriage".<sup>(320)</sup> On the policy ground, it may be argued that the application of the *lex fori*, as a choice of law rule in this context, would lead to uncertainty, limping marriages, and would promote forum-shopping because "the outcome of the proceedings would be dependent on the petitioner's choice of forum".<sup>(321)</sup> It is therefore reasonably clear that the *lex fori* rule is undesirable and hard to justify in principle, inasmuch as it would facilitate the invalidation of marriage.

Nevertheless, the *lex fori* has an important role to play in refusing recognition to a capacity conferred by the applicable law, especially where the marriage is celebrated locally. Thus, for instance, a marriage celebrated in England or Scotland would be invalid, if either party's consent is overborne by mistake as to the identity of the other

party, regardless of its validity under the relevant foreign law. Where, conversely, the applicable law is more exacting, the *forum's* courts might be prepared to apply it, and thus to invalidate the marriage, e.g. on the ground of mistake as to the moral and social attributes which is not a defect of consent under the law of the *forum*.<sup>(322)</sup>

Professor Clive, being aware of the arbitrary result to which the application of the *lex fori* would lead, has submitted that the "best rule would be to apply the law with which the marriage had at the time the most substantial connection".<sup>(323)</sup> In Vervaecke v. Smith,<sup>(324)</sup> where the question of sham marriage was in issue, Lord Simon was of opinion that the "quintessential validity" of a marriage is determined by the law of the country with which the marriage has the most real and substantial connection. It has been argued that the present approach is a vague test which may "produce an unacceptable degree of uncertainty into the law"<sup>(325)</sup>

However, the almost unanimous view of judicial and academic authorities is that the personal law of the parties, i.e. *lex domicilii*, is the most appropriate law to govern the reality of consent as being a matter of the essential validity of marriage. The argument in favour of the parties' prenuptial domiciliary law, for Dicey, is that the question of consent "is analogous to one of capacity, in that marriage is essentially a 'voluntary union', and the question whether a union is in law voluntary should depend upon the personal law to which each of the parties was subject at the date of the ceremony".<sup>(326)</sup> In Szechter v. Szechter,<sup>(327)</sup> a Polish domiciliary divorced his wife and married his secretary for the sake of getting her out of prison and enabling her to reach the west where she could obtain urgently medical treatment. The wife, on arrival to England, brought nullity proceedings before the English court on the basis that she did not consent to the marriage by reason of duress. Although the parties' antenuptial domiciliary law and the *lex fori* were the same as to the effect of duress, the learned judge stated clearly that the marriage was void because it was as such under the Polish

law as being the law of the parties domicile.<sup>(328)</sup>

It remains to consider whether the parties' personal laws, in the case where they are domiciled in different countries, should be applied in cumulation or distributively. Professor Dicey seems to suggest that the issue of consent is a bilateral impediment to which the parties' prenuptial domiciliary laws apply cumulatively, for he said: "No marriage is (semble) valid if by the law of either party's domiciles he or she does not consent to marry the other."<sup>(329)</sup> Thus, a party to a marriage may invoke the nullity of the marriage if he did not consent under his own, or under the other party's premarital domiciliary law. This is questionable on the basis that the policy behind the requirement of consent is the protection of the party's interest whose consent is alleged to be defective. Therefore, it is difficult to imagine any sound reason "why, if a party's own law considers that he has validly consented to the marriage, he should nevertheless be entitled to avoid the marriage on the basis of his lack of consent under the other party's domiciliary law".<sup>(330)</sup> Hence, it has been submitted that the better view is the application of the party's domiciliary law whose consent is allegedly defective, so that whether he does not consent under the other party's personal law is irrelevant.<sup>(331)</sup>

### **C- Parental Consent**

It has been already indicated that the requirement of parental consent is the selective area where conflict of law problems commonly arise, insofar as the characterisation of that issue varies considerably from one legal system to another. While it is characterised under English and Scottish laws as a matter of formal validity referable to the *lex loci celebrationis*, it is regarded by the Algerian law as a matter affecting capacity to marry and thus must be determined by the parties' *lex patriae*.<sup>(332)</sup> The overwhelming weight of opinion among continental writers is that parental consent is to be treated as unilateral, so that each of the parties is only subject to the requirements imposed by his own law.<sup>(333)</sup> The argument in favour of applying the party's law requiring parental

consent is that the policy of such provision is generally to protect the party whose law establishes that condition from his own immaturity, and the parents' interests.

Unlike the other unilateral requirements, the relevant foreign law will be applied even if it is more liberal than the *lex fori* in the sense that it permits its own subject to marry without the parental consent. Thus, a marriage which takes place in Algeria without parental consent, between foreigners whose laws require age of majority slightly lower than the age required by the Algerian *forum*, would be valid before the Algerian courts. This is because the public policy has no overriding effect on the conflict of law rule for the questions of parental consent.<sup>(334)</sup> Moreover, it is usually agreed that effect must be given to the relevant foreign law importing a more exacting regulation of this matter than the *lex fori*, as to require parental consent at a higher age limit than the *forum*. However, a marriage celebrated in Algeria between two foreigners aged 23 without parental consent would be held invalid before the Algerian courts on the ground of comity, if it is regarded as such by their personal law or laws.

#### **D- The Prohibited Degrees of Relationship**

Although it is generally recognised that the prohibitions against marriage between persons standing in a certain relationship to each other are of universal character, the kinds and the degrees of relationships which constitute legal impediments to marriage vary considerably among legal systems. The existence of such wide variations reflects the differences in the social, moral and religious concepts upon which the rules as to the prohibited relationships are predominantly based. While the prohibitions, both in Scottish and Algerian laws,<sup>(335)</sup> are mainly based on consanguinity and affinity, the difference lies in that the prohibitions in Scots law extend to the relationships by adoption,<sup>(336)</sup> whereas in Algerian law they extend, not to the adoptive relations, but to the relationships by fosterage [Allaitment].<sup>(337)</sup> The reason of such rules, however, seems to be the prevention of marriage relationships which are destructive of the morality or religion prevailing in the states concerned, and may be also, in cases of

consanguinity, to reduce the risk of conceiving physically or mentally handicapped children. One might think that the policy objective of such impediments is the protection of the society from the feeling of disgust to which certain relationships may give rise and the family concerned from disturbing sexual relations.<sup>(338)</sup>

It is well established, both in common and civil law countries, that the prohibited degrees of relationships are matters affecting capacity to marry referable to the parties' personal laws, i.e. the law of their domicile or nationality at the time of the marriage. The reason for referring to the personal laws of the parties is that the main purpose of the prohibiting rules seems to be the protection of public interest. As a matter of principle, a marriage will be void if the parties are within the prohibited degrees of relationships set forth by their personal law or laws; even though it is valid by the law of the *forum qua lex fori et lex loci celebrationis*.<sup>(339)</sup> This rule holds equally true if the law of either party considers their relationship as constituting a legal impediment to the marriage, notwithstanding the marriage validity under the other party's personal law as the parties are not within the forbidden degrees of relationship or, the impediment is unknown to that legal system or it has been removed by dispensation.<sup>(340)</sup> To that extent, it has been pointed out that the rules prohibiting marriage between certain categories of relatives are to be characterised as necessarily bilateral because the disqualifying fact refers to circumstances in respect of the quality or capacity of both parties to the relationship. If, for instance, Algerian law forbids marriage between uncle and niece, it goes without saying that the marriage will be barred whenever one of them, whether the uncle or the niece, is an Algerian national; for a marriage can only be lawfully solemnised if both parties have capacity to marry each other.<sup>(341)</sup>

So far as the Algerian law is concerned, it appears that the general rule as to capacity to marry applies also here, so the prohibited degrees of relationship, being a substantive requirement of marriage, must be determined by each party's personal [national] law.

However, it is undoubtedly clear that a marriage, though celebrated abroad, between persons related in degrees specified in the family law code 1984, (articles 23-29) will be void before the Algerian courts not only if both parties are Algerian subjects, but also if either the husband or the wife is an Algerian citizen at the time of the marriage.<sup>(342)</sup> The question that arises is whether a marriage of an Algerian with a foreigner whose law regards the marriage invalid for reasons of consanguinity or affinity, whether celebrated locally or abroad, will be held valid before the Algerian courts on the sole ground that the would-be spouses are not within the prohibited degrees set forth by the family law code 1984. According to the general principles of private international law, the answer seems negative because the impediments based on the degrees of relationships are characterised as bilateral impediments which affect not only the individual capacity of the parties, but mainly the marriage relationship that is to be created. The reason is simply that effect must be given to the rules of the relevant foreign law which establishes wider degrees or other kinds of forbidden relationship than the *forum*.

But the wording and the context of the article (13) of Algerian civil code 1976, as interpreted by Professor Issad, seems to suggest that the marriage in this case will be held valid, regardless of its invalidity under the other party's national law; for it provides clearly that the Algerian law is the only applicable law whenever an Algerian subject is involved thereof.<sup>(343)</sup> The rule in question is not easily reconcilable to any sound reasoning on the basis that there is no sufficient reason for Algerian law to be applied exclusively to determine the validity of the marriage where a bilateral impediment is in issue, for a marriage can only be recognised as valid if both parties are free to marry each other. However, the proposed rule is irrational inasmuch as the aim, or at least one of the aims, of the reference to the foreign law is to ensure that the marriage will be recognised as valid by that law. Furthermore, it is commonly accepted

that it is undesirable to give special preference to the *forum law qua lex fori et lex patriae* of one of the parties, because of the limping marriages that must inevitably result. One might therefore think that the article (13) should be interpreted as providing, not for an exclusive application of the Algeria law, but for a cumulative application of that law along with the relevant foreign law. The universal validity principle, the prevailing of harmonisation and uniformity of decisions, and the desire to prevent the creation of limping marriages would seem to demand this.

The application of the relevant foreign law rules, designated by the Algerian conflicts rule, does not give rise to any difficulties whatsoever where it imports a more exacting regulation of this matter than the Algerian domestic rules as being the *forum*, whether because the kinds, or the degrees of the prohibited relationships of that law are wider than those provided for by the *lex fori*. The reason is that the application of such rules is, it is thought, of no concern to the *forum's* public policy, and the legitimate interest of the country to which the parties belong in the application of its domestic policies should be upheld. However, a marriage prohibited by the parties' national law is, though valid by Algerian domestic law, invalid in Algeria, whether solemnised locally or abroad. It is well established that this holds equally true for cases where the marriage is void by the national law of either party, provided that the other party is not an Algerian subject.<sup>(344)</sup> Although, for instance, marriages between first cousins are lawful in Algeria, persons so related will be debarred from marrying each other there if they are, or one of them is of Portuguese nationality, since the application of the prohibitory rule of the law of Portugal is not offensive to the Algerian notion of public policy.<sup>(345)</sup>

Conversely, the relevant foreign law will be refused application on the ground of public policy if it is less exacting than the *lex fori*, permitting marriage between persons who are within the prohibited degrees as set out by the law of the *forum*. This is because, to use Palsson's words, "the consideration of religion, morality and social policy

underlying the rules as to prohibited relationships are often held to carry such force as to demand the application of those rules in respect of all marriages celebrated within the enacting country and to exclude the enforcement of foreign law based on different policies."<sup>(346)</sup> However, one might say that the marriage impediments based on the prohibited degrees of relationship, as prescribed by the Algerian law, are usually held to form part of public policy and so require application in respect of all marriages solemnised in Algeria, since such impediments are all regarded as being of absolute nature. Suppose, for example, that two German nationals, uncle and niece, desire to celebrate their marriage in Algeria. Although German law permits marriage between uncle and niece, the marriage can never be sanctioned by the marriage officer, or upheld by the courts on ground of public policy in accordance with the civil code 1976, article 24, insofar as marriage between uncle and niece are deeply offensive to the Algerian's ideas of justice and morality.<sup>(347)</sup> Despite the application of the local prohibitions, by virtue of public policy, seems to be well justified when the celebration takes place in Algeria, it is worth stressing that public policy considerations will rarely intervene to defeat the recognition of the validity of a marriage solemnised abroad in compliance with the relevant foreign law even if it conflicts with an absolute prohibition of the Algerian law. This is because public policy is an exceptional jurisdiction which must be exercised with extreme caution.<sup>(348)</sup> It is undoubtedly clear that the suggested solution is in glaring consistency with the prevailing policy of protecting existing marriages [*favor matrimonii*], promotes uniformity of decisions, and seems to have the advantage of reducing the possible occasions for limping marriages. One might therefore conclude that reasons of public policy would not be adduced to deny recognition to such marriages, if valid by the parties' personal (national) law, unless the parties are so closely related, such as marriages between brothers and sisters, which hardly even occur in the practice of conflict of laws.<sup>(349)</sup>

As regards English and Scottish laws, the prevailing view is that the prohibited degrees

of relationships, as being matters of substantive validity, are to be governed by the law of each party's domicile at the time of the marriage. In Sttomayer v. De Barros [N°1],<sup>(350)</sup> the facts of which have already been stated, the court of appeal held that a marriage celebrated in England between first cousins domiciled in Portugal is, though valid in England, void because the parties have failed to comply with the relevant foreign law, i.e. the law of their domicile at the time of the marriage. This decision, though is confined to the case where both parties are domiciled in the same country at the time of the marriage, seems to be the prevailing view also where the parties are domiciled in different countries, for the application of the decision in Sottomayer v. De Barros [N°2] <sup>(351)</sup> is restricted to the case where an English domiciliary is involved thereof. Furthermore, the Marriage (Scotland) Act 1977, with increasing explicitness, has inclined to favour the dual domicile doctrine, for it provides that a marriage between persons related in degrees specified in schedule 1 of the Act is void if either party is domiciled in Scotland.<sup>(352)</sup>

By taking a different course of arguments, Jaffey has suggested that the intended matrimonial home rule would seem to deserve preference here as the policy behind the prohibited degrees of relationships is the protection of public interests. Accordingly, he has pointed out that "A country's policy on these matters will not be affected by a marriage where the matrimonial home is abroad, even where one of the parties had his antenuptial domicile in the country. So, for example, English policy does not require the invalidation of marriage between an English domiciliary and her Egyptian uncle, if the matrimonial home is in Egypt"<sup>(353)</sup> Nevertheless, the learned writer believes in the correctness of the matrimonial home rule as a subsidiary rule applicable only where the parties have, within a reasonable time after the ceremony, established a matrimonial home in a country the law of which regards their marriage valid. It is therefore reasonably clear that Jaffey's view implies that the dual domicile rule remains applicable

where the parties have not established a matrimonial home within a reasonable time after the ceremony, seems to have the advantage of meeting the demands of *favor matrimonii* principle, and lessens the conflict of interest arising between the countries to which the parties belong at the time of the marriage and the country of their matrimonial home.

The strong weight of authority establishes that a marriage between English or Scottish subjects or, an English or a Scots domiciliary and a foreigner, will be void where the parties are within the prohibited degrees of English or Scots laws, not only if the marriage is solemnised locally but also if the celebration takes place abroad. In Re Paine,<sup>(354)</sup> it will be recalled, the marriage was held void on the basis that the parties being a woman and her deceased sister's husband incapable of intermarriage according to the law of England where she was domiciled at the time of the ceremony. To the same effect, the Marriage (Scotland) Act 1977 states clearly that a marriage is void if the parties are within the prohibited degrees set out in the Act, provided that one of them is domiciled in Scotland at the time of the ceremony.<sup>(355)</sup> Moreover, it has been submitted that this rule applies also where the marriage, whether celebrated locally or abroad, is prohibited by the law of the country where both parties are, or one of them is, domiciled at the time of the marriage. Section 2 (3) (a) of the Marriage (Scotland) Act 1977, however, makes it clear that persons related in degrees not specified in schedule (1) to the Act may lawfully marry, but without prejudice to the effect which such degrees not so specified "...may have under the provisions of a system of law other than Scots law in case where such provisions apply as the law of the place of celebration of a marriage or as the law of a person's domicile."<sup>(356)</sup>

One might therefore say that foreign marriages, whether the ceremony takes place in England, Scotland or abroad, are valid before English and Scots courts if the parties are capable of intermarriage according to their antenuptial domiciliary laws. Nevertheless, such marriages will never be sanctioned by the registrar or upheld by the English and

Scots courts if the parties are within the prohibited degrees set forth by the local domestic laws, provided that the marriage is solemnised locally. The 1977 Act provides clearly that a marriage solemnised in Scotland is void if the parties are within the forbidden degrees of Scots law, notwithstanding its validity under the law of the domicile of the parties.<sup>(357)</sup> The justification for this exception is that it would be contrary to public policy to allow people within the prohibited degrees to conclude a valid marriage in Scotland even if they had induced the marriage registrar to solemnise a purported marriage.

As regards marriages celebrated abroad, it seems to be common ground that their recognition by English or Scottish *forum* will not be affected by the fact that the parties are within the prohibited degrees of the *lex fori*, as long as they are valid by the parties' domiciliary laws. In Cheni v. Cheni,<sup>(358)</sup> for instance, a marriage solemnised in Egypt, between a Jewish uncle and niece domiciled there, was recognised in England on the sole ground that it was valid by the relevant Egyptian law, as being the law of the parties' domicile. Sir Jocelyn Simon P. expressly declined to accept the view that such a marriage, being invalid in England, must be rejected as contrary to the *forum's* public policy on the basis that a denial would perpetrate injustice and affront conscience. The learned judge therefore pointed out that the courts, in deciding the question whether a marriage is so offensive to the public policy,

"will seek to exercise common sense, good manners and a reasonable tolerance. In my view it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many people of deep religious convictions, lofty ethical standards and high civilisation"<sup>(359)</sup>

Professor Clive, though accepted Sir Jocelyn Simon P.'s view, has suggested that the Scottish courts would decline to recognise certain child marriages and marriages between persons so closely related, such as marriages between brothers and sister, for they are so offensive to the Scottish notions of morality and public policy.<sup>(360)</sup> The

general editor of the current edition of Dicey and Morris on the conflict of laws observes that "A marriage between [for example] a half-brother and half-sister, would be for most purposes refused recognition in England on the grounds of public policy, even if it is valid by the *lex loci celebrationis* and by the law of each party's antenuptial domicile"<sup>(361)</sup> The main reason for this exception, it is submitted, is that recognition of such marriages would affront conscience, as well as offending the *forum's* notions of substantial justice.

In conclusion, the present writer believes that public policy considerations might be adduced only to justify the *forum's* position, as being the law of the place of celebration, to the extent of forbidding a marriage registrar to solemnise a marriage within the absolutely prohibited degrees of relationship set out by his own domestic law. The justification for this solution is that the use of public policy at the time of the ceremony would only result in the denial of celebrating the marriage. Furthermore, the application of public policy to refuse recognition to the existing marriages would promote limping marriages, undermine the *favor matrimonii* principle, and would render the structure of choice of law rules unduly complex, especially if one of the parties has decided to remarry in the *forum*: would his capacity to remarry still to be determined by his personal law or not. It might therefore be said that the courts of the place of celebration should not refuse to recognise the validity of a marriage, though it is within the prohibited degrees of its own domestic law, if it has been celebrated nevertheless in accordance with the parties' personal laws.<sup>(362)</sup>

### **E- Prior Subsisting Marriage**

Prior subsisting marriage has recently been characterised as the main selective area where conflicts of law problems commonly arise in monogamy-insisting countries, inasmuch as the international mobility has led, this century, to an increase in the number of cases concerning the breakdowns of marriages involving a foreign element,

with the consequence that the parties' capacity to remarry depends on the recognition of divorce or nullity decrees by the relevant laws. The general prevailing view in such legal systems is that a married person has no capacity to contract a valid union with a third party whilst his or her first valid marriage is still subsisting under the parties' personal laws or, probably, the *lex loci celebrationis*. This is because the matter [prior subsisting marriage] is deemed to be such a fundamental part of public policy affecting the ethical well-being and the moral concepts of the society concerned. If a married person, for instance, has attempted to remarry or remarried in England or Scotland the marriage will be void *ab initio* before the English or Scottish courts, notwithstanding its validity by the parties' domiciliary laws which permit polygamy.<sup>(363)</sup>

However, the almost unanimous view of judicial and academic authorities maintains that monogamy is an essential requirement referable to the parties' domiciliary [national] law at the time of the marriage ceremony.<sup>(364)</sup> In *Shaw v. Gould*,<sup>(365)</sup> a marriage solemnised in England between two English subjects was dissolved in Scotland where the wife married a domiciled Scotsman afterwards, and lived with him there. The recognition of the divorce was denied in England on the basis that the first husband never lost his English domicile of origin. Since the first union was not dissolved under the law of the parties' antenuptial domicile, they had no capacity to enter into a subsequent marriage. The House of Lords held that the second union was void, notwithstanding its validity by the law of the second husband's domicile and by the law of the intended matrimonial home.<sup>(366)</sup>

It is also established beyond any doubt, both in common and civil law countries, that bigamy is to be classified as necessarily a bilateral impediment requiring consideration not only when the married person is a subject of the law imposing it, but also when it forms part of the other party's personal law. This is because the main purpose of this impediment is the protection of the basic principle of monogamy the achievement of

which would be impossible if it is only applicable where the married party is subject to the law imposing it.<sup>(367)</sup> However, it is a rule of law in England and Scotland that a domiciled English or Scottish person is not only prohibited from remarrying when he is bound by a prior, valid and subsisting marriage, but also from marrying a married person whether the proposed union is to be solemnised locally or abroad. Section 11 (b) of the Matrimonial Causes Act 1973, therefore, provides clearly that "A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say...(b) That at the time of the marriage either party is already married..."<sup>(368)</sup>

It has been submitted in white v. white,<sup>(369)</sup> that there never can be any conflict of laws between monogamous countries with reference to bigamy, as the relevant laws always agree that bigamy is an impediment preventing the solemnisation of a marriage between parties one of whom is already a party to a prior, valid and subsisting union. Certainly, the issue cannot give rise to any conflict of law problems in cases where the capacity to marry of the parties is governed by the *lex fori* as their personal law. Suppose, for instance, that both parties to a proposed union in Scotland are domiciled there. The husband was previously bound by a valid union which has been dissolved by a divorce granted by an Italian court where the wife was domiciled. It is very clear that the question whether the first union was dissolved, and thus the husband is free to remarry depends on Scottish law, i.e its rules for the recognition of foreign divorces, which is decisive in such cases as being the *lex fori et lex causae* <sup>(370)</sup>

But where the capacity to marry of both parties, or one of them, is subject to a foreign law, the above submitted view is not equally self-evident. The underlying justification lies on the existing divergences between different legal systems as to the validity of a marriage or a divorce, with the consequence that the remarrying party may be regarded by one of them as being bound by a prior marriage but not so bound by another. Suppose, however, that the parties to the proposed marriage in the above example are

and intended to remain domiciled in France. The Italian divorce decree, though it is not recognised by Scots law, is entitled to recognition in France the law of which governs capacity to marry of the parties to the proposed union according to Scots conflicts rule. The main problem, therefore, is whether the validity and the continued existence of the prior marriage, as a preliminary question, should be determined by the *lex fori* including its choice of law rules or, by the relevant foreign law applicable to the main question, namely, capacity to marry. It is worth noting that the decision in such a case would differ according to which law applied to determine the existence of the prior union; as it dissolved in France and valid by Scots law.

It is therefore clear that bigamy may give rise to conflict of law problems in a number of instances, especially where the validity or the subsistence of a previous marriage is in doubt, for the reason that it is a limping one or has been terminated by a divorce, or declared void by a decree of nullity, whose international recognition is in issue. In what follows we shall first examine the situations which occur more frequently in legal practice, namely, where the prior marriage is valid and subsisting in the eyes of the relevant foreign law applicable to the parties' capacity to marry, but not so regarded by the *lex fori*. The converse situation, where the prior union is regarded as valid by the *forum*, but not so treated by the appropriate foreign law, will also be examined here.

These situations, in particular where the recognition of a divorce or a nullity decree is in issue, can give rise to the general problem known in the modern conflict of laws as the incidental question. This is because the existence of the prior union arises for decision, not independently, but in the course of deciding the principal question of capacity to marry of the parties to the proposed marriage. This problem may squarely be presented if the principal question is governed by a foreign law under the *forum's* conflict rule; the incidental question is capable of existing as a separate issue which can be referred to an independent conflict rule; and the determination of that question under the *forum's* conflict rule must lead to a different result from that provided by the conflict rule of the

appropriate foreign law governing the principal question.<sup>(371)</sup>

The incidental question in bigamy cases and capacity to remarry have been a subject of much controversy and have produced an ample body of case law and legal literature in the modern conflict of laws. However, the judicial and academic authorities have canvassed two methods of solution within the doctrine of the incidental question, i.e. the *lex fori* method and the *lex causae* method, the scrutiny of which is very important here in order to establish whether it is possible and desirable to adopt a general rule according to which the incidental question will be determined in every case. The solution of the subsidiary question is rather complicated and perplexed by the existence of conflicting policy objectives and *disederata* that mainly concentrate on the international harmonisation of decisions and internal consistency within the *forum*, which favour the application of the *lex causae* approach, and the *lex fori* approach respectively. It is thus the present writer's view that the evaluation of the existing views must rather centre on the intimate interrelation of the incidental question and the principal one, the advantages and disadvantages of each solution judged in the light of the existing relevant policies, and the proposition that a general conflict rule within this subject must reflect the preventive nature of the essential requirements of marriage.

Another situation which must be adverted to is the conflict of laws problems arising from the restrictions on remarriage imposed upon one or both parties to the properly dissolved marriage. Since the policy objectives underlying the prohibitions against remarriage after divorce vary considerably, it is necessary to analyse the main restrictions in order to find out whether they are to be accorded extraterritorial effect, or to be rejected on the ground of public policy.

**1 - The existence of a prior marriage recognised by the relevant foreign law, but denied by the law of the forum:** This situation has been identified as the most frequently

occurring case in legal practice. It mainly concerns a remarriage after a divorce validly granted or recognised by the *forum*, but not so recognised by the relevant foreign law governing capacity to marry of the parties to the proposed union as being the *lex causae* according to the *forum's* conflicts rule. But the first instance of the present case, which rarely occurs in practice, is where the first union has not been dissolved by divorce but limps from the outset being valid by the relevant foreign law; invalid by the *lex fori*. It has already been submitted that the prevailing view in English and Scots laws maintains that incapacity of either party under his or her antenuptial domiciliary law may render the marriage void or, may primarily preclude its celebration, provided that the impediment is not contrary to the public policy of the *lex loci*.<sup>(372)</sup> One might, however, argue that although capacity to marry under the *lex loci* is required when the marriage is celebrated locally, it is hardly convincing that the *forum* will permit the celebration, or recognise the validity of a marriage on the sole ground that the parties possess capacity to marry by the *lex loci celebrationis*.<sup>(373)</sup>

It is therefore clear that a party to a marriage has no capacity to marry in England or Scotland if he is regarded as already married by the law of his antenuptial domicile, notwithstanding his capacity by the English or Scottish laws where the first union is void *ab initio*, since bigamy is not contrary to the local public policy. Suppose, for instance, that both parties to a proposed marriage in Scotland are domiciled in Greece. The man was previously married in France by means of religious ceremony. The marriage is valid by Greek law but is regarded as being void in Scotland since it is not solemnised according to the *lex loci* the law of which considers the civil ceremony as the only recognised form in which a marriage should be celebrated there. It is undoubtedly clear that the proposed union will never be solemnised in Scotland, or will be regarded there void if it has been celebrated nevertheless, because the invalidity of the first marriage in Scotland does not form a sufficient basis for conferring capacity on the parties whose prenuptial domiciliary law regards the prior union as valid and

subsisting. To this extent, Carter,<sup>(374)</sup> in a stimulating recent article on the capacity to remarry after a foreign divorce, has submitted that it is hardly conceivable that an English court would be obliged to regard a person free to marry simply because, according to English conflicts rule, the previous marriage would have been regarded as void *ab initio*.

Jaffey, being attracted by the need to avoid the consequence of a single person being held incapable to marry, has recently pointed out that the incidental question of the validity of the prior union must be determined by the *forum's* conflicts rule.<sup>(375)</sup> This view, however, seems to be based on the fact that the application of the *lex causae* has the serious disadvantage of condemning a single person to "perpetual celibacy", as well as on the growing international trend towards the right to marry free of unjustified restrictions as being a fundamental human right the protection of which should be guaranteed on both national and international bases.<sup>(376)</sup> It is interesting to note that neither of these reasons seems particularly compelling. In the first place, it appears to be scant justification in the instant case to speak of a single person being condemned to a forced celibacy because it is in the power of the married party to remove the impediment existing under his personal law by obtaining a valid divorce. Secondly, the argument of the protection of the right to marry is not very convincing as the international conventions on human rights concern only the protection of such right from unjustified restrictions, and not from restrictions which are intimately related to the basic institution of monogamy.<sup>(377)</sup>

It is thus clear that Jaffey's view is inconsistent and in direct conflict with the basic principles of English and Scottish conflict of laws according to which the essential validity is a matter for the parties' antenuptial domiciliary laws. However, the application of the *lex fori qua lex loci celebrationis* to permit the celebration of a marriage between parties one of whom is already married by his personal law is hard to justify in principle, inasmuch as the foreign incapacity based on the existence of a prior

union is not discriminatory, penal or offensive to the *forum's* ideas of justice and morality so as to be within the scope of the only existing exception to the general conflict rule, i.e. public policy.<sup>(378)</sup> Moreover, the existing judicial authorities delivered by English courts in other contexts imply clearly that English, and probably Scottish, courts would not recognise the validity of a marriage solemnised abroad between parties one of whom is a married English or Scots domiciliary, even though the prior union is void *ab initio* by the *lex fori qua lex loci*.<sup>(379)</sup>

The most important situation occurring within the present case is where the prior marriage has been ended by a divorce which is validly granted or recognised by the *forum* but it is not recognised by the personal law of both parties, or one of them, to the proposed marriage. Until some years ago the prevailing view in monogamy-insisting countries is that a divorce validly granted or recognised by the *lex fori* is not a sufficient ground for conferring capacity to remarry on the parties if it is not recognised as validly dissolving the first union by the law governing capacity of one of the parties to the fresh marriage <sup>(380)</sup>

The common position in England and Scotland, before the coming into force of the 1971 Act, is that a person whose divorce is not entitled to recognition under his antenuptial domiciliary law has no capacity to remarry, even though the *forum* does recognise the divorce as dissolving the prior union. This view has been clearly adopted by the Divisional court in *R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias*,<sup>(381)</sup> in which the problem is complicated by the introduction of *renvoi*. The facts leading to the decision in this case were that an Italian national domiciled in Switzerland, where he had obtained a divorce from his first wife, sought to marry in England a woman of Spanish nationality, both intending after the marriage to set up their matrimonial home in Switzerland. The marriage registrar, by referring the parties' capacity to Swiss law, and accepting *renvoi*, declined to issue a marriage certificate as

there was a lawful impediment within section 32 (2)(a) of the Marriage Act 1949, since the husband lacked capacity to remarry by Swiss law, as well as Italian law, being the *lex patriae* referred to by Swiss conflicts rule, under which the Swiss divorce was not recognised. The parties then applied for an order of *mandamus* against the registrar ordering him to issue a certificate enabling the marriage to be solemnised. The Divisional court dismissed the petition because the divorce, though validly pronounced by a court of common domicile, and recognised in England in accordance with the English rules on recognition of foreign divorces, was invalid by the husband's *lex patriae*, the law governing capacity to marry according to his antenuptial domiciliary law.<sup>(382)</sup>

It was argued that the Swiss incapacity was offensive to the conscience of the English court in these circumstances and not worthy of recognition in England because " of its discrimination between husband and wife<sup>(383)</sup> or because it was penal or because it involved factors, religious or otherwise, which this country would disregard".<sup>(384)</sup> Sachs LJ, who delivered the judgement of the court, had strongly rejected this line of arguments on the basis that, to use the phraseology of Pearce J. in *Igra v. Igra*,<sup>(385)</sup> "Different countries have different personal laws, different standards of justice and different practice. The interest of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognise decrees that are valid by the law of domicile".<sup>(386)</sup> The learned Lord Justice stressed that, even if he had been satisfied that the Swiss incapacity was so inherently abhorrent to English public policy that it should be ignored in this country, *mandamus* would not have been available. This is because

"whether an order of *mandamus* issues is always a matter of discretion; and even if the registrar had erred in law it would be wholly wrong to issue such an order simply to assist the parties to the proposed marriage to circumvent personal laws valid in another country relating to status. That view applies even if the law of that country does not conform with the views held in this country".<sup>(387)</sup>

Thus, it is reasonably clear that the decision was mainly based on the fact that both parties were domiciled and intended to establish their matrimonial home in Switzerland, that it is "no part of the functions of an English court to arrogate to itself the task of seeking in effect to impose on another country its views as to what should or should not be the law in relation to the capacity of the parties domiciled there to marry",<sup>(388)</sup> and the undesirability of promoting limping marriages.

The same view has been applied in Scotland by the Sheriff court in Rojas case,<sup>(389)</sup> where an Italian national domiciled in Italy, who had been divorced from her first husband by a decree pronounced by a Mexican court, wishes to marry in Scotland the Venezuelan consul in Naples where he lives. The Sheriff court refused to grant her a *mandamus* because the wife had no capacity to marry as her Mexican decree was not recognised by Italian law, as being her antenuptial domiciliary law according to Scottish conflicts rule. Thus, it has been pointed out that the existence of the wife's previous marriage under the law of her premarital domicile constitutes a "legal impediment to her going through a form of a marriage with another man".<sup>(390)</sup>

In support of the wide reference approach, it has been submitted that the application of the *lex causae* to determine the incidental question of the validity of a divorce in remarriage cases is regarded as the inevitable consequence of the rule that capacity to marry and the essential validity of a marriage is governed by the parties' personal laws, whether determined by domicile or nationality. Whether a subsisting marriage constitutes a bar to a second union is an essential requirement affecting capacity to marry of the parties, as well as the public interest of the society to which each party belongs at the time of the marriage, for the *impedimentum legaminis* is a corollary of the monogamy principle. It should be emphasised too that the validity of a divorce purporting to dissolve a prior marriage, so as to set the parties free to remarry, becomes significant here only "because it is made so by the applicable foreign law, which (it is

assumed) insist on monogamy". Therefore, it would be contrary to the principles and inconvenient to fragment the question of essential validity and to apply, say, the law of the *forum* to the issue of bigamy. "If the *forum* were to reserve the issue for an independent determination by its own law, it would (in the situations interesting us here) come to affirm a person's capacity to marry in the teeth of the *lex causae* of that matter, thereby distorting the applicable law, and violating its own conflicts rule".<sup>(391)</sup>

It has been argued that the application of the *lex causae* approach would lead to internal inconsistencies within the *forum's* legal system, as the marriage authorities and the courts would be compelled to disregard their own divorce decree. Moreover, it would be anomalous and contrary to the reasonable expectation of the parties, if a divorce which is validly granted by the *forum* does not automatically carry with it the right to remarry at least in that country.<sup>(392)</sup> The critics of the wide reference approach seem somewhat exaggerated as the application of the relevant foreign law to deny a person's right to remarry does not connote the denial of recognising the divorce for other purposes. The underlying justification is that the right of remarriage, being a legal consequence of divorce, "is held to be separable from others and not to be necessarily inherent in the decree; it is only produced by virtue of and to extent sanctioned by the applicable rules of substantive law, the reach of which in its turn depends on the rules of the conflict of laws".<sup>(393)</sup> From this realisation has emanated the conviction that the *forum*, by referring capacity to marry to the parties' personal laws, has impliedly admitted the limitation of its divorce decree authority by the law so designated. Accordingly,

"it is no true inconsistency for the *forum* on the one hand, to affirm the validity of the divorce and, on the other, to deny the right of remarriage of one or both of the ex-spouses. Nor is there, in the opinion of courts and writers reasoning on these lines, any other tenable ground for excluding the normally governing foreign law from application".<sup>(394)</sup>

This line of reasoning has been rejected as being irrelevant because it is not established whether the determination of the validity of a divorce purporting to dissolve a prior marriage is referable to the *lex causae* governing capacity to marry. Furthermore, it has not been ascertained whether an initial choice is made in favour of the *lex causae* to determine the right of remarriage, so as to say that the *forum* has accepted the corresponding limitation on its divorce decree authority.<sup>(395)</sup> This argument is questionable inasmuch as the overwhelming weight of judicial and academic authorities has classified the *impedimentum legaminis*, being a corollary of the principle of monogamy, as an essential requirement, designed to prevent affront to public opinion on moral and religious grounds, the determination of which is referred to the law of the country to which each party belongs at the time of the ceremony. One might argue that the internal inconsistency to which the wide reference approach may lead is not a sufficient ground for the *forum* to permit the celebration of a second marriage on the authority of a locally valid divorce. This is because the *forum*, in its capacity as the personal law of one of the parties, would not recognise the validity of the second union of that party celebrated in a foreign country where his first marriage has been ended by a valid divorce that is not recognised by the *forum's* rules. Shaw v. Gould,<sup>(396)</sup> furnishes a good illustration. Although the wife's second marriage was celebrated in Scotland where she had been divorced from her first husband by a locally valid divorce, the House of Lords held the second marriage void *ab initio* as the Scottish decree was not entitled to recognition under the wife's antenuptial domiciliary law, i.e. English law.

Quite apart from this dogmatic consideration, it is submitted that there are sound policy reasons to support the view that the incidental question ought to be governed by the *Lex causae* approach. In the first place, it has been maintained that the application of this approach is supported by the notion of international comity. However, the courts and the marriage authorities of the *forum* recognise the interest of the relevant foreign

country in the application of its own law out of comity. Thus, the *lex causae* has a claim to govern the incidental question in remarriage cases on which the answer to the principal question of capacity to marry depends.

Secondly, seeing that the main purpose of the choice of law rule referring capacity to the parties' personal laws is to ensure the marriage validity everywhere, or at least in the country to which each party belongs by domicile or nationality respectively, it seems necessary to accept that the *lex causae's* application to determine the incidental question in the present case [in particular at the time of the second union] serves the interest of preventing limping marriages and promoting international uniformity of status and decisions. Thus, this solution helps to a certain degree to bring about a harmony of decision as between the courts of the *forum* and the courts of one or more foreign countries. However, it is Palsson's claim that this purpose

"would obviously be frustrated if the *forum* were to permit the celebration of a second marriage on the authority of a locally valid divorce which is not recognised by the relevant foreign law; for such a marriage would be invalid for bigamy in the country of that law, and possibly in third countries as well". (397)

The decision in R. v. Brentwood Registrar, for instance, has achieved uniformity of decisions and status in England with the countries of the husband's domicile and nationality, since any remarriage by the husband would be void in English law, as well as by Swiss and Italian laws. One might argue that since the remarriage would be ineffective in Switzerland, where both parties are and intended to remain domiciled, "it would not really benefit the parties to allow them to celebrate it, in fact an English marriage certificate might mislead third parties in Switzerland". (398)

This policy argument, it is submitted, fail to carry conviction on the ground that it is impossible to achieve international uniformity of decisions; if the parties belong to different countries the laws of which give conflicting solutions. Suppose, for instance,

that an Italian domiciled in Italy has divorced his first wife, whose domicile is in France where he remarries a French woman also domiciled there.<sup>(399)</sup> The second marriage is valid in France but void in Italy where the French decree is not entitled to recognition. However, there is no logical and convenient reason in this case, as Hartley pointed out, "why an English court should try to reach conformity with one rather than the other legal system..."<sup>(400)</sup> This reasoning is dubious on general principles as the attainment of international uniformity of decisions remains possible in the present context, not with the parties' personal laws at the time of the marriage but, with the law of the parties' actual matrimonial home at the time of the proceedings.<sup>(401)</sup> The underlying reason lies in the policy of validation which comes into operation once the marriage has been performed. One might therefore suggest that English and Scottish courts, when examining the marriage validity *ex post*, should take into consideration the position of the country where the parties have established their matrimonial home. If the parties in the above example have established their matrimonial home in Italy or in any country where the French divorce is not recognised, it is hard to find any policy reason why an English or Scottish court should declare the marriage as nevertheless valid.<sup>(402)</sup>

It has also been argued that the problem in applying this criterion in the present context is that "international harmony is dearly bought at the price of internal dissonance".<sup>(403)</sup> This is questionable on the basis that it is unlikely that the parties' personal laws would be prepared to recognise the marriage as valid simply because it has been celebrated to achieve internal consistency among decisions in the *forum qua lex loci celebrationis*. Russell v. Russell,<sup>(404)</sup> provides a good example. In this case, a British subject, whose domicile was in England, divorced his first wife in Nevada where he remarried shortly afterwards. Although the internal harmony in Nevada had been achieved by the celebration of the marriage, the House of Lords declared the marriage void *ab initio*, and found the husband guilty of bigamy, for the excellent reason that his first union had not been dissolved by a court of competent jurisdiction. Hence, it would not seem to

be accurate to speak of preventing internal dissonance in the present case because the celebration of the marriage in the *forum* may endanger the remarrying party's life in case he returns to his home country where he may be prosecuted and convicted for bigamy.<sup>(405)</sup>

Nevertheless, it has been submitted that the dangers associated with limping marriages vary considerably with the circumstances of every single case, since the chances seem remote that the marriage will ever be confronted with a foreign law under which it is not recognised as a valid union. Although this proposition may be true, one might argue that it is not a sufficient ground for the *forum* to permit the celebration of a marriage on the authority of locally valid divorce in view of the fact that the risk of its being confronted with a legal system which is opposed to its validity cannot be excluded with certainty at the time of the ceremony. This is because "events may later come to take a course which was not to be foreseen". Accordingly, "the only way in which this uncertainty can be avoided is if, following the wide reference approach, the marriage is not allowed to be celebrated".<sup>(406)</sup>

The common law position in England and Scotland, as to the effect on capacity to remarry after the recognition of divorce, underwent a modification to the effect that a person whose divorce is entitled to recognition in England or Scotland is free to remarry locally, even though the divorce is not recognised, and thus the prior union still subsists, by the law of the parties' domiciles. This rule is embodied in section 7 of the Recognition of Divorces and Legal Separations Act 1971 which was the first attempt to deal with capacity to remarry in the U.K. after recognition of a foreign divorce and, intended to implement article 11 of the 1970 Hague convention. This section, as amended,<sup>(407)</sup> provides that:

"where the validity of a divorce obtained in any country is entitled to recognition by virtue of sections 1 to 5 or section 6 (2) of this Act or by virtue of any rule or

enactment preserved by section 6 (5) of this Act, neither spouse shall be precluded from remarrying in the United Kingdom on the ground that the validity of the divorce would not be recognised in any other country".

The effect of this provision, it is submitted, was to reverse the decision in R. v. Brentwood Registrar denying the right of remarriage when the divorce was not recognised by the relevant foreign law governing the principal question [capacity to marry].<sup>(408)</sup>

Although section 7 of the 1971 Act is restricted to remarriage in the U.K. after a recognised divorce, it seems that it affords the strongest possible persuasive authority for the same solution as to the case of a divorce validly granted by English or Scottish courts. This is because English or Scottish courts could hardly disregard their own divorce decree in view of the fact that may lead to internal inconsistency within English or Scottish legal system. Consequently, it is argued, it is indeed difficult to imagine any conceivable policy reason for such chauvinistic distinction the effect of which is that a domestic divorce would not be entitled to the same degree of authority as a foreign one for the purpose of remarriage.<sup>(409)</sup>

It is to be observed that the principle embodied in section 7 renders the recognition in the U.K. of a foreign divorce as the conclusive factor in determining the capacity of the spouses to contract a subsequent union locally, and thus any incapacity under the *lex domicilii* said to be due to the existence of the prior marriage is irrelevant. The wording and the context of this provision make it clear that primacy is given to divorce recognition rule of the *forum* to determine first the validity of the divorce before dealing with the issue of capacity to remarry governed by the foreign law. One might submit that this rule seems hard to justify in principle since it is a unilateral rule showing preference only for the English or Scottish law as being the law of the *forum*. Thus, English or Scots law prevails to determine the capacity of a foreigner whose divorce is recognised in the U.K. when he remarries locally, but no corresponding

preference for the foreign law concerned is admitted when the facts are appropriately reversed. It has been already indicated that the House of Lords declared that a remarriage of an English subject, whose foreign divorce is denied recognition in England, would be regarded as a void union, even though the divorce is recognised in the foreign country where the second marriage is solemnised.<sup>(410)</sup> Moreover, it is regretful that the recognition of a foreign divorce in the *forum* has been considered as a sufficient ground for permitting the remarriage of a person whose first union still subsists in the eyes of the *lex domicilii*, but the recognition of a divorce under the parties' domiciliary laws, as we shall see,<sup>(411)</sup> has not given any prominence in the converse situation where the first marriage subsists only in the *forum qua lex loci*.

It has been submitted that section 7 does not cover remarriage in the U.K. after a foreign annulment which is entitled to recognition under the common law rules. In Perrini v. Perrini<sup>(412)</sup> this very situation arose. The facts leading to the decision of Sir George Baker P. in this case were as follows. An Italian domiciled in Italy married an American woman there by a civil ceremony in 1957. The woman returned immediately after the ceremony to New Jersey, U.S.A., where she obtained a decree of nullity in 1960, on the ground of non-consummation which rendered the marriage void *ab initio*. Although the New Jersey court assumed jurisdiction on the wife's *bona fide* residence within the jurisdiction for at least six months, there was evidence that she had in fact resided there for more than three years before instituting the proceedings. In 1967 the man, while still domiciled in Italy where the nullity decree was not recognised, married in London an English woman domiciled in England. After the London ceremony the parties went immediately to live in Italy, and remained there until December 1967 when they moved to England intending to, and did in fact, establish their matrimonial home there.

It was urged in this case that the marriage was void because the husband had no

capacity to marry by his antenuptial domiciliary law, i.e. Italian law under which the New Jersey decree was not recognised, and thus the husband's prior union was valid and subsisting. Accordingly, the nullity decree would not be recognised by the English courts since it was not granted or recognised by the courts of the husband's domicile. This line of argumentation was decisively and very properly rejected by the court. Sir George Baker P., though he did not deny the authority of the dual domicile theory upon questions of capacity, held that the quality of the wife's residence in New Jersey where the decree was granted was such as to entitle the decree to recognition. The learned President pointed out that the decree would be recognised since the party, who had obtained the decree, had a real and substantial connection with the court exercising jurisdiction. Moreover, it would be contrary to principle and inconsistent with comity if English courts refused to recognise a jurisdiction which *mutatis mutandis* they claimed for themselves. This is because there was evidence, though The New Jersey court had assumed jurisdiction on a different basis, that facts existed at the time of the proceedings upon which English courts would have assumed jurisdiction.<sup>(413)</sup>

The learned President, having held that the foreign decree should be recognised in England, had no hesitation in declaring: "Once recognised [the decree] it must be taken to have declared the pretended marriage a nullity, with each party free to marry"<sup>(414)</sup> Therefore, it was held that the second marriage was valid because the husband had in English law capacity to marry. The fact that the husband could not remarry in Italy, the country of his domicile was considered as no bar to his remarriage in England where the decree was recognised, and thus was free to remarry. In effect Sir George Baker P. had treated recognition as the primary matter and relegated capacity to the incidental question: English law regulated both the principal question of recognition and the incidental question of capacity to marry. Although the learned President's reasoning leaves much to be desired, the decision seems right, not because the recognition of the foreign decree in England has conferred on the parties capacity to marry, but because

the second marriage has the most real and substantial connection with England at the time of the proceedings. One might therefore submit that the policy justification for upholding the validity of the second marriage in this case derives from the fact that it was celebrated in England, the wife was domiciled there and, more important, the parties have established their matrimonial home in that country.<sup>(415)</sup> However, it is reasonably clear that the decision in this case cannot be regarded as an authority for English courts and marriage authorities to permit the celebration of a marriage when the validity of the prior union is questioned at the time of the ceremony. Nor there is any policy considerations to hold a marriage valid in a similar case where the parties have established a matrimonial home in a country the law of which regards it as void *ab initio*, unless they have capacity by their antenuptial domiciliary laws at the time of the marriage.

It has been submitted that the scope of section 7 of the 1971 Act is limited to cases of remarriage in the U.K.,<sup>(416)</sup> and does not cover cases where the remarriage has taken place abroad. This situation has recently been considered in the case of Lawrence v. Lawrence,<sup>(417)</sup> the facts of which are as follows. A Brazilian woman domiciled in Brazil married there in 1944 an American national also domiciled in Brazil. By 1968 they were separated, and the wife met in Switzerland another American citizen [hereinafter referred to as the second husband] who was domiciled in England. In early 1970 they decided to marry once the wife obtained a divorce, and agreed that their future matrimonial home would be in England. In July 1970 the wife and the second husband, being aware that she could not obtain a divorce in Brazil, and under the guidance of legal advice, went to Nevada and resided there for more than six weeks [a sufficient foundation for jurisdiction under the Nevada law]. The Nevada court, having assumed jurisdiction on the ground of six weeks residence regarded there as domicile, granted her a decree of divorce. On the following day she went through a ceremony of marriage with the second husband. Shortly afterwards they went to England according

to their agreed plans and established a matrimonial home there. Two years later, the marriage broke down and the wife returned to Brazil. The second husband petitioned for a declaration that the marriage celebrated in Nevada was a valid and subsisting marriage. The wife by her amended answer sought a declaration that the marriage was null and void.

It should be noted that the Nevada divorce was not recognised by the Brazilian law, the law of the wife's domicile, which recognises a foreign decree granted to a Brazilian national only as a decree of separation. However, it is argued that there is no doubt that the English courts are statutorily obliged to recognise the Nevada divorce by virtue of section 3 of the 1971 Act, either on the ground of the first husband's United States nationality, or on the ground of the wife's domicile as defined by the law of Nevada at the time of the proceedings.<sup>(418)</sup> Nevertheless, one might argue that the Nevada divorce would be denied recognition on the ground that the court was fraudulently induced to assume jurisdiction. The reason was that there was no *bona fide* domicile in Nevada as the wife had resorted there for the purpose of jurisdiction, so as to obtain a divorce enabling her to remarry. The fact of the case indicates clearly that the wife and the second husband have no intention to reside permanently in Nevada as they have decided to marry, and intended to establish their matrimonial home in England beforehand.<sup>(419)</sup>

The central question in this case was as to whether the wife's second marriage in Nevada was to be regarded as a valid marriage simply because the Nevada divorce was entitled to recognition in England, notwithstanding that she lacked capacity by the Brazilian law under which the first marriage was valid and subsisting. The wife contended that her Brazilian domiciliary law, by not recognising the Nevada decree, regarded her as a married woman at the time of her marriage to the petitioner in Nevada, and her second marriage was consequently void for bigamy. The wife's antenuptial

domiciliary law was urged upon the court, as being the law so designated to determine capacity to marry by the English conflicts rule.

At first instance Antony Lincoln J., being attracted by the view that there is no *a priori* assumption that the determination of all issues of capacity are to be referred to the same law, has rejected the argument, ruling that "while the dual domicile test has been applied over and over again, there is no case relating to a foreign divorce and a subsequent marriage in which the court have been confronted with a choice between the competing doctrines - dual domicile and intended matrimonial home."<sup>(420)</sup> The learned judge, satisfied that the wife would have nothing to do with Brazil provided that the marriage prospered and relying on a *dictum* of Lord Simon of Glaisdale taken from Vervaeke v. Smith, pointed out that bigamy relates to capacity to be governed not by the law of the antenuptial domicile but by the law of the intended matrimonial home, i.e. the law of the country with which the marriage has the most real and substantial connection. Since the parties "were looking to the future, to a married life in England and to establish a matrimonial home in this country,"<sup>(421)</sup> the marriage was substantially connected with England. Accordingly, the second marriage was valid in England by virtue of the fact that the Nevada divorce was entitled to recognition, and thus the wife had capacity to marry by English law. However, it is worthy of note that the learned judge has confined his conclusion to the distinctive facts of the present cases, for he openly states

"that contract of marriage entered into in such circumstances such as occurred in the instant case [where the domiciles become English] should be upheld rather than destroyed. If the application of the criterion of real and substantial connection results in the marriage being held valid and the application of the dual domicile results in invalidation, in my view the former should prevail. I leave open the question whether the vice versa proposition should also hold good. Nor is it necessary to resolve the question whether where the intended domicile is other than that of England, the criterion should apply, though I see no ground for such chauvinistic distinctions."<sup>(422)</sup>

The members of the court of Appeal affirmed the decision by using various ways of reasoning. Ackner L.J., having rejected the view that the issue involved an incidental question on the ground that the general question of capacity to marry did not raise for decision, emphasised that the present case concerned with one species of alleged incapacity to re-marry arising out of the continued existence of the wife's first marriage contracted in Brazil. The wife's submission referred to above was rejected simply because it totally ignored the Nevada divorce granted the day before the Nevada marriage, the validity of which the English courts were required to recognise under section 3 of the 1971 Act. The most specific reason given by Ackner L.J. for refusing the wife's proposition was that since the Parliament had failed to provide that the validity of the divorce should only be recognised in England if it would be recognised by the law of each party's domicile, the non-recognition in the country of domicile appeared to be irrelevant. Moreover, section 8 of the 1971 Act had made no specific provision for excepting from recognition a divorce obtained by a party whose marriage, according to the law of his or her domicile, was indissoluble. The learned Lord Justice, having decided that the Nevada divorce was entitled to recognition under the 1971 Act, submitted that

"The essential function of a decree of divorce is to dissolve the marriage hitherto existing between the parties. I consider that it is plainly inconsistent with recognising a divorce to say in the same breath that the marriage which it purported to dissolve still continue in existence. Such a recognition would be a hollow and empty gesture."(423)

However, His Lordship appears to suggest that the determination of capacity to remarry after divorce is to be referred to the law of the *forum*, as being the law to determine whether the divorce is to be recognised. Ackner L.J. therefore concluded

"that any incapacity said to be due to a pre-existing marriage cannot be relevant where the validity of the divorce dissolving such a marriage has to be recognised under the Act....Thus, in cases where the entitlement to remarry is based exclusively on an

overseas divorce, we are required to consider whether the circumstances of that divorce are such as to oblige us (pursuant to the provision of the 1971 Act) to recognise its validity."<sup>(424)</sup>

Accordingly, the wife's second marriage is valid in England on the ground that the inevitable consequence of the court recognising the Nevada divorce under the provisions of the Act, is to recognise that it dissolved the prior marriage, and thus the wife has capacity to remarry. The learned Lord Justice's reasoning seems to be dogmatic, devoid of policy justification and too conceptualistic to be of much value as it give undue prominence to the unqualified counsel's proposition that properly interpreted the 1971 Act sanctions freedom to remarry abroad. However, the legal significance of recognising the divorce, it is thought, is simply that in the eyes of English domestic law the parties are free to remarry if, and only if, they are domiciled in England. Furthermore, it is submitted with respect that consideration of the marriage dissolution without consequential removal of a bar to remarriage as "a hollow and empty gesture" is otiose on the ground that capacity to remarry, though it is one of the several incidents of divorce, "is far from being the only important legal consequence of divorce under any system of law."<sup>(425)</sup>

There is no doubt that the acceptance of this view as a general proposition would permit unwarranted assertions of extraterritoriality abhorrent to international comity and would create limping marriages, particularly in cases where the parties' matrimonial home is not in England. Suppose, for instance, that the parties in the instant case have established their matrimonial home in a country where capacity to re-marry, though the divorce is recognised there, remains dependable upon the parties' personal laws; or the divorce is altogether not entitled to recognition. Or suppose that the parties in this case have married illegally in Brazil and established their matrimonial home there. It is therefore reasonably clear that there is no possible policy justification for an English court to recognise the marriage in these circumstances, in which it would be regarded as

void in every country, "as nevertheless valid simply because it would be statutorily obliged to recognise the Nevada divorce as terminating a different marriage."<sup>(426)</sup> This view indeed gives rise to an even more subtle problem- what would have been the position if the wife, after the death of her first husband, remarried in Brazil. The English courts would have been bound, by the recognition of the wife's marriage in Nevada as valid and subsisting, to declare that marriage as bigamous, thereby creating yet another limping marriage.

This approach might be criticised in that it creates an inelegant exception to the usual conflicts rule for capacity to marry. One might therefore argue that the prohibited degrees of relationship, for example, raise the same sort of issues as the capacity to remarry after divorce, and it is difficult to see what social or policy factors could there be for applying different choice of law rules. It is to be remembered too that the invalidity *ab initio* of the first marriage in the *forum* does not require the courts and the marriage authorities to permit the celebration of a second marriage. Therefore Carter has persuasively argued that "if the words of a statute requiring recognition of a divorce are to be construed as implying the recognition of freedom from incapacity to re-marry arising from the first marriage, it is hard to see why invalidity *ab initio* of that first marriage should not imply freedom to marry."<sup>(427)</sup>

Purchas LJ have achieved the desired result on quite different, and, it is submitted, rather curious and erroneous reasoning. Having accepted that the issue raised an incidental question, the learned Lord Justice persuasively rejected the husband's counsel proposition that as a matter of statutory interpretation the court required to recognise freedom from incapacity arising from the first marriage. In support of this, His Lordship suggested that the Parliament could have provided in section 7 of the Act that the fact the divorce was not recognised in the country of domicile should not preclude either party to the union from remarrying in the United Kingdom or cause the remarriage of either party contracted abroad to be regarded as void in this country.

Since the Parliament failed to do so, the restrictive words of section 7, which confined the recognition of freedom to remarry to cases of remarriage in the United Kingdom, remained unchallengeable.<sup>(428)</sup>

However, Purchas LJ suggested that the issue in the instant case falls within the scope of the general conflicts rule which refers capacity to marry to the parties' antenuptial domiciliary laws. He went on to say that the wife was domiciled in Nevada, not in Brazil, for the purpose of the validity of the remarriage. The underlying justification for this lay in the interpretation given to section 3 (2) of the 1971 Act. It was argued that since by virtue of section 3 (2) of the Act the Nevada divorce had to be recognised on the ground of the wife's domicile as defined by the Nevada law, it was logical to assert that the wife's domicile in Nevada should be relevant as well for the purpose of determining her capacity to remarry "so long as no further events intervene". His Lordship therefore said:

"In my judgment, it is an acceptable and logical step to assert that the domicile in Nevada acquired according to the laws of that state will be recognised by English law not only for the purpose of recognising a decree of divorce but also for recognising a resulting capacity to marry in the same state... Since the wife was still clothed in her Nevada domicile recognised for the purposes of the divorce under the Recognition of Divorces and Legal Separations Act 1971, then she must be considered to have capacity to enter a marriage in Nevada if that capacity is recognised in that state. Her Brazilian domicile for this purpose had lapsed by virtue of her acquiring a domicile in Nevada recognised by the English courts."<sup>(429)</sup>

The Learned Lord Justice seems to suggest that the question of capacity to remarry after a divorce should be determined by "the law of domicile as defined by the law of the place of divorce where remarriage occurs in the same place".

This approach has been criticised severely in that it "is unsupported by previous authority, was not required by the terms of the 1971 Act, reflects no discernible policy, and constitutes a flagrant violation of the elementary and fundamental principle of the

choice of law process that a connecting factor (here domicile) is to be interpreted by reference to the criterion of the *forum*."<sup>(430)</sup> Moreover, one might argue that this reasoning may create a certain difficulty, particularly in cases where the decree of divorce happens to be granted by the court on the basis of nationality or residence. The marriage in such circumstances could not be recognised as the propositus' original domicile would be unchanged. Hence, this view can be construed only as re-asserting the authority of the common law rule under which a divorce is to be recognised only if it is granted or recognised by the parties' domiciliary laws.<sup>(431)</sup>

It is also submitted that Purchas LJ's judgement indeed gives rise to another problem where the wife had remarried after losing her Nevada domicile. His Lordship gave what was in effect an unqualified answer that the issue of capacity to remarry would depend on whether the *lex loci celebrationis* recognised the Nevada divorce. "Why that law should come into the picture in addition to the law of the domicile is not explained".<sup>(432)</sup>

Finally, Sir Davis Cairns appears to have relied upon two distinct grounds for upholding the wife's re-marriage in Nevada. The first ground is fully consistent with Ackner LJ's view that the recognition of a divorce "must *a priori* remove a bar (on the ground of bigamy) to re-marriage". The alternative ground appears to support a traditional incidental question under which capacity is to be determined by the law of the intended matrimonial home, for he said: "My own inclination would be to hold that either basis of recognition would suffice".<sup>(433)</sup>

The assessment of the decision and the reasoning of the judges in the court of Appeal have shown that they lack in consistency, and it is difficult for a lawyer to assert with rigour the ground on which the decision is founded. Whether Lawrence's case and its reasoning should stand as a general rule governing capacity to remarry after divorce is

not altogether a clear-cut authority. The underlying reason for this decision, it is argued, is to be derived neither from any "transposition of domestic policy attitudes into a transnational context", nor from the construction of the limited scope of the 1971 Act, the primary concern of which is the recognition of foreign divorces and legal separations. In his comments on the instant decision, Carter has pointed out that the "Policy justification for upholding the validity of the Lawrence marriage derives from the fact that the parties intended to set up their matrimonial home in England, that they in fact did so, and that England was the country with which their marital relationship had had the most real and substantial connection".<sup>(434)</sup> Moreover, the actual result in this case seems to be in accordance with the countervailing policy of validation which comes into operation where the validity of the marriage is examined *ex post*. A persuasive argument supporting this view is deducible from Antony Lincoln J's decisive judgement, for he pointed out that "it was not necessary to argue and was not argued [in *R. v. Brentwood Registrar*] that the domicile of the intended matrimonial home could provide the governing law".<sup>(435)</sup> However, the decision in the present case must be construed only as a decision on facts with no coherent policy basis that may require the recognition of the second marriage validity simply because the divorce is entitled to recognition in England. It is therefore clear that the reasoning of the court of Appeal is not one to support or to encourage as a general rule in conflict of laws as it runs against the uniformity of results' claim on international scale, and rather increases the danger of limping marriages, particularly where England is not the country with which the marriage has the most real and substantial connection.

Nevertheless, It has been submitted that the decision in *Lawrence v. Lawrence* appears to be in favour of determining the incidental question by the law of the *forum*. A provision to this effect figured among the proposals for reform of the divorces' recognition rules put forwards by the Law commissions, ruling that the recognition rules of the *forum* should prevail over the marriage choice of law rules. The proposal

of the English and Scottish Law commissions suggests that the recognition of the divorce or annulment in England or Scotland requires the English or Scottish courts to reach out so as to confer capacity upon either spouse to contract a subsequent marriage locally and to treat the remarriage of either party [wherever it takes place] as valid, even though the divorce is not recognised by the remarrying party's domiciliary law.<sup>(436)</sup> What is most curious, and indeed uncharacteristic, it is submitted, about the Law commissions' proposal is that they offered no conceivable policy reason for the application of the English *forum* rules as to recognition, nor explained why the traditional incidental question approach is to be abandoned. This proposal have been confirmed by section 50 of the Family Law Act 1986<sup>(437)</sup> which provides that

"Where, in any part of the United Kingdom- (a) a divorce or annulment has been granted by a court of civil jurisdiction, or (b) the validity of a divorce or annulment is recognised by virtue of this part, the fact that the divorce would not be recognised elsewhere shall not preclude either party to the marriage from remarrying in that part of the United Kingdom or cause the remarriage if either party (wherever the remarriage takes place) to be treated as invalid in that part."

The main argument in support of the view that the *lex fori* should govern the incidental question of the divorce validity in the remarriage cases concerns the internal consistency among decisions within the forum, the reach of which would be impossible if the opposite approach were to be applied. Hence, it is submitted that the *lex fori*, unlike the *lex causae*, approach "ensures a uniform evaluation of the divorcee's status for whatever purpose the question fall for consideration in the forum country".<sup>(438)</sup> The proponents of this view appear to rely on the fact that the wide reference approach does not only compel the forum' authorities to regard a prior union as still subsisting despite a divorce validly granted or recognised by the forum and whose validity they are required to affirm in other contexts,<sup>(439)</sup> but also creates inequality between the ex-spouses in cases where the divorce is only recognised by the personal law of one of them. The case which is most likely to arise in practice is where the divorce concerns a marriage between parties one of whom is subject to the *lex fori* as his personal law. If

the *lex causae* were to be applied in such cases, it is submitted, the party whose personal law declines to recognise the divorce will be in effect condemned to "perpetual celibacy". To this extent, Professor Palsson has argued that "Such legal constructions fail to take account of a marriage as an indivisible social fact which, from the view of each legal system, must reasonably either exist or not exist for both parties".<sup>(440)</sup> Thus, it is also submitted that

"There is nothing to be gained either practically or theoretically in recognising a decree of nullity or divorce and, at the same time, allocating the determination of its effect on the parties' capacity to marry to another system of law which denies it recognition. Limping marriages are inevitable but that hardly justifies the same system simultaneously declaring the parties both fit and lame".<sup>(441)</sup>

The fundamental defect of this view in terms of the policy issues relevant in marriage, it is submitted, is that it fails to consider capacity to remarry after a divorce as one of the species of legal capacity which is designed to prevent affront to public opinion on moral and religious grounds, and to prevent the commission of the crime of bigamy. It is also arguable that this view is indeed difficult to reconcile with the basic principle of private international law according to which the only country, in the ordinary course of events, that can be so intimately interested in asserting the protection of the public and the parties' interests is the country to which each party belongs at the time of the ceremony.<sup>(442)</sup>

It is commonly agreed, both in Common and Civil law countries, that the main purpose of referring capacity to marry to the parties' personal law is to guarantee the recognition of the marriage as universally valid, or at least in the parties home country. Accordingly, it can be assumed that the forum which has selected the personal law as the primary general choice of law rule governing capacity to marry would be unlikely to advance a claim for a rigid application of its domestic rules so as to permit the celebration of a marriage in defiance of the rules of the relevant foreign law so

designated. The underlying reason for this lies in the fact that the foreign incapacity based on the existence of a prior marriage is not so offensive to the forum's religion, or morality, or to any of its fundamental institutions, as to be repudiated on the ground of public policy which constitutes the only unquestionable bar to the normal application of the *lex causae* and its transitional provisions.

However, conceding that this view is holding right, the remaining issue which requires consideration is whether the forum, in its capacity as the personal law, would be prepared to recognise the validity of the second marriage of one of its subjects celebrated in a foreign country where the first union has been ended by a valid divorce, if the decree is not entitled to recognition in that country. The answer to this question is negative. It has been already indicated that the English, and probably the Scottish, courts are not prepared to uphold the validity of a marriage celebrated abroad between parties one of whom is an English or a Scots subject and whose foreign divorce is not recognised, simply because it has been celebrated to achieve internal consistency within the foreign system and to protect the remarrying party from being condemned to a "forced celibacy".<sup>(443)</sup> This reasoning appears to be in accordance with the English and Scottish statutory provisions the implication of which is, if interpreted in the framework of conflict of laws, that a married English or Scottish subject have no capacity to remarry either locally or abroad if his first union is not recognised as being dissolved under the English or Scots laws.<sup>(444)</sup> However, David Pearl in his comments on the Family Law Act 1986 has assumed that if a divorce is not recognised because of a particular provision of the Act, a subsequent second marriage by the divorcee must necessarily be regarded as void in the U.K., even though it may be valid elsewhere. This implies that a subsequent marriage of an English subject, for instance, in a country where he has obtained a divorce decree which is not recognised under the 1986 Act, would be treated as void in England.<sup>(445)</sup> It is therefore reasonably clear that there is no adequate policy justification for the English or Scots

courts to permit the celebration of a marriage, or to recognise the validity of marriage solemnised nevertheless, in the present case simply because it is statutorily obliged to recognise a divorce purporting to dissolve a different marriage. Nor is there, in the opinion of courts and writers reasoning, any tenable ground for such chauvinistic distinction which does not do justice to the foreign law, and to the forum's subjects.

Moreover, Both Law Commissions in their joint report in 1985 have suggested that the law of the forum cannot form a basic choice of law rule in relation to capacity to marry, for it is uncertain, unpredictable and inoperative in the prospective situation where the question is whether the marriage should be allowed to take place. Since the ability of a person to remarry raises the same issues as his ability to marry in the first place, it is difficult to imagine any substantial policy reason requiring the consideration of capacity to remarry after a divorce as a separate and a special question of essential validity to be referred exclusively to the *lex fori*. However, the application of the narrow reference approach in the instant case, it is submitted, would provide an encouragement to forum-shopping; and would deprive the personal law of a basic part of its function, "indeed to the extent of reducing that rule to little more than a courteous affirmation". Finally, it is hard to disagree with Sachs J. when he pointed out that the application of this view is wrong in principle:

"It would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's adjudicated on the issue... It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony..., be consistently decided...and that consistency cannot be attained if the test is *lex fori*". (446)

In conclusion, it might be pointed out that there is no universal agreement on the question of whether, as a general proposition, the incidental question ought to be determined by the domestic law system designated by the conflict rules of the law governing the principal issue [*lex causae*], or by that system designated by the forum's

conflict rules. It is interesting to underline that the conclusion of the *lex fori* approach advocates, that only the forum's recognition rules are relevant in deciding the divorcee's capacity to remarry in that country, or in determining the validity of his subsequent remarriage abroad, does not inspire confidence. This is because the arguments advanced in favour of this approach are inferred from the unconvincing interpretation of the existing judicial authorities which are based, not on general principles, but on the particular factual context of each case; and in none of them has the incidental question been identified and discussed in general terms. Therefore, the law of the forum has been applied in a number of cases on the ground that they present a sufficiently strong connection with the forum country. In Lawrence v. Lawrence, for instance, Antony Lincoln J., who delivered the only decisive judgement, has determined the validity of the Nevada marriage by English law, not as being the law of the forum, but in its capacity as the law of the country with which the marriage has a real and substantial connection.<sup>(447)</sup>

It is also submitted in this respect that the application of the *lex causae* approach in the present case appears to be in accordance with a fundamentally-held principle in conflict of laws under which capacity is to be determined by the system of law indicated by the relevant forum's conflicts rule. Seeing the preventive function of the law governing capacity, and the relevance of the policy considerations which carry more weight at the time of the ceremony, it is suggested that the *lex causae* [the parties' antenuptial domiciliary laws] would prevent the creation of a marriage which would not be recognised as valid in the home country of the parties, and possibly in third countries as well. Although the dual domicile test seems to be the most appropriate, as a general conflict rule, to govern capacity to remarry at the time of the ceremony, it is argued that it does not provide a satisfactory rule in every case where the remarriage has been celebrated nevertheless in defiance of the parties' personal law, and the remarriage validity is examined *ex post*.

It is interesting to note that the conflicting approaches within the doctrine of incidental question have failed to recognise the established framework of private international law, as well as the importance of the time element which plays a major role in formulating an appropriate and reasonably sophisticated choice of law rule to operate within that framework. However, it might be suggested that there is no need to establish a general rule according to which the incidental question should always be determined in the instant case, for the practical consequences vary considerably in each situation.<sup>(448)</sup>

Consequently, it is submitted that a sounder approach in the present case would have been to draw a distinction between cases where the remarriage has not yet taken place and the issue before the forum's authorities is whether the party, whose personal law declines to recognise the divorce, should be allowed to remarry; and cases where the second marriage has already been formed. There is no doubt that the only acceptable view, which would lay a certain respect between legal systems, that would be applied at the former stage is the parties' antenuptial domiciliary [ national] law or laws. The underlying reason is that this view would permit the marriage registrar to determine with certainty whether the parties have capacity to intermarry, and thus being able to prevent the creation of illegal and incestuous union that would not be recognised as valid in the parties home country. The marriage registrar and the Divisional court in the Brentwood case, however, by refusing the celebration of the marriage were able to prevent the creation of a limping union and to avoid the distortion of the established framework of English private international law. In so deciding the court in this case has given more consideration to the policy of promoting international uniformity of status and decisions, and of international comity which carry more weight at the time of the ceremony. It is also important to note that the application of this view at the time of the ceremony would curtail potential forum-shopping.<sup>(449)</sup> Thus, there is no policy ground, it is submitted, for accepting that a remarriage may be allowed to take place on the sole ground that the parties intended to settle in a country where the remarriage

would be valid, inasmuch as the establishment of a domicile of choice, or even a habitual residence, in a given country is subject to the restrictive nature of its immigration regulations.

Although the parties' antenuptial domiciliary [national] law should be held relevant so as to bar celebration of the second marriage, it is much more difficult to imagine any tenable ground which may support the application of this view, in general terms, where the remarriage has already entered into in contravention of the relevant foreign law. The reason is that the countervailing policy of validation, which is without significance at the former stage, comes into consideration once the union has been created. Accordingly, When the remarriage has been celebrated nevertheless, it would be held valid if it is regarded as such in the country where the parties have established a matrimonial home. It is the community of that country which has the most enduring interest in the parties' marital status in this particular regard.

Moreover, it is submitted with respect that the second marriage will never be held invalid on the ground of bigamy if the parties have capacity under their antenuptial domiciliary [national] law, even if they have no capacity under what may be called the law of the matrimonial home. However, the rule of the matrimonial home would only be used to validate a marriage that would be invalid by the dual domicile rule and so offers at least a conceptual basis for the extension in favour of validity, inasmuch as it rests upon the desirability of giving effect, whenever it is possible, to the reasonable expectations of the parties. Thus, it would be contrary to principle if the law of the matrimonial home is applied to invalidate a marriage celebrated according to the general conflicts rule, for its substantial effect would be to make every marriage potentially and conditionally invalid.<sup>(450)</sup> It is also arguable that the courts of forum should not declare the remarriage as valid, if it is invalid under the law of the country with which

the marriage has a most real and substantial connection, as well as by the parties' antenuptial domiciliary [national] law.

However, Section 50 of the Family Law Act 1986, which extended the scope of section 7 of the 1971 Act to the cases of remarriage abroad, expressly provides that if a foreign divorce is recognised in England and even the marriage have no connection with England, it inexorably follows that no subsequent marriage of either party of that divorce is ever to be denied validity in England simply on the grounds of non-recognition of the divorce in another country. According to this provision the English courts should regard the non-recognition of the divorce under the *lex loci celebrationis*, the law of nationalities, domiciles and residences of the parties to the subsequent marriage, and the laws of the place of real and substantial connection [i.e. matrimonial home] as being irrelevant in determining the validity of the subsequent marriage. This is really the result of the piecemeal nature of the reform implemented by section 50 of the 1986 Act without any consideration of the wider ripples that it causes in the capacity and nullity pools. More generally, one may be tempted to inquire as to what would be the English court position if asked to annul the marriage on the ground of bigamy, or to recognise a decree of nullity in respect of that marriage obtained elsewhere. Would an English court then feel obliged to dismiss the petition simply because the marriage is valid in England, without giving consideration to its own choice of law rules in nullity?<sup>(451)</sup> However, this provision may be criticised as a position devoid of policy justification, was not required by the decisions in Lawrence v. Lawrence and Perrini v. Perrini; and that likely to lead to unwarranted assertions repugnant to international comity. The rule seems hard to justify in principle since it shows a unilateral preference for the English or Scottish law of the forum. Consequently, this provision may be acceptable only if the English (or Scots) forum is prepared to recognise the validity of a subsequent union between parties one of whom is an English (or a Scottish), in cases where the facts are appropriately reversed.

Finally, there is certainly no authority that would stand in the way of the courts, when next given an opportunity to rule on this question, for adopting the rule here argued for. It is to be hoped that section 50 of the 1986 Act would be amended so as to provide that the remarriage of a divorcee, that has been celebrated nevertheless in contravention of the relevant foreign law governing capacity, will be held valid in the United Kingdom if, and only if, the parties have established a matrimonial home in a country where it is regarded as a valid union.

2- The existence of a prior union recognised by the forum, but denied by the relevant foreign law: The general tendency, it is submitted, is that where the prior marriage is valid from the outset, or the foreign divorce or nullity decree is not entitled to recognition, in the forum, a subsequent marriage by either party will be barred even though the prior union is invalid or dissolved under the personal laws of the parties to the fresh union.<sup>(452)</sup> The first instance which requires consideration within the present case is where the previous marriage has been validly entered into in the forum, but is invalid by the relevant foreign law to which the parties belong at the time of the marriage. It is commonly agreed that neither of the parties can remarry validly in England or Scotland if the prior marriage has not been terminated either by death, or by a divorce the validity of which must be recognised in these countries. It is also submitted that the remarriage, if it has been celebrated nevertheless, must be declared void *ab initio* for bigamy by the English or Scottish courts. However, the Scottish Law Commission<sup>(453)</sup> has recently examined this problem and suggested that "a marriage entered into in Scotland should be invalid if, according to Scottish internal law,...(b) either party is already married...", notwithstanding that the parties have capacity under their respective domiciliary laws. The underlying reason is, it is argued beyond any doubt, that bigamy is deemed to be such a fundamental part of public policy, "going to the very basis of concept of marriage", in England and Scotland the laws of which have a paramount rule of monogamy.

The question which arises is, therefore, whether either party may remarry in England or Scotland if the prior marriage has been annulled or declared invalid by a court in the foreign country. The answer to this question depends on whether the decree of nullity or the declaration of invalidity is entitled to recognition under the English or Scots law of the forum. It is undoubtedly clear that recognition, according to English and Scots conflicts rules, is accorded to foreign nullity decrees granted by a competent court, the ground on which the decree was based and the law applied by the foreign court being, in principle, irrelevant. Hence, the fact that the marriage has been celebrated in England or Scotland with due observance of all formalities required by the local law is not a sufficient ground to prevent the recognition of a foreign decree whereby that marriage is declared invalid on grounds, for example, relating to form, provided that the decree was, according to English and Scots laws, granted by a court of competent jurisdiction.<sup>(454)</sup> Consequently, a party to a prior union which has been declared null and void by a competent foreign court may remarry in England or Scotland if, and only if, the decree of nullity is entitled to recognition there. Nevertheless, if the foreign nullity decree is not entitled to recognition as being so offensive to English or Scottish views of substantial justice,<sup>(455)</sup> neither can the marriage registrars permit the celebration of a subsequent marriage, nor can the courts uphold the validity of such a marriage if it has been celebrated nevertheless in such circumstances.

However, similar problems may arise in a case where the previous union has been ended by a divorce which is validly granted or recognised by the courts of the foreign country concerned, but not so treated by the *lex fori*. The first situation of this type is where the divorce is obtained, in accordance with the parties' personal law, by means of extrajudicial proceedings, in the forum the law of which considers the judicial proceedings as the compulsory means by which a marriage can be ended in that country. It is indisputedly a rule of English and Scottish laws that a divorce obtained locally by extrajudicial proceedings is not effective to dissolve a marriage, even if it is

valid under the personal law of the parties. Section 44 of the Family Law Act 1986 provides clearly: "...no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction".<sup>(456)</sup> Consequently, it is submitted that an extrajudicial divorce, if obtained in England or Scotland, is not a sufficient ground for remarriage there even though it is recognised as valid by the foreign law governing the capacity to marry of the parties to the fresh union.<sup>(457)</sup>

The second situation within the instant category is where the divorce purporting to dissolve the prior union has been validly granted in a foreign country but is not entitled to recognition in the eyes of the *lex fori*. There is no doubt, it is submitted, that the prevailing view in this case is that the previous marriage constitutes a legal impediment to the remarriage in the forum, notwithstanding the divorce validity by the relevant foreign law which is decisive for the capacity of the parties to marry. This view appears to be adopted by the Scots Law commission in its recommendation, referred to above, the effect of which is that a marriage entered into in Scotland should be invalid if, according to Scottish internal law, either party is already married. Moreover, Hartley pointed out that the case of Shaw v. Gould, though the issue of incidental question did not arise for the excellent reason that the wife's capacity to remarry was governed by English law of the forum, is frequently referred to in this context. In this case, an English couple obtained a divorce purporting to end the prior union in Scotland where the wife married a Scottish domiciliary afterwards and lived with him there. The House of Lords decided that the wife's remarriage in Scotland is void *ab initio* simply because her first marriage is still subsisting as the Scottish divorce is not recognised in England. However, it is clear that this decision has been considered, as Hartley suggested, as an authority in favour of applying the *lex fori* approach in the present case since it is based solely on the assumption that the second marriage can only be celebrated if the divorce is recognised under English choice of law rules.<sup>(458)</sup>

Nevertheless, a different position has been adopted by the Ontario court of Appeal in Schwebel v. Ungar (459) where the second marriage has been already entered into and a child was born to the parties. The facts of this case were as follows: a husband and a wife, both Jewish, domiciled in Hungary, had decided to settle in Israel. When they arrived in Italy en route to Israel, the husband divorced his wife by a Jewish *Ghet* obtained before a rabbinical court. The divorce was not recognised by Hungarian law, the parties' domiciliary law at the time of the divorce, but it was recognised by law of Israel where they subsequently acquired a domicile of choice. While so domiciled, the wife went to Canada, and in the province of Ontario married a second husband who was domiciled there. Subsequently the second husband petitioned the Ontario court for a decree of nullity of his marriage on the ground that the marriage was bigamous as the wife had never been validly divorced, inasmuch as the Jewish *Ghet* granted by a rabbinical court in Italy was not entitled to recognition according to the Ontario conflicts rule.

The main question in this case was the wife's capacity to remarry which, according to the Ontario conflicts rule, seems to be governed by Israeli law, i.e. her antenuptial domiciliary law. The law of Ontario and the Israeli law differ not as to the rule regarding capacity to marry but as to the rule respecting recognition of foreign divorces. The latter law apparently recognises any Jewish *Ghet* wherever granted irrespective of the parties' personal law in terms of domicile or nationality, so long as it has been obtained in accordance with the requirements of the Jewish religion. But Ontario law will refuse recognition to any divorce that would not be recognised by the parties' *lex domicilii* at the time of the divorce. The incidental question therefore concerns the validity of the Jewish *Ghet* which was denied recognition by the Ontario conflicts rule, inasmuch as the parties were, at the time of the divorce, still domiciled in Hungary where the *Ghet* was not recognised.

It has been argued that one would have expected the supreme court of Canada, like an English or Scottish court, to solve the problem by applying the "historical approach" according to which the remarriage should be declared void *ab initio* as being bigamous. This is because the *Ghet* had been delivered to the wife when she and her then husband were domiciled in a country whose law would regard it as ineffective to dissolve their married status, that it was not recognised according to Ontario conflicts rule, and that they were still husband and wife when the wife remarried in Ontario. Accordingly, it is thought that the court would have regarded the wife and her first husband's status under Israeli law as quite irrelevant because they have acquired that status only according to the law of a subsequently acquired domicile.

However, this process of reasoning has not been adopted by the Canadian court which inevitably would lead to deny to the wife capacity to marry in Ontario. The court has also expressly refused to inquire into the means whereby the wife had acquired her single status. Mackay J.A., who delivered the judgement on behalf of the court, has argued that the decision in the present case should be based on the marital status of the wife according to her antenuptial domiciliary law at the time of her remarriage in Ontario. The learned judge therefore pointed out that

"To determine that status, I think our inquiry must be directed not to the effect to be given under Ontario law to the divorce proceedings in Italy as at the time of the divorce, but to the effect to be given to those proceedings by the law of the country in which she was domiciled at the time of her marriage to the plaintiff in 1957, namely Israel, ..., or, to put another way, the inquiry is as to her status under the law of her domicile and not to the means by which she acquired that status". (460)

Since the wife's remarriage validity should be recognised in Ontario if it has been celebrated in Israel where it would be recognised as valid, his lordship submitted that it seems an acceptable and logical step to assert that the wife's domiciliary law should be decisive in the present case as the "legal result should not be different because the remarriage took place in Ontario". Moreover, Mr. Justice Mackay went on to say that

to determine the personal status of a person not domiciled in Ontario by the Ontario law instead of his domiciliary law would be contrary to the basic principle of international law and would result in the social evil referred to by Lord Watson in the *Le Mesurier* case of a person being regarded as married in one jurisdiction and unmarried in another. Having decided that the wife acquired a domicile of choice in Israel at the time of the remarriage, the learned judge declared the Ontario marriage valid on the ground that the wife's status by the Israeli law of her domicile at the time of the second marriage had been that of a single woman, notwithstanding that the bill of divorcement was recognised neither by the law of the country where she and her then husband were domiciled at the time of the divorce, i.e. Hungary, nor by the conflicts rules of the Ontario law of the forum. The Supreme Court of Canada,<sup>(461)</sup> affirming the decision of the court of Appeal, held that the remarriage was valid on the ground that the wife's capacity to remarry was to be governed by the law of her domicile and not according to the validity of her antecedent divorce. Consequently it has been argued that the issue of the incidental question was resolved by applying the law of the main question [capacity to remarry] and not by the conflicts rule of the forum.<sup>(462)</sup>

From a social point of view, one might argue that the decision is welcome and it is hopefully that the conflict laws relating to status of married persons should be simple and easily understood to spare people finding themselves bigamously married because of the complexity of the laws, especially in this period of international mobility and frequent divorce. Further, the decision in this case helps also to bring about a certain harmony of decision as between the courts of the forum and the courts of the foreign country. But from a legal point of view, it has been submitted that the assessment of the Canadian case reveals that it is difficult to assert with confidence the basis on which the decision is founded as the court reasoning is rather confusing. This appeared from the judgement given by Ritchie J. in the Canadian supreme court when he pointed out:

"I am accordingly of opinion that at the time of her marriage in Toronto, the respondent had the capacity to marry according to the law of the country where she was then domiciled. This does not, however, solve the whole problem because as a general rule, under Ontario law a divorce is not recognised as valid unless it was so recognised under the law of the country where the husband was domiciled at the time when it was obtained, and although the validity of the Jewish divorce was at all times recognised in Israel where the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognised according to the law of the husband's Hungarian domicile of origin.

The court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgement Mr. Justice Mackay has thoroughly and accurately summarised and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status". (463)

The decision of the Ontario court of Appeal and of the Supreme court of Canada has been severely criticised in that it is inconsistent with the traditional accepted rules of choice of law in Common law in respect of the validity of marriage. The court has declined to grant a nullity decree according to its own conflicts rules and applied the relevant foreign law. However, it has been submitted that the court of the forum has ceased to be master in its own house if it is willing to throw to the winds its own conflict rules bearing on recognition of foreign divorces, thus surrendering its own policy to that of any foreign country.<sup>(464)</sup> Although this might be persuasive, one might argue that English and Scottish courts, for instance, surrender their own public policy to that of any foreign society whenever they recognise the validity of a status acquired under a foreign law that would not have been so acquired under English or Scots law. However, it is inherently abhorrent to English or Scottish public policy for, let us say, an uncle and niece to marry one another, and yet it is not abhorrent to

recognise such a marriage if it has been celebrated abroad and valid under the relevant foreign law governing the parties' capacity to marry.<sup>(465)</sup> One might suggest that the application of the foreign law in such cases does not connote any surrender of policy by the forum, inasmuch as the foreign law is designated by the forum's conflicts rules.

In his comments on the instant decision, Lysyk has argued that the court upheld the validity of the remarriage without consideration being given to the dual domicile test exception, though quoted by Mr. Justice Mackay, i.e. a marriage should be invalid if the parties have no capacity under the law of the place of celebration. Hence the learned writer has pointed out that this exception "have an apparent relevance to the facts of *Schwebel v. ungar*, inasmuch as by the law of the jurisdiction in which the marriage was celebrated -Ontario- one of the parties would be under an incapacity to marry the other unless, ..., the wife's prior divorce could be recognised under Ontario's conflict of laws rule relating to recognition of foreign divorces".<sup>(466)</sup> This is questionable on the ground that, as already indicated, the application of this exception is only justifiable if the question has been raised at the time of the ceremony for the only consequence of its application then is the denial of celebration. But the application of a such rule at the time of the proceeding would only create an obstacle to the marriage validity, insofar as it would undermine the parties' reasonable expectations, violating the *favor matrimonii* principle, and thus creating a limping marriage as between the country of the forum *qua lex loci* and the country of the parties' domicile. Although Mackay, J.A. has quoted this exception, the decision seems to be in accord with the view referred to above that the rule requiring capacity to marry by the *lex loci* is to be applied only at the time of the ceremony since it is based on the ground of public policy which would not be infringed if the parties have only a transient connection with the country of celebration. The present writer therefore believes that the Ontario court of Appeal would have decided the case differently if the question arose for decision at the time of the ceremony.

The learned writer has also argued that Mackay J.A. has failed to consider the unilateral-bilateral dichotomy according to which neither a married person can validly contract a marriage in a monogamous country, nor a single person can validly contract a marriage with a married person in a monogamous country, if either party is already married by either's personal law. Consequently, the wife's remarriage in this case should be held void *ab initio* since the husband lacked capacity by the Ontario law to marry a married person, the wife having married status by Ontario law.<sup>(467)</sup> Certainly, the marriage would have been declared void if this approach has been adopted by the Canadian court. Nevertheless, it might be assumed that this line of reasoning has not been altogether considered by the court on the ground that it may lead to injustice, inasmuch as the annulment of a marriage in such circumstances would be contrary to the parties' reasonable expectations and may have undesirable effect regarding the legitimacy of the child born to the parties before the proceedings.

The consequence of such decision is, it is submitted, that the Ontario forum might be compelled in other proceedings in Ontario to hold that the wife's first marriage has not been dissolved. Suppose, for instance, that her first husband were to acquire a domicile in Ontario and married there a domiciled Ontario woman. The first husband remarriage in Ontario would be held invalid on the ground that his status under the law of his domicile is that of a married person as the Jewish *Ghet* granted by the rabbinical court in Italy is not recognised by the law of his domicile, i.e. Ontario law. Accordingly, it has been pointed out that the Ontario court, in such circumstances, "would be put in the invidious position of denying H1's capacity to remarry on the grounds of his subsisting marriage to W1, though in *schwebel v. Ungar* W1 had been found to be validly married to H2". The absurd result would then have been followed that the divorce would have been valid for the first wife but invalid for the husband. Such internal dissonance may happen whenever the principal question is one which is referred to the law of any country other than Israel as, for example, in matters of succession to

movables or immovables depending on whether or not the marriage between the parties was validly dissolved.<sup>(468)</sup>

However, it has been argued that the law of the forum is the most appropriate law to determine the incidental question in the present case because of its being an elementary expression providing protection for the basic principle of monogamy according to which capacity to marry must be denied when the prior union is valid and has not been effectively ended under the *lex fori*. Another, at least equally important, argument in favour of this view is that the application of the law of the forum would prevent the forum's recognition of the unacceptable consequence to which the application of the opposite approach may lead, i.e. a person being lawfully married to two spouses at the same time. Consequently, Jaffey has expressly submitted that the application of the *lex causae* approach would imply the recognition of a kind of "legal bigamy" by the forum, and consequently "Intractable problems in relation to succession, matrimonial relief and other matters could thus arise". In explaining the *lex causae* unnecessary complications, the learned writer argues:

"Suppose in such a case as *Schwebel*, the wife, after her second marriage had been held valid in England, became domiciled in England and died there intestate. The first husband would be entitled to succeed as the surviving spouse, for the divorce would not be recognised in England. What about the second husband, whose marriage had been held valid?"<sup>(469)</sup>

Moreover, it has been respectfully submitted, and seems to be the implication which follows from Hartley's view, that the remarriage abroad of a party to a prior union, who had obtained a divorce, should also be held void *ab initio* by the English courts if the divorce is not entitled to recognition under English conflicts rules. The Law Commission and the Scots Law Commission, in an unpublished consultation paper in 1983, have provisionally recommended to the effect that "a person whose foreign divorce or annulment is not recognised as valid in the U.K. should not be regarded as

free to remarry (whether in the U.K. or elsewhere), notwithstanding that the law of, for example, his domicile recognised the divorce or annulment".<sup>(470)</sup> In his comments on the Family Law Act 1986, David Pearl seems to adopt the same view when he expressly said that the Act does not provide a solution to the problem of a woman, whose divorce is not entitled to recognition in the U.K. and, who remarries abroad, especially if she applies for entry clearance for settlement in this country as the wife of an English domiciliary. Relying on the fact that the validity of a marriage can affect matters of immigration and citizenship, the learned writer has concluded that

"One must assume that in this situation priority would be given to the policy of the Act. Thus if a divorce is not recognised because of a particular provision of the Act, it will follow that a subsequent marriage by the woman must necessarily be treated as void in the U.K. even though it may be valid elsewhere, and even though its validity in this country could be achieved by referring to the conflict of law rules governing capacity to contract a marriage. Entry for settlement would undoubtedly be refused in these circumstances".<sup>(471)</sup>

The application of the law of the forum, as a general rule, to determine the incidental question of the divorce validity in the present case, however, seems neither warranted on principle, nor to be in accord with the existing judicial authorities on the matter which appears to be interpreted wrongly by the advocates of the *lex fori* approach. In fact most of the courts' decisions on this subject are reconcilable with the *lex fori* approach, but it appears to be the *ratio decidendi* of none of them. The underlying justification is that the law of the forum has been applied by the courts nearly in all the cases where the incidental question is involved not because of its being the *lex fori*, but for the excellent reason that it is the personal law of one of the parties to the proposed union, who is a domiciliary or a national of the forum's country. The existing judicial authorities are thus alternatively and rightly open to the explanation that the courts have considered bigamy as a bilateral impediment which must be applied not only when the remarrying party is subject to the law imposing it, but also when it forms part of the other party's personal law. For instance, English law has been applied in Shaw v.

Gould on the ground that the wife was domiciled in England at the time of her second marriage, and thus the remarriage was held void for the reason that the Scottish divorce purporting to dissolve her first union was not recognised by her antenuptial domiciliary law, i.e. English law. Furthermore, one might also argue that there are apparently no cases where the courts have applied the law of the forum if neither of the parties to the fresh union is a subject of the forum's country.<sup>(472)</sup>

The Law commission and the Scottish law commission have recently examined this problem of incidental question and refused to recommend any legislative provision to deal with the effect of non-recognition of foreign divorce on capacity to marry. The main argument given by the commissions was that the issue is not one of any practical significance and the likelihood of a conflict of rules is limited because even if the parties have capacity under the relevant foreign law, capacity under the law of that part of the U.K. in which remarriage is sought would also be required. It is also suggested that since the English and Scottish rules for the recognition of foreign divorce are so broad, a conflict with the personal law of the parties governing capacity is unlikely so far as remarriage abroad is concerned, except where recognition is denied in England or Scotland on ground of public policy. Finally, the Commissions have submitted that the non-recognition of a foreign divorce on the ground of public policy "ought not to be a bar to the recognition of the validity of a remarriage elsewhere".<sup>(473)</sup>

In conclusion, therefore, it might be said that the adoption of the *lex fori* approach in its generalised form is an over simplification which cannot be supported in principle or by authority. Apart from the fact that the proceedings are brought there, the country of the forum may have no connection with the marriage. However, it is difficult to imagine any conceivable policy reason for the forum to annul a marriage the validity of which is sustained both in the *lex loci celebrationis* and the *lex domicilii* of the parties simply because the divorce of either party is not entitled to recognition in that

country.<sup>(474)</sup> This is because the forum, in its capacity as the personal law of the parties, is not prepared to recognise a foreign decree annulling a marriage involving one of its subject simply because the foreign forum has applied its own law according to which a prior divorce is not recognised there, unless that country is the domicile of the other party. It is also undoubtedly clear that the application of this approach would be in direct conflict with the basic principles of the forum's conflict rules which refer capacity to the parties' personal law, whether determined by domicile or nationality.

There is no doubt that the *lex fori* method of solution is well justified where the parties are, or one of them is, subject to the law of the forum as their personal law, for it is the only, or one of the relevant laws to decide whether the parties have capacity to marry, and whether they are single. The merits of this approach, on the other hand, are open to grave doubt where the parties are subject to a foreign country the law of which differs considerably as to the validity of the prior marriage.

Certainly, the application of the *lex fori qua lex loci* so as to refuse the celebration of a second marriage locally is well founded if one of the parties is already a party to a prior subsisting union in the forum, on the sole ground of public policy as the allowance of the second union would be so offensive to the morals and religious concepts of the monogamy-insisting *lex fori* and would create a legal bigamy in that country. To this extent, It has been established in England and Scotland that a marriage registrar should not issue the necessary licence or certificate if the existence of any lawful impediment has been shown to his satisfaction. It is therefore clear that the application of the *lex fori qua lex loci* at the time of the ceremony is justified on the ground of public policy, as well as on the ground that the policy of validation is without significance at this stage.<sup>(475)</sup>

Accordingly, it might be submitted that an incapacity due to a prior subsisting marriage

under the *lex fori qua lex loci* can hardly require the invalidation of a subsequent marriage if it has been celebrated locally in accordance with the *lex causae*, which would recognise the validity of that marriage. The underlying reason is that there is no policy justification for applying this principle which would create an additional obstacle to the validity of the remarriage, and would lead to limping marriages, especially if the remarriage has no connection with the forum's country.<sup>(476)</sup> The Canadian decision in Schwebel v. Ungar referred to above appears to be in favour of applying the view suggested here which seems to be consonant with the *favor matrimonii* principle and the best way in which the forum can further international uniformity of decisions. In view of the injustice that may be caused in such cases by the application of the the *lex fori* approach, the principle applied in the Canadian case has much to commend it, and it is to be hoped that an English or a Scottish court would adopt the same principle so as to sustain the validity of a remarriage celebrated locally in accordance with the parties' antenuptial domiciliary law.

Finally, It might be suggested that the application of the *lex fori* approach in cases where the remarriage has been celebrated abroad is undesirable since "the parties cannot predict what is to be the future forum with whose law they must comply". However, it would be absurd to determine the validity of a marriage on the basis of whether the parties are single according to the law of the country's courts adjudicating on the matter. It is, therefore, clear that the policy of validation, the desire to eliminate limping marriages, and the policy of protecting the parties' reasonable expectations seems to demand the rejection of such an approach.

**3 - Prohibitions Against Remarriage After Divorce:** It is well settled in various legal systems that the right to remarry of both parties, or one of them, to a properly dissolved marriage may be limited by different restrictions which has been imposed for achieving different purposes. These prohibitions, it is submitted, might be divided in two

categories, namely, those that are imposed on both parties to the dissolved union and those which are directed only against one of the parties. However, It has been pointed out that while the restrictions within the first category only come into question where the previous union has been ended by a decree of nullity or divorce, the prohibitions within the last category arises also when the prior marriage has been terminated by death of one of the parties.

The main and the only prohibition which falls for consideration within the first category, and which has been considered most frequently in the courts of common law countries, is that which prevents either party to a properly dissolved marriage from remarrying within the time allowed for appeal from the divorce decree or until the appeal which is brought within that time has been dismissed. However, the rationale of such restriction is the desire to prevent the complications likely to arise from a second marriage if the decree is reversed on appeal. The practical effect of this prohibition, as Dicey has pointed out, "is the same as that of a system in which a decree *nisi* is granted in the first instance and decree absolute is pronounced only after all appeals have run their course". It has been submitted that this kind of prohibition must be applied if it forms part of the law of the country's court which granted the decree, notwithstanding that it is unknown to the law governing capacity of the divorcee to remarry.<sup>(477)</sup>

The question of whether such prohibition are to be accorded extraterritorial effect has been considered in Warter v. Warter,<sup>(478)</sup> the leading English case on the matter, where the parties to the first union were divorced in India. The wife came to England shortly afterwards and married there a domiciled Englishman within six months after the divorce decree was granted. On the evidence, it appears that the Indian divorce Act 1869, under which the proceedings were taken, prohibits either party from remarrying until six months after the decree absolute had expired and no appeal had been lodged. The remarriage was therefore held invalid notwithstanding the position of the parties'

antenuptial domiciliary law. The same view has been applied in the case of Miller v. Teale,<sup>(479)</sup> where the parties to the first marriage were divorced in the country of their domicile. The law of the parties' domicile contained a prohibition against remarriage of the kind now under consideration. After the divorce, the wife acquired a domicile of choice in another country where she married another man, who was also domiciled there, within the prohibited time. The court of the country where the wife remarried held that the prohibition of the *lex divortii* was applicable and the marriage was held invalid, even though the parties' capacity to the second union was governed entirely by the law of the forum *qua lex domicilii*.

The same questions, it is argued, may also arise for decision in the country the law of which imposes the prohibition in situations where the *lex fori* and *lex divortii* are congruent. Professor Palsson has clearly pointed out that "The attitude of that country is even a matter of primary importance; for the courts of other countries cannot be expected to recognise that the restraint has extraterritorial effect unless it is treated as having such effect in its country of origin"<sup>(480)</sup> Thus, this particular situation arose for decision in the early English case of De Thoren v. Att. Gen.,<sup>(481)</sup> where one of the parties to an English divorce remarried in Scotland before the expiry of the time allowed for appeal against the divorce decree. Although the marriage was initially invalid by English law at least as understood when the case came to be decided, it was held to have become valid by a presumed exchange of matrimonial consent in Scotland after the prohibition had expired.

It has been argued that the ground on which the second union should be held invalid is not well settled beyond doubt. The general prevailing view which appears to be adopted in most of the relevant decisions on the matter is that the *lex divortii's* prohibition should be interpreted to the extent that the prior union is not completely dissolved before the expiration of the time allowed for appeal against the divorce decree. In Warter v. Warter, for example, the Indian law by virtue of which the

divorce decree had been pronounced was interpreted to the effect that the first marriage had not entirely come to an end while the restriction lasted and that it formed "an integral part of the proceedings by which alone both parties can be released from their incapacity to contract a fresh marriage".<sup>(482)</sup> The same line of reasoning was clearly adopted in Boettcher v. Boettcher<sup>(483)</sup> by Wallington J. who was reported as saying that the restriction "had in English law the effect of making the marriage subsist" until the expiry of the time limit within which an appeal can be presented. It is undoubtedly clear that a second union celebrated while the restriction lasts is, according to this view, void for bigamy, and thus the position of the *lex loci* and that of the *lex domicilii* are irrelevant.

The problem of the ground upon which the second marriage should be held invalid has been more fully considered in Miller v. Teale, where Wallington J.'s statement referred to above was regarded as being "perhaps too compendious a way of describing the position taken by English law".<sup>(484)</sup> Having satisfied that the prohibition is "a temporary qualification of the effect of the decree", the majority of the judges thus concluded that

"In English law a restraint on remarriage so as to allow time for appealing appears to be regarded as designed to give a provisional or tentative character to the decree dissolving the marriage so that it does not yet take effect in all respects. It is regarded as ancillary to the provision of the law which for a comparatively brief time makes the decree absolute for dissolution contingently defeasible in the event of appeal. It is as if there is a residual incapacity to remarry arising out of the previous marriage and not yet removed by the process provided for dissolving it".<sup>(485)</sup>

Kitto J., on the other hand, having stated that the incapacity arising from the first union was removed by the divorce decree went on to hold that the wife's second marriage was invalid on the ground that the incapacity of the divorced spouses to remarry before the expiry of the time allowed for appeal originated from the *lex divortii*'s prohibitory statute itself. Since the court of a foreign forum have jurisdiction to grant a divorce

purporting to dissolve a marriage as well as to reverse the decree on appeal, the learned judge pointed out that the restriction should be recognised in other countries simply for preventing the complications that may arise in case the judgement is reversed on appeal.<sup>(486)</sup> In line with this view, it was held in Marsh v. Marsh, where no issue of conflict of laws is involved, that the decree absolute dissolves the marriage from the moment it is pronounced by the court. "The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgement *in rem*, and unless and until a court of appeal reversed it the marriage was for all purposes at an end."<sup>(487)</sup> Accordingly, it has been submitted that "If this is the position under the law of the country which granted the decree it would seem strange if the marriage is held to be still in existence -even if only for a limited purpose -in the eyes of the law of other countries".<sup>(488)</sup>

Finally, it might be concluded that the rival view of Kitto J. seems preferable from the theoretical standpoint because the prohibition now under consideration is so closely linked to the divorce proceedings, and therefore cannot be referred to a separate choice of law rule. The underlying justification lies on the fact that the purpose of such prohibition would be exceedingly difficult to achieve if it is referred to a different choice of law rule than that applicable to the divorce, inasmuch as the foreign forum, which has granted the divorce decree, has also jurisdiction to reverse it on appeal.

The first prohibition that to be examined within the second category is that imposed against the guilty party to the divorce who has committed a matrimonial offence. It is well established beyond any doubt that a prohibition imposed by foreign law "by way of punishment, discipline or example" will not be applied in England or Scotland, irrespective of the parties' domicile. However, the decision in the English case of Scott v. Att. Gen.<sup>(489)</sup> seems to be a persuasive authority for the proposition that an incapacity to remarry imposed *in ponaem* against the guilty party to the divorce must

be disregarded by English or Scottish courts if that party's remarriage is celebrated locally. In this case a husband domiciled in Cape colony divorced his wife there on the ground of her adultery. There was evidence that a person divorced for adultery, according to the law of the Cape, has no capacity to remarry so long as the injured party remained single. After the divorce, the wife acquired a domicile of choice in England where she married a domiciled English man. Satisfied that the divorce decree dissolved the marriage, Sir James Hannen P. declared the wife's remarriage valid on the ground that she has capacity to marry by the law of her domicile at the time of the second marriage, i.e. English law. It is interesting to note that the learned judge, on delivering the judgement of the court in Warter v. Warter,<sup>(490)</sup> justified the decision in Scott v. Att. Gen on a different ground, namely, the restriction on remarriage was intended to punish the guilty party, and thus must be disregarded in England as being penal and discriminatory. The practical effect of this explanation, however, is that the wife's remarriage in England would have been held valid on the ground of public policy, even though she had remained domiciled in the Cape colony.

The last prohibition to be considered within the second category is that under which a former wife is prohibited from remarrying within a limited period of time taking effect from the date on which her prior union was ended. It is interesting to underline that this incapacity, though it attaches only to one party, is far from being discriminatory as it applies alike to widows and divorced women. The purpose of this restriction is, and it is too clear for argument, to prevent doubt arising as to the paternity of any child born to the widow or the divorced wife within that period of time, in other words to prevent *turbatio sanguinis*. It has been submitted that this prohibition, perhaps also the one imposed in connection with the right of appeal, should be applied whenever it forms part of personal law of the parties to the proposed union.<sup>(491)</sup>

The only case in point where the question of whether such a kind of restriction would be accorded extraterritorial effect is the Australian case of Lundgren v. O'Brien,<sup>(492)</sup> which concerned a breach of promise action. In this case, a couple obtained a divorce in Belgium and the wife's marriage to the respondent was to take place in Australia within ten months of the Belgian divorce. The court refused to give effect to a Belgian provision by virtue of which the divorced woman was prohibited from remarrying within ten months after the divorce. The reason for this decision given by the court was that this incapacity was penal and discriminatory as it attached only to one party. Although there may be good policy justification for not according extraterritorial effect to foreign restrictions of this kind, it is unacceptable to consider such prohibition as penal, inasmuch as it applies equally to widows and divorced women. The correct decision, as Morris said, "should have been that if the plaintiff was still domiciled in Belgium, and by Belgian law she had no capacity to remarry until the ten month has expired, a remarriage at Victoria within that time would have been invalid; but if she had acquired a domicile in Victoria, the marriage would have been valid".<sup>(493)</sup>

## Notes chapter two

- 1- See, supra chapter one p. 7; This view was established for the first time by the statist doctrine which suggested that the *locus regit actum* applies not only to the form of any contract but also to its essential requirements. see, Wolff, *op. cit.* p. 324. However, the application of *lex loci actus* as a choice of law rule has strongly been explained by the principle of territoriality under which it is thought that the law of the place of celebration of any contract is the most appropriate law to govern on the basis of sovereignty within the territory of its application. see, Palsson, L., *Marriage in comparative conflict of laws*, 1981, pp. 15 ss.; Walton, F.P., *Husband and wife*, 1951, p. 316; Dicey and Morris, *Op. Cit.*, 11th. ed., 1987, p. 623, See now 12th ed., 1993, p. 664.
- 2- See, Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395, 161 E.R. 782; Compton v. Bearcroft (1769) Bull. N. P.113; Middelton v. Janverin (1802) 2 Hag. Con. 437; Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54,161 E.R. 665, Ruding v. Smith (1821) 2 Hag. Con. 371, 389-92, 161 E.R. 774,780-81; Rose v. Rose (1827) 5 S. 605 at 639 & 656; Simonin v. Mallac (1860) 2 Sw. & Tr. 67.
- 3- Walton, F. P., *Op. Cit.*, pp. 316-17; Smart, P. St. J., *Interest analysis, False Conflicts and the Essential Validity of Marriage* [1983] 14 *Anglo-American L. Rev.* p.225 at 227; Jaffey, A. J. E. *Introduction to the Conflict of Laws*, 1987, pp. 24-25; Sykes, E. I., *The Essential Validity of Marriage*, [1955] 4 *I.C.L.Q.* 159, at 160-61; Clive, E. M., *Op. Cit.*, p. 144, See now 3rd ed., 1992, p. 133. It is interesting to underline that the *lex loci celebrationis* still the prevailing view in the united states as the main governing rule upon capacity, eventhough the parties' domiciliary law or laws is regarded as decisive under some special circumstances. See, Palsson, L., *Op. & Loc. Cit.*; Sullivan v. American Bridge Co. [1935] 176 *Atl.* 24; Mazzolini v. Mazzolini [1958] 155 *N. E.* (2ed) 206, 228; Jewett v. Jewett [1961] 175 *A.* (2ed) 141, 142.
- 4- Wolff, *Op. Cit.*, p. 312; Von Barr, *Op. Cit.*, pp. 342-43; Genin-Meric, R., *Op. Cit.*, pp. 100,23; Pillet, A., *Op. Cit.*, p. 483; Palsson L., *Op. Cit.*, pp. 90,93; Batiffol et Lagarde, *Op. Cit.*, p. 37 ss.
- 5- Dicey and Morris, *Op. Cit.*, pp. 622 ss., See now 12th ed., 1993, p. 664 ss.; Anton, A. E., *Op. Cit.*, p. 274, See now 2nd. ed, 1990, p. 428; Clive, E. M., *Op. Cit.*, p. 148, See now 3rd. ed., 1992, p. 133 ss; Cheshire and North, *Op. Cit.*, p. 574, See now 12th ed., 1992, p. 586; Jaffey, A. J. E., *Op. Cit.*, p. 25; Collier, G., *Conflicts of Laws*, 1987, p. 259.
- 6- Issad, M., *Op. Cit.*, 2nd ed., pp. 248 ss.; Algerian civil code 1976, article 11 provides: "Les conditions relatives à la validité du mariage sont regie par la loi nationale de chacun des deux conjoints.", and Article 13 which states: " Dans les cas prévus par les articles 11 & 12, si l'un des deux conjoints est Algerian , au moment de la conclusion du mariage, la loi Algerienne est seul applicable, sauf en ce qui concerne la capacité de se marier."
- 7- See, Supra, [chapter one pp,14 ss]. It is perhaps worth noting that the basis of the existing divergences, between legal systems, concerning characterisation are the degree or the intensity of the public policy, social interest, and the implementation of justice which is interpreted differently.

- 8- See, *Lawrence v. Lawrence* [1985] Fam. 106, 2 All. E. R.; The Nullity of Marriage Act 1971, s.7; The Family Law Act 1986, s. 50.
- 9- *Brook v. Brook* (1861) 9 H. C. L. 193; see, Dicey and Morris, *Op. Cit.*, p. 623; Cheshire and North, *Op. Cit.*, p. 574; Morris, J. H. C., *Op. Cit.*, p. 159; Anton, A. E., *Op. Cit.*, p. 273-75.
- 10- *Ibid*, at p. 207 [per Lord Campbell].
- 11- Dr Cheshire has suggested that many of the relevant decisions are rather inconclusive on the ground that the adoption of either theory would lead to the same result: *Mette v. Mette* (1859) 1 Sw. & Tr. 416; *Brook v. Brook* (1861) 9 H. L. C. 193; *Re De Wilton* [1900] 2 Ch. 481; *In the Will of Swan* (1871) 2 V.R. (1E & M) 47; See Cheshire and North, *Op. Cit.*, p. 578, See now 12th ed., 1992, pp. 590-91.
- 12- See *Vervaeck v. Smith* [1983] 1 A.C. 145; *Lawrence v. Lawrence* [1985] 1 All. E R. 506; Fentiman, R., *The Validity of Marriage and the Proper Law*, [1985] C. L. J. 256; Smart, P. St. J., *Op. & Loc. Cit.*
- 13- Dicey and Morris, *Op. Cit.*, pp. 622-23, See now 12th ed., 1993, pp. 663-64; Morris, J.H.C., *Op. Cit.*, pp. 159-60; Jaffey, A.J.E., *Op. Cit.*, 1988, pp. 24-25; Collier, J.G., *Conflict of Laws*, 1988, p.160; Sykes, E.I., *The essential Validity of Marriage*, [1955] 4 I.C.L.Q., p.139 at 161; Anton, A.E., *Op. Cit.*, p. 273 ss, See now 2nd. ed, 1990, pp. 429-31; Swan, J., *A New Approach to Marriage and Divorce in the Conflict of Laws*, [1974] 24 U.To.L.J., p.17 at 120; Maddaugh, P.D., *Validity of Marriage and The Conflict of Laws: A Critique of the Present Anglo-American Position*, [1973] 23 U.To.L.J., p.117, at120; Palsson, L., *Op. Cit.*, p. 106,128.
- 14- The hypothesis posed here is based upon the fact situation in *Mette v. Mette* (1859) 1 Sw. & Tr. 416.
- 15- Morris, J.H.C., *Op. Cit.*, p.159; Jaffey, A.J.E., *The Foundations of Rules For The Choice of law*, [1982] 2 Ox.J.L.S., p368, at369-73; Cf. Cheshire and North, *Op. Cit.*, pp. 575 ss, See now 12th ed., 1992, pp. 588 ss.
- 16- *Brook v. Brook* (1861) 9 H.L.C. 193 at 212.
- 17- See, Hartley, T.C., *The Policy Basis of the English Conflict of laws of Marriage*, [1972] 35 M.L.R. 571 at 576; *Sottomayer v. De Barros* [N° 1] (1877) 3 P.D. 1, 6.
- 18- Jaffey, A.J.E., *Supra* note 15, see also his book: *Conflict of laws*, 1988, pp. 25-26.
- 19- *Ibid*, pp, 387-88; see also Morris, J.H.C., *Op. Cit.*, p. 159; Palsson, L., *Op. Cit.*, p. 135.
- 20- Dicey and Morris, *Op. Cit.*, p. 625, See now 12th ed., 1993, p. 666, Law com. [N° 89] and Scots Law com. [N° 64], 1985, p. 93.
- 21- Dicey and Morris, *Ibid*, See now 12th ed., 1993, p. 666; Morris, J.H.C., *Op. & Loc. Cit.*; Smart, P. St.J., *Op. Cit.*, p.228, *Gray v. Formosa* [1963] P. 259 at 267 [per Lord Denning M.R.]; *Adams v. Adams* [1971] P. 188 at p.216 [per Simon, P.]; Palsson,L., *Op. Cit.*, pp. 102, 134.
- 22- *Brook v. Brook* (1861) 9 H.L.C. 193.
- 23- *Ibid*, p. 220, and see p. 208.
- 24- *Ibid*; See also *Mette v. Mette* (1859) 1 Sw. & Tr. 416 at p 424 where it has been said that:

- "There could be no valid contract unless each party was competent to contract with the other."
- 25- Cheshire and North, Op. Cit. p. 578; See also Collier, G, Op. Cit., p. 260; Smart, P.St.J., Op. Cit., p. 228; Fentiman, R., Op. Cit. p. 262.
- 26- See, Supra note 16.
- 27- As to the requirements of acquiring a domicile of choice, see, Law Com.[N° 168] and Scots Law Com.[N°107], P. I. L.:The Law of Domicile, paras: 2.6, 2.7; Bell v. Kennedy [1968] L.R. 1 Sc. & Div. 307, 321; Winans v. Att. Gen. [1904] A.C 287; Gulbenkian v. Gulbenkian [1937] 4 All.E.R. 618,627; In The Estate of Flud (N° 3) [1968] P. 675,685; Re Flynn [1968] 1 W.L.R. 103; I. R. C. v Bullock [1976] 1 W.L.R. 1178 (C.A.).
- 28- Karsten, I.G.F., Capacity to Contract a Polygamous Marriage [1973] 36 M.L.R. 291 at p. 294; Brook v. Brook (1861) 9 H.L.C. 193, at pp. 224-27, 234-35.
- 29- Sottomayer v. De Barros [N° 1] (1877) 3 P.D.1(C.A.); Re De Wilton [1900] 2 Ch. 481; Lendrum v. Chakravarti 1929 S.L.T. 96; MacDougal v. Chitnavis 1937 S.C. 390 at 406; Re Paine [1940] Ch. 46; Pugh v. Pugh [1951] P. 482; Bliersbach v. MacEwan 1959 S.C. 43 at 49-52; Cheni v. Cheni [1965] P. 85; Rojas, Petr. 1967 S.L.T. (Sch. Ct.) 24; R. v. Brentwood Marriage Registrar [1968] 2 Q.B. 956; Padolechia v. Padolechia [1986] P. 314; Szechter v. Szechter [1974] P. 286.
- 30- Sottomayer v. De Barros [N° 1] (1877) 3 P.D. 1(C.A.); Cf. Fentiman,R., Op. Cit. p 263-64; Smart, P.St.J., Op. Cit. p 229-30.
- 31- Ibid, p. 5: "As in other contract, so in that of marriage, personal capacity must depend upon the law of domicile." it is interesting to underline that this decision cannot be used as an authority for a case involving parties who have separate domicile, because it is "confined to the case where both contracting parties are, at the time of their marriage, domiciled in a country the law of which prohibits their marriage." Ibid, p 6; Cf. Sottomayer v. De Barros [N° 2] (1879) L.R. 5 P.D. 94 which is discussed Infra, Section 2.
- 32- Re Paine [1940] 1 Ch. 46.
- 33- See, Supra, note 24, and Ibid, p 49. Moreover, the learned Judge quoted also Dicey's rule concerning capacity to marry.
- 34- Ibid, p 49
- 35- Pugh v. Pugh [1951] P. 482; See also, North, P.M., Private International law of Matrimonial Causes, 1977, p 120; North, P. M., Development of Rules of private International law in the Field of Family law, [1981] 166 (1) R.C.A.D.I., p 9 at 57 ss; Cf. Fentiman, R., Op. Cit., p 272, Smart, P. St. J., Op. Cit., p 233.
- 36- Ibid, at p 494.
- 37- Fentiman, R., Op. & Loc. Cit.; The Age of Marriage Act 1929, Sec. 1 provides that: " A marriage between two persons either of whom is under the age of sixteen shall be void."; See now, The Marriage Act 1949, Sec. 2; Cf. Marriage (Scotland) Act 1977, Sec. 1.
- 38- See, R. v. Brentwood Marriage Registrar [1968] 2 Q.B. 956; Rojas, Petr. 1967 S.L.T. (Sch. Ct.) 24. However, these case surely suggest that the lex domicilii is applied, not only where it is English, but as a choice of law rule governing the essential validity in all cases whether an English domiciliary is involved or not.; See also, Mohamed v. Knott [1969] 1 Q.B. 1.
- 39- Padolechia v. Padolechia [1967] P. 314, at 336,338-39. Cf. Fentiman, R., Op. Cit., p. 268-

- 40- Lendrum v. Chakravarti 1929 S.L.T. 93 at 103; Walton, Husband and Wife, p 319-21.
- 41- Rojas, Petr., 1967 S.L.T. (Sh. Ct.) 24.
- 42- Ibid.
- 43- The Marriage (Enabling) Act 1960, The Matrimonial Causes Act 1973; The Marriage (Scotland) Act 1977.
- 44- The Marriage (Enabling) Act 1960, Sec. 1(3).
- 45- The Matrimonial Causes Act 1973, Sec.11(d), Cf. Radwan v. Radwan [1937] Fam. 35; Hussain v. Hussain [1983] Fam. 26, 32.
- 46- The Marriage (Scotland) Act 1977, Secs. 1(1), 3(5) & 5(4) (f).
- 47- Cheshire and North, Op. Cit., p. 577, See now 12th ed., 1992, p. 590; Hartley, Op. Cit. p 577; Smart, P.St.J., Op. Cit., p 231.
- 48- Cheshire and North, Op. Cit., p. 578, See now 12th ed., 1992, p. 590.
- 49- Jaffey, A.J.E., [1978] 41 M.L.R. 38 at 39.
- 49A- e.g. Carswell (1881) 8 R 901; Stavert (1882) 9 R 579; Morton 1897 5 S.L.T. 222.
- 50- Hartley, Op. Cit., p 576.
- 51- Cheshire & North, Op. Cit., p 578, See now 12th ed., 1992, p. 590; Law Com. [N°68] & Scot. Law com. [N°107], paras:5.23-5.25.
- 52- Cheshire and North; *Op.Cit.*, p. 575, See now 12th ed., 1992, pp. 587-89. See also Cheshire, G., *Op. Cit.* (P.I.L.) 7th ed., 1965, p. 277; Cook, Logical and Legal Bases of Conflict of Laws, p.449; Foote, J.A., A Concise treatise on Private International Law, 5th ed. (by Bellot, H.L.), at 384, note P.; Palsson, L., *Op.Cit.*, p. 128; Morris, J.H.C., *Op.Cit.*, p. 159; Smart, P. St. J., *Op. Cit.*, p. 228; Anton, A.E., *Op. Cit.*, p. 278, See now 2nd ed., 19920, pp. 428-29.
- 53- Contrast Harvey v. Farnie [1882] 8 App.Cas.43 at 50; Cooper v. Cooper's Trustees [1885] 12 R. 473; 15 R (H.L.) 21.
- 54- Cheshire G.C., *Op Cit.*, 7th ed., p. 280; Savigny, Private International Law (Guthrie's translation) S.379; p. 240.
- 55- Cheshire and North, *Op Cit.*, (11th ed.) 1987,p. 375, See now 12th ed., 1992, p. 588.
- 56- See Report of the Royal commission on Marriage and Divorce (1956) Cmnd. 9678, para. 889.
- 57- Ibid para: 891; see also para. 889 in which it said: "There are circumstances in which it would be unfair to apply the personal law or laws of the parties at the time of the marriage." This implies that the Royal commission has never intended to lay down a new rule within the sphere of essential validity.
- 58- Cheshire and North, *Op.Cit.*, 11th ed., p. 576, See now 12th ed., 1992, pp. 588-89; Palsson, *Op.Cit.*, p.129; Radwan v. Radwan [No.2] [1973] Fam. 35; see also Lawrence v. Lawrence [1985] Fam. 106 at 127.
- 59- Palsson, L., *Op. and Loc. Cit.*
- 60- Cheshire and North, *Op.Cit.*, p. 576. See now 12th ed., 1992, p. 589; Jaffey, A.J.E. [1978] 41 M.L.R. 38; (1982) 2 Ox.J.L.S. 368, 380; Law. Com. [No.89] and Scots Law Com. [No.64] para 3.34; Lawrence v. Lawrence [1985] 1 All E.R. 506, 411.12; Hartely T.C., [1972] 34 M.L.R. 571.

- 61- Jaffey, A.J.E., The essential validity of marriage in the English conflict of laws [1978], 41 M.L.R.: This factor regarded by Swan as strong enough to be a basis for choice of law rule governing marriage, Swan J., *Op.Cit.* [1974] 24 U.T.O. L.J. 16, 27, 39, 41; Cf. Jaffey [1982] 2 Ox.J.L.S. 368, 378, 381.
- 62- Jaffey, A.J.E. *Op.Cit.* [1982] 2 Ox.J.L.S. 368, 381; and See Law Com. [No.89] and Scots Law Com. [No.64], [1985], para. 3.37.
- 63- Brook v. Brook [1861] 9 H.L.C. 193; Mette v. Mette [1959] 1 Sw. & Tr. 416; In Re Dewilton [1900] 2 ch. 481; Cheni v. Cheni [1965] P. 85; Ali v. Ali [1968] P. 564. It is interesting to note that the intended matrimonial home rule has been plainly rejected in: Padolechia v. Padolechia [1968] P. 314, 336; Lendrum v. Chakravarti [1929] S.L.T. 96, 103; Schewebel v. Ungar [1964] 48 D.L.R. (2d) 644 (S.C.C.).
- 64- De Reneville v. De Reneville [1948] P. 100 at 114; Warrender v. Warrender [1835] 2 Cl. & F. 488, 536. Cf. Fentiman, R. *Op.Cit.*, p. 268.
- 65- *Ibid* at p.122; see also Casey v. Casey [1949] P. 420 at 429.30 (per Lord Bucknill).
- 66- Morris, H.J.C., *Op.Cit.*, 1971, p. 163-64; Pugh v. Pugh [1951] P. 482, Padolechia v. Padolechia [1968] p.314; see also Hutter v. Hutter [1944] P. 95; Magnier v. Magnier [1968] 112 S.J. 233; Ponticelli v. Ponticelli [1958] p. 204, at 213; Ross-Smith v. Ross-Smith [1961] P. 39, 49 where it is fully expressed that in De Reneville v. De Reneville "the distinction drawn between a void and voidable marriage was relevant for the purpose of determining the domicile of the petitioning wife."
- 67- Kenward v. Kenward [1948] P. 124 at 144-146; see also Bliersbach v. MacEwen 1959 S.C. 43 at 55; Fentiman, R. *Op.Cit.*, (1985) 44 C.L.J. 256 at p. 257.
- 68- Radwan v. Radwan [1973] Fam. 35. See, *Supra*, Chapter One - Section 3, p.8.
- 69- Cumming-Bruce J. has openly stated that the authorities upon which the Queen Proctor argued for the invalidity of marriage were confined to cases of monogamous marriage, since they were not decisions concerning capacity to contract polygamous marriage. For this he said that: "Different public and social factors are relevant to each of these types of incapacity." *Ibid*, at p. 51. It is worth mentioning that his Lordship relied upon dictums, none of them related to polygamy. Brook v. Brook [1861] 9 H.L.C. 193, 224, 234-35; De Reneville v. De Reneville [1948] P. 100, Warrender v. Warrender [1835] 2 Cl. & F. 488, 536 a decision which is disapproved by Lord Westburn, in Shaw v. Gould [1868] L.R. 3 H.L. 55, 86-87.
- 70- *Ibid*, [1973] Fam. 35 at 54. Cf. Ali v. Ali [1968] P. 564, 578 (per Cumming-Bruce, J.).
- 71- *Ibid*.
- 72- See Davis, J.L.R., capacity to contract a polygamous marriage (1973) 5 F.L.R. 294 at 299, 301; Graverson, *Op.Cit.* pp.267-296; Karsten, I.G.F. *Op.Cit.* at p.291-97, Pearl, capacity for polygamy (1973) C.L.J. 43-46; Wade, J.A. capacity to marry: Choice of Law Rules and Polygamous Marriages (1973) 22 I.C.L.Q. 571-75; Cf. Carter, P.B., Decisions of British courts during 1972-73 involving questions of Private International Law, 46 B. YB. Int. L. 428 at 436-37.
- 73- See Palsson, L. *Op.Cit.* p.131; Graverson, R.H. *Op.Cit.* p.267.
- 74- See Morris, J.H.C. *Op.Cit.* 3rd ed. 1983, p.160; Dicey and Morris *Op.Cit.* p. 625, See now 12th ed., 1993, p. 666 ; Smart, P. St. J., *Op.Cit.* p.228; jaffey, A.J.E. Introduction to the

- conflict of laws, 1988, p. 38; Palsson, L. *Op.Cit.*, p. 135 where he openly states, "Any prospective test for the choice of law, such as that based on the intentions of the parties, is bound to leave plenty of scope for guesswork and to open the gate to evasion."
- 75- Ali v. Ali [1968] p.564, 578; see also Anton, A.E., *Op.Cit.*, p. 278, See now 2nd ed., 1990, p. 429; Walton, Husband and wife, 1951, p.317; Palsson, L. *Op.Cit.* p.133; Morris, J.H.C. *Op.Cit.* and *Loc. Cit.*
- 76- Cooper v. Cooper's Trustees [1885] 12 R. 473, Rev. 15 R (H.L.) 21; see also Anton, A.E. *Op.Cit.* & *Loc. Cit.*; Walton, *Op.Cit.* and *Loc. Cit.*, has fully asserted that "This application of Cheshire's view to these facts logically necessitates the acknowledgement of a new domicile of choice before it has, in fact, been acquired."
- 77- See patrick Glenn, H. Capacity to marry in the conflict of laws: some variations on a Theme. *Dalh. L. J.* 157 at 158; Woodhouse, J.T. Lack of Consent as a Ground for Nullity and the Conflict of Laws (1954) 31 *I.C.L.Q.* 454 at 455; English sham marriage cases: see H. v. H. [1954] P. 258; Buckland v. Buckland [1968] p.296; Szechter v. Szechter [1971] p.286; see also For Scotland, Orlandi v. Castelli [1961] S.C. 113.
- 78- Cheshire and North, *Op.Cit.*, p. 577, See now 12th ed., 1992, p. 587. Another answer to these problems, it is submitted, is that the decision of whether a marriage is valid or not requires institution of nullity suit, and by the time of the proceeding it will be clear if the parties intention has been fulfilled or not. Dr. North, as General Editor for the most recent edition of Cheshire and North's private international law in 1987, has criticised this answer on the basis that "it ignores the fact that a marriage which is void *abinitio* does not require a decision of a court to determine the parties' status. Ibid, Contrast: Sykes, E.I. *Op.Cit.* who (p.166-67) has referred essential validity in these situations to the actual matrimonial domicile on the basis of social considerations; see also Maddaugh, *Op.Cit.*, pp. 136-37.
- 79- See Dicey and Morris, *Op.Cit.*, p. 625, See now 12th ed., 1993, p. 666; Cheshire and North, *Op.Cit.*, 11th ed. 1987, p. 577, See now 12th ed., 1992, p. 589; Jaffey, A.J.E. Introduction to Conflict of Laws, 1988, p.39 where he has expressly stated the better solution dealing with cases mentioned above: "the marriage is valid if it is so under either the intended matrimonial home or the dual domicile doctrine."; see also, Gravesson, Matrimonial Domicile and the Contract of Marriage, (1938) 20 *Jour. Comp. Leg.* pp. 62 *et seq.*; Palsson, L., *Op.Cit.*, p. 134, Patrick Glenn, H. *Op.Cit.* p. 159; Smart, P. *St. J. Op.Cit.* at p.228; Fentiman, R. Activity in the law of Status: Domicile, Marriage and the Law Commission (1986) 6 *Ox. J.L.S.* 353 at 355.
- 80- Palsson, L. *Op.Cit.* p.133; see also Cheshire and North, *Op.Cit.*, p. 577, See now 12th ed., 1992, pp. 587-95.
- 81- See Jaffey, A.J.E. *Op.Cit.* 1988, p.26; (1982) 2 *Ox.J.L.S.* 368.
- 82- Cheshire, G.C., The English Private International Law of Husband and Wife, (1963-I) 108 *R.C.A.D.I.* 115 at 139; See also Maddaugh, *Op.Cit.*, p. 137; Palsson, L., *Op.Cit.*, p. 134.
- 83- See L. Com. (No. 168) and Scot. L. Com. (No. 107) The Law of domicile paras 2.9, 5.1-525; Fentiman, R., (1986) 6 *ox. J.L.S.* 353-367; 91985) *C.L.J.* 856; see also, The First Report of Private International Law Committee, (1954) *Cmd.* 9068; Reform of the Law of

- Domicile, (1954) 70 L.Q.R. 492.
- 84- Vervaeck v. Smith [1983] 1 A.C. 145.
- 85- Ibid, p. 166.
- 86 Lawrence v. Lawrence [1985] 1 All. E.R. 306; [1985] Fam. 106.
- 87- Ibid, at p.512 (italics provided); see also Perrini v. Perrini [1979] Fam. 85; Collier, [1979] C.L.J. 289.
- 88- See Fentiman, R., [1986] 6 Ox. J.L.S. 353, 355; [1985] C.L.J. 256, 257; Smart, P. St. J. Op.Cit., p.252, Sykes, E.I., Op.Cit. {1954} 4 I.C.L.Q. 159, at 168-69. However, the real and substantial connection test may obviate some of the objections to the test of Dr. Cheshire. It is important to note that the intended matrimonial home test provides no guidance where the parties' intention have not been implemented, or where they have no intention to cohabit as husband and wife (sham marriage). See Vervaeck v. Smith [1983] 1 A. C. 145, 166.
- 89- See Vervaeck v. Smith [1983] 1 A.C. 145, 166; Fentiman, R. [1985] C.L.J. 256, 1273-276.
- 90- Fentiman, R., [1986] 6 Ox. J.L.S. 353, at 358-59.
- 91- Ibid, at 359.
- 92- Ibid, at 360; Lawrence v. Lawrence [1985] 2 W.L.R. 86, at 92.
- 93- Ibid at 360; see also Cook, W.W. Logical and Legal bases of conflict of laws 448.
- 94- See Law Com. (W.P. No. 89) & Scots. Law Com. (C.M. No. 64), [1985], para. 3.20.
- 95- Cheshire and North, 12th ed., 1992, p. 602; see also Recognition of Divorces and Legal Separations Act 1971; Law com. [No. 137]; Scot. Law Com. [No. 88 ](1984); Family Law Act 1986.
- 96- These indicators of the best connected law are: - Forum Law if one of the parties is domiciled in the forum; -Lex loci celebrationis, Favor matrimonii, -Combination of the lex loci and the domicile of one of the parties; - intention of the parties. See Fentimen, R. [1985] C.L.J. 256, at 273 et. seq. cf. Law Com. (W.P. No. 89) and Scot. Law Com. (C.M. No. 64) (1985) paras. 3.18 - 3.23; Cheshire and North, *Op.Cit.*, 11th ed., 1987, See now 12th ed., 1992, pp. 601-02.
- 97- See Jaffey, Essential validity of marriage in the English Conflict of Laws (1988) 41 M.L.R. 38; (1982) 2 Ox.J.L.S., 368; Conflict of Laws, 1988, pp. 26, 37-38, 39; see also Cheshire and North, *Op.Cit.*, p. 590, See now 12th ed., 1992, pp. 602; Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para. 891. The distinction is drawn between public (e.g. prohibited degrees) and private (e.g. non-age) incapacities imposed upon parties.
- 98- Jaffey, Conflict of Laws, 1988, p.26. cf. Pugh v. Pugh [1951] p.482.
- 99- Lawrence v. Lawrence [1985] Fam. 106, at 115; see also Radwan v. Radwan [1973] Fam. 35 that might be construed as supporting the alternative reference test since the English court may not recognise the marriage if the parties remained footloose without establishing a matrimonial home in Egypt.
- 100- See Law Com. (W.P. No. 89) and Scot. Law. Com. (C.M. No. 64), [1985], para. 3.37.
- 101- See Hartley, T.C. Op.Cit. [1972] 35 M.L.R. 571, at 577-78; Cheshire and North Op.Cit. p. 591; law Com (W.P. No. 89) and Scot. Law Com. (No. 64) [1985] para. 3.38. Cf. Mette v. Mette [1859] 1 Sw. & Tr. 416; Re Paine [1940] Ch. 46, Pugh v. Pugh [1951] P. 482.

- 102- See Law com. W.P. No. 89 and Scot. Law Com. C.M. No. 64, para. 3.38; Cheshire and North, *Op.Cit. and Loc. Cit.*, See now 12th ed., 1992, p. 603.
- 103- See, Lawrence v. Lawrence [1985] 1 All E.R. 506, [1985] 2 All E.R. 733; Radwan v. Radwan [N°2] [1973] Fam. 35, [1972] 3 All E.R. 1026; De Reneville v. De Reneville [1948] P. 100, [1948] 1 All E.R. 56; Kenward v. Kenward, [1951] P. 124.
- 104- See Law Com. (No. 89) and Scot. Law Com. (No. 64), 1985, para: 3.32; See also Scottish Law Commission [Scot. Law Com. N° 135], Report on Family Law, 1992, para. 14.5.
- 105- Ibid, para. 3.31; see also paras: 3.25-3.26, 3.29-3.30; Law Com. (N°88) and Scot. Law Com. (N°63), 1984, the Law of Domicile, para. 2.3.
- 106- Ibid para. 3.19; see also Ponticelli v. Ponticelli [1985] p.204, 215-16 (per Sachs, J.). See Also Ross-Smith v. Ross-Smith (per Lord Reid).
- 107- Ibid paras. 3.21-3.23.
- 108- Ibid paras 3.32-3.36.
- 109- See Batiffol, H. and Lagarde, P. Droit International Privé, Vol. 2, 1983, p.37 et seq.; Mestre J., Droit international privé Français (Mariage) Jurisclasseur, Fasc. 546-A, 1983, p.6; Loussouarn and Bourel, Droit international Privé, 2nd ed. 1980, p.394; Mayer, P. Droit International Privé, 2nd ed., p. 431-33; Issad, M. droit international privé, 2nd ed., Vol. 2, 1986, p. 229-232, 248.
- 110- See Issad, M. Op.Cit. pp.133-134, 238; Bischoff, J.M. Mariage, Répertoire de droit international, 1969, p.287; Ali Ali Soulieman, Commentaries on Algerian private international law, 1984, p. 57 (in Arabic).
- 111- See Issad, M., Op.Cit., p. 228; Milliot, L. Introduction à l'étude du droit musulman, Sirey, 1971, No. 93 et s.; see also Algerian Family Code 1984 which is mainly based on the religious principles; Ghaouti Benmelha, éléments du droit Algérien de la famille, vol.1, 1985.
- 112- See Algerian Civil Code (No. 75/58), article 10 alinea I which provides: "les lois concernant l'état et la capacité des personnes, régissent les Algériens même résidant en pays étrangers"; see Mohand Issad, Op.Cit., p.248, Soulieman, A.A. Op.Cit. p.69 (in Arabic); Peyrard, G. La solution des conflits de lois en Algérie, [1977] 66 R.C.D.I.P. 380 at 387-389.
- 113- See Algerian Civil Status Code (Ordonnance No. 70/20), article 97 states that: "le mariage contracté en pays étranger entre Algériens ou entre Algérien et étrangère, est valable s'il a été célébré dans les formes usitées dans le pays, pourvu que l'Algérien n'ait point contrevenu aux conditions de Fond requises par sa loi nationale pour pouvoir contracter mariage", see also Issad, M., Op.Cit., p. 248.
- 114- See Batiffol, H. and Lagarde, P. Op.Cit. p.37; Audinet, Les conflits de lois en matière de mariage et de divorce, Cours La Haye, 1926, T.1, p.176; Niboyet, Traité de droit international privé français, T.V. 1948, n. 1487 s.; Birschoff, Op.Cit. no. 13 s.; Mayer, P. Op.Cit. 1977, n. 529; Loussouarn and Bourel, Op.Cit. n.299; see also Trib. civ. seine 30/1/1923: Rev. dr. int. pr. 1922-23, p. 494; Trib. gr. Inst. seine 10/11 1962: Gaz. Pal. 1962, 1, 284; Trib. gr. Inst. paris 22/1/1969; J.C.P. 68 ed. G, IV, 216, Rev. Crit. dr. int. pr. 1963, Som. 775; Trib. gr. Inst. Paris 15/3/1972, Rev. Crit. dr. Int. pr. 1973, 509.
- 115- See Algerian Civil Code 1976, Article 19 which provides that: "Les conditions relatives à la

- validité du mariage sont régies par la loi nationale de chacun des deux conjoints"; see also Issad, M., *Op.Cit.*, p. 248-49; Soulieman, A.A., *Op.Cit.*, p. 89 (in Arabic).
- 116-** See Peyrard, G., *Op.Cit.*, (1977) 66 R.C.D.I.P. 398; Soulieman, A.A., *Op.& Loc. Cit.*
- 117-** See Bartain, *Principes de droit International Prive*, v.II, 1932, p.123; for the same view in favour of the husband's domicile see Savigny. *Private International Law* (Hans. Gutherie, ed. 2, 1880, 291; see also Palsson, L., *Op.Cit.*, p. 101-103.
- 118-** See Batiffol, H. and Lagarde, P. *Op.Cit.* No. 414 Note 3, No. 432; Bischoff, *Op.Cit.* No. 22; *Trib. gr. Inst. Seine* 4/4/1951: *Rev. Crit. dr. Int. pr.* (1953), 586; *Trib. gr. Inst. Versailles* 2/2/1960: *Rev. Crit. dr. Int. pr.* (1960), 370; *Trib. gr. Inst. Lyon* 28/11/1975: *Rev. Crit. dr. Int. pr.* 9/1976), 477; see also Dutoit, B. and autres, *La nationalité de la femme mariée*, Vol. I [Europe], Vol. II [Afrique] 1976; Patarin et Zajtary, *Introduction a l'ouvrage sur le "regime matrimonial dans Les Legislations contemporaines"* *Trav. Inst. dr. Comp. Paris II*, 1974; Algerian constitution 1989, article 28 which provides "les citoyens sont égaux devant la loi, sans que puisse prevaloir aucune discrimination pour cause de naissance, de race, de sexe, d'opinion ou de toute autre condition ou circonstance personnelle ou sociale."; *Charte internationale des droits de l'homme*, article 16 alinea 1, ratified by the Algerian Government.
- 119-** See Bischoff, *Op.Cit.*, No. 22; Mestre, J., *Op.Cit.*, No. 63, Audinet, *Op.Cit.*, p.181-82.
- 120-** See Niboyet, *Traite de droit international privé francais*, Vol. V, 1948, n. 1496; Dlaume, *l'influence de la nationalité française sur la solution des conflits de lois en matière des personne*: *Rev. Crit. dr. Int. pr.* (1949) s, 17; *Trib. Seine* 17/03/1948: *Rev. Crit. dr. Int. pr.* (1948) 112; *Trib. Seine* 20/07/1948: *Rev. Crit. dr. Int. pr.* (1949), 96; Cf. *Trib. Seine* 06/04/1951: [1953] *Rev. Crit. dr. Int. pr.* 586; *Trib. Paris* 15/03/1972 [1973] *Rev. Crit. dr. Int. pr.*, 509.
- 121-** See Algerian Civil Code 1976, article 13 as compared with article 11, provides: "Dans les cas prévus par les articles 11 et 19, si l'un des deux conjoints est Algerien, au moment de la conclusion du mariage, la loi algerienne est seule applicable, sauf en ce qui concerne la capacité de se marier".
- 122-** See Bischoff, *Op.Cit.*, No. 24; Mestre, J., *Op.Cit.*, No. 66. *Cass. civ. I.* 17/4/1953 *clunet* 1953, 862, Batiffoll, H., *Traité elementaire de D.I.P.* 2nd ed 1955 No. 338.
- 123-** Batiffol, H. and Lagarde, P., *Op.Cit.*, No. 414; Bischoff, *Op.Cit.*, No. 26; Mestre, J., *Op. Cit.*, No. 68; Palsson, L., *Op.Cit.*, p. 106; Audinet, *Op.Cit.*, p. 181; Loussouarn and Bourel, *Op. Cit.*, p. 395, Mayer, *Op. Cit.*, p. 432; cf. Lerebours-Pigeonnère, *Precis de droit international privé*, 6th ed. 1954, No. 327; Arminjon, *Precis de droit international prive*, II, 1934, pp. 573-75.
- 124-** See *Trib. civ. Seine* 05/05/1919: *Rev. dr. Int. pr.* (1919) 543; *Trib. cv. Seine* 06/04/1951: *Rev. crit. dr. Int. pr.* (1953) 586; *Paris* 2/12/1966: *Rev. crit. dr. Int. pr.* (1967) 530; *Trib. gr. Inst. Paris* 15/03/1972: *Rev. crit. dr. int. pr.* (1973) 510.
- 125-** Algerian civil code 1976, article 11; Issad, M., *Op. Cit.*, p. 248; Soulieman, A.A., *Op. Cit.* p.69 (in Arabic); Peyrard, G. *Op.Cit.* p.398.
- 126-** See Batiffol and Lagarde, *Op.Cit.* No. 414, p.39; Bischoff, *Op.Cit.* No. 27, p.288; Ponsard, A. *La conclusion du mariage.* In *Le droit international privé de la famille en France et en*

- Allemagne, paris. 1954, p. 11; Mestre, J., Op. Cit., No. 71, p. 14; Audinet, Op. & Loc. Cit.
- 127-** See, Benmelha, Gh. ,Op. Cit., p. 35.
- 128-** See, Peyrard, G., Op. Cit., [1977] R.C.D.I.P. 398; Issad, M., Op. & Loc. Cit.
- 129-** See Bischoff, Op.Cit. No. 16, p.287; Batiffol and Lagarde Op.Cit. Tome I, No. 78; Mestre, J., Op. Cit., No. 43, p. 10; cas. civ. I, 17/06/1968: Rev. Crit. dr. Int. pr. (1969) 59; Cass. Civ. I, 7/11/1972: Rev. crit. dr. Int. pr. (1973), 30; see also Algerian Civil Code 1976, article 22 Alénea 2 provides that ".....Toutefois, la loi algérienne est appliquée si la personne presente, en meme temps, la nationalité algérienne, au regard de L'Algérie et, une autre nationalité, au regard d'un ou plusieurs etats étrangers"; Issad, M., Op. Cit., p. 231; Peyrard, G., Op. Cit., p. 390. Palsson, L., Op. Cit., pp. 94-96.
- 130-** Bischoff, Op.Cit. and Loc.Cit., Batiffol and Lagarde Op.Cit. No. 82; Cass. Civ. I 15/05/1974: Rev. Crit. dr. Int. pr. (1975), 260; see also Algerian Civil Code 1976, article 22 alenea 1 states: "En cas de puralité de nationalités, le juge applique la nationalité effective..."; Issad, M., Op. & Loc. Cit., Palsson, L., Op. & Loc. Cit. Effective nationality is a reference to that state in which the person exercises his political rights.
- 131-** See Plasson, L. Op.Cit. and Loc. Cit. Idem, Marriage and Divorce in comparative Conflict of laws, 1974, s. 161.
- 132-** See Bischoff. Op. Cit., No. 17, p. 287; Mestre, J., Op. Cit. No. 44, p. 16; Palsson, L., Op. Cit. 1974, pp. 173, 176, Idem, Op. Cit., 1981, pp. 97-100; Trib. Civ. Seine, 4/4/1951: Rev. Crit. dr. Int. pr. (1953), 586, at 588; Trib. gr. Inst. Seine 10/01/1962: Gaz. Pal. 1962, I, 284; cf. Bonassies, structure fédérale et conflits internes de lois: l'exemple des Etats-Unis d'Amerique: Rev. crit. dr. Int. pr. (1953), 289 s. et 533 s.
- 133-** See Algerian Civil code 1976, article 23: "Lorsque les dispositions qui précèdent renvoient au droit d'un Etat dans lequel existent plusieurs systèmes juridiques, le système à appliquer est déterminé par le droit interne de cet etat."; also see Issad, M., op. Cit., pp. 175-76, Soulieman, A.A., Op. Cit., pp. 62-63 (in Arabic).
- 134-** See Issad, M., Op.Cit., pp. 175-76; see also in General Palsson, L., Op. & Loc. Cit., (1981), idem, Op. Cit., 1974, s. 179-180, Issad M. expressed that: "Mais, ici également le droit due statut personnel étant en l'etat actuel en grande partie un droit religieux, il est difficile d'appliquer la loi agérienne à un American ou à un Anglais, au risque de les voir devenir polygames, alors que la polygamie est deja Fortement decrié chez nous." Cf. article 13 civil code 1976; Cf. generally the difficulties encountered in R. O'Keefe 1940.
- 135-** See Bischoff, Op.Cit., No. 18, p. 287; Batiffol and Lagarde, Op.Cit., No. 347; Palsson, L., Op. Cit. 1981, pp. 96-97; Idem, Op. Cit., 1974, s. 164; 165; Trib. Seine 14/02/1908: Clunet 1908, 813 (dealing with the formalities); The same solution is applied where the nationality of a person cannot be determined with certainty: French decision Trib. Pontoise 23/04/1969; Clunet (1969), 928.
- 136-** See New York Convention, 28/09/1954, article 12; ratified by Algeria: Decret du 8 Juin 1964.
- 137-** Issad, M., Op. Cit., p. 230, Peyrard, G., Op.Cit., p. 390.
- 138-** Batiffol and Lagarde, Op.Cit. T. II, n. 387; Bischoff, Op.Cit. and Loc. Cit.; Sarraute et Tager, le nouveau statut international des regugi'és, Rev. Crit. dr. Int. pr. (1953) 245, 266, Palsson, L., Op. Cit., 1974, 166-168. The same solution applies to refugees which fell outside the

- scope of Geneva Convention 1951, see French decision Cour de cass. 251 06/1975: Rev. crit. dr. Int. pr. (1974), p. 678; Geneva Convention 28/07/1951, article 12; ratified by Algeria 07/02/1963, see Décret No. 63/274: 25/07/1963, JORA 1963, p. 764.
- 139-** See supra section 2.
- 140-** See Decret No. 63/274: 25/07/1963, JORA, 1963, p.764; Issad, M. Op.Cit. and Loc. Cit.
- 141-** See Louis-Lucas, Le Probleme de la loi applicable A L'Etat et à la capacité des personnes, Trav. Com. Fr. dr. Int. Pr., 1947, 94 at -.103; Labrusse, C. La Competence et L'Application des Lois Nationales Face Au Phenomène de L'Immigration Etrangère, [1976] Trav. Com. Fr. Dr. Int. Pr., 111; Miboyet, Traité de droit international privé Français, T. V 1948.
- 142-** Louis-Lucas, Op.cit. at p.103, 115 Louis Lucas said: "J'ai soigneusement reservé Le cas ou, précisément parce qu'il n'y aura pas de Fraude, Ils pourront naturaliser leur mariage. S'ils s'établissent dans un autre pays, il n'y a aucun intérêt à ce qu'ils soient a la loi du lieu de célébration." Answering the question concerning the criteria that to be taken into account for the naturalisation of the marriage, he said: "Retour effectif en France, Fixation du domicile en France; volonté commune des epoux de voir ce mariage, qui était régi par le droit Italien, etre régi par le droit français; et une procédure qui pourrait etre simple." p. 118.
- 143-** L'instruction générale relative à L'Etatcivil 1955, No. 475; Arret Bisbal du 12/05/1959: J.C.P. 1960, II. 11733 where "La cour de cassation" said: "Les règles Françaises de conflit de lois, entant du moins qu'elles prescrivnt l'application d'une loi étrangère , n'ont pas un caractere d'ordre public."; see also Bischoff Op.Cit. No. 85, 86, p.293; Palsson, L. Op.Cit. 1981, pp. 168-171.
- 144-** See Bischoff, Op.Cit. No. 89-88; Louis-Lucas Op.Cit. p.112, 113, 114 (per Lerebours-Pigeonnière); also 115 where Decugis, M. expressed "votre solution a le mérite d'etre simple, mais elle est contraire à toutes les necessites de la pratique... Votre systeme heurterait de front tous les intérêts des entrangers qui viennent se marrier en France, et Les intérêts des Français qui se marrent à l'étranger. voilà deux Français qui vont se marrier à l'étranger: vous allez Les obliger à rester régis parla loi entrangère sous prétexte qu'ils auront sé jounré pendant quelque temps dans un pays étranger..." (p.115). As regards naturalisation principle, Lererbours-Pigeonnière said: "vous parlez de Francisation: pourquoi, si vous vous de placez en suite, ne pourriez-vous pas, après avoir francisé, re-etalianiser?..." (p.121); see also Batiffol, Op.Ci.t, 413, p .38, 39.
- 145-** See Niboyet, Traité de droit International Privé Français, Tome 5, 1948; Soulieman, A.A., Op.Cit., p .60 (in Arabic).
- 146-** See Wolff, Private International law, 2nd ed. p.313; North, P.M. Development of the rules of private international law, [1980] 166 (I) Recueil des Cours, 9 at p.90-92.
- 147-** See De Winter, L.I., Nationality or domicile, [1969] Vol. (III) Recueil des Cours at pp.375-378; Cassin, La nouvelle conception du domicile dan le règlement des conflit de Lois, [1930] Recueil des cours, vol. IV, p.729; see also North, P.M., Op. & Loc.Cit.
- 148-** Kahn, Freud [1974] 143. Recueil des Cours Vol. III, 139-190; North, P.M. Op.Cit. Loc.Cit.
- 149-** See North, P.M. Op.Cit. p.93-95; see also Roehrich, P.C. La Convention de La Haye du 1er Octobre 1977 sur la celebration et La Reconnaissance de la validité des mariages [1977-1978]

- Trav. Com. Fr. dr. Int. Pr., 1-27.
- 150-** This convention has been heavily criticised by the academic authorities of both common and civil law countries, see; Reese, *The Thirteenth Session of the Hague Conference*, [1977] 25 *Am. Jo. Comp. L.* 393, - *idem*, *The Hague Convention on celebration and Recognition of the validity of Marriages*, [1979] 20 (1) *Virg. J. Int. L.*, 27-36; Glenn, *Conflict of Laws - the 1976 Hague Conventions on Marriage and Matrimonial property regimes*, [1977] 55 *Can. Bar. Rev.* 586 at 588, 95; Batiffol, H. "La Treizième Session de la Conference de La Haye de Droit International privé" [1977] *Rev. Crit. dr. Int. pr.* 66; Lalive, "La Convention de la Haye du 14/03/1976 sur La celebration et la reconnaissance de la validité de mariage" [1978] 34 *Annuaire suisse de droit international*, 31; *Law Com. No. 89* and *Scot. Law. Com. No. 64* [1985] Appendix A. paras 7-11.
- 151-** See Louis-Lucas, *le Probleme de la Loi Applicable a L'Etat et a la Capacité des personnes*, [1947] *Trav. Com. Fr. dr. Int. pr.* 95 at pp.111-128 (per Lererbourg-Pigeonnière and others); Batiffol, H., *Op. & Loc.Cit.*; *Law Com. No. 89* and *Scot. Law Com. No. 64* [1985] paras. 3.21-3.22; *Brook v. Brook* [1861] 9 H.L.C. 193, 212.
- 152-** See *Law. com. and Scot. Law com.* *Ibid* paras 3.20, 3.34-3.35, 3.37-3.38; The advocates of these approaches in England and Scotland failed to consider the earlier cases which show the fallacy of their arguments, see *Compton v. Bearcroft* [69] 2 *Hag. Con.* 444n; *Mette v. Mette* [1959] *Sw. and Tr.* 416; *Brook v. Brook* [1861] 9 H.L.C. 193; *R. v. Biddin* [1910] p.57; As to the intention of acquiring a domicile of choice see, *Law Com. No. 168* and *Scot. Law Com. No. 107: The Law of domicile* (1985) paras. 5.8-5.22; *Winans v. Att. Gen.* [1904] *A.C.* 287, 291-92; *In the Estate of Fuld* (No. 3) [1968] *P.* 675, 684-85.
- 153-** *R. v. Brentwood Marriage Registrar* [1968] 2 *Q.B.* 956; see also, *R. v. Hammersmith Marriage Registrar* [1917] 1 *K.B.* 634 (C.A.); *R. v. Registrar General, ex parte Minhas* [1976] 2 *All. E. R.* 246 (Q.B.); *Rojas, Petitioner* [1967] *S.L.T.* 24 (Ch. Ct.), contrast *Family Law Act 1986*, S. 50.
- 154-** See *Padolechia v. Padolechia* [1968] p.314; *Lendrum v. Chakravarti* [1929] *S.L.T.* 96; The acceptance of this rule would seem to be maintained by many academic writers, especially the writers who expressed their disapproval of the Hague Convention of 1976, see *supra* note 150.
- 155-** See, *L'instruction générale sur L'etat civil 1955*, No. 475-76; Batiffol, H. *Op.Cit.* 7th ed. 1983, Vol. II ,pp. 38-39; Mestre, J., *Op. Cit.*, No. 58, p. 12; Palsson, L., *Op. Cit.*, pp. 168-70. Professor Palsson has submitted that the same practice exists in England and Scotland, even though there are statutory provisions providing that marriage registrars should not issue the marriage licence (or schedule) if the parties are known to be subject to any lawful impediment. See Palsson, L., *Op. Cit.* 170-71; *Marriage Act 1949*, s. 32 (2) (a); see also *Marriage (Scotland) Act 1977* s. 6 (1).
- 156-** See Batiffol, H. *Op.Cit. and Loc. Cit.* Mestre, J. *Op.Cit.* No. 59-60, p.12, Bischoff, *Op.Cit.* No.87; Batiffol, H., *L'Instruction générale sur L'état civil du 21/09/1955 et le droit international privé*, [1955-57] *Trav. Com. fr. dr. Int. pr.* 46 s.
- 157-** See *Marriage (Scotland) Act 1977*, S 3 (5), Clive, E.M. *The Marriage (Scotland) Act 1977*, *S.L.T.*, 1977, 225; For a full discussion of such devices invented to help marriage registrars to apply the conflict rules correctly, see Palson, L. *Op.Cit.* pp.365-73.

- 158- Palsson, L., *Op. & Loc. Cit.*
- 159- This hypothetical example is based on the fact of: *Sottomayer v. De Barros* [1879] 5 P.D. 94.
- 160- *Ibid.*
- 161- See *Radwan v. Radwan* [1973] Fam. 35; see also the German case where the law of the nationality of the parties at the time of the proceeding is applied to sustain the marriage validity. R. G. 16 May 1931, R. G. 2 132, 416, IPR s pr, 1931 No. 59, see Palsson, *Op. Cit.*, p. 135.
- 162- See Dicey and Morris, *Op. Cit.*, p. 639; Morris, *Op. Cit.*, p. 163; Anton, A.E., *Op. cit.*, pp. 276-280; Palsson, L., *Op. Cit.*, (1981), pp. 106-07; Batiffol, H., *Op. Cit.*, (1983) pp. 39-40; Issad, M., *Op. Cit.*, p. 248. See also *Mette v. Mette* [1859] 1SW and Tr. 416; *Re Paine* [1940] Ch. 46; article 11 of Algerian Civil Code 1976.
- 163- *Mette v. Mette* [1859] 1SW and Tr. 416; *Sottomayer v. De Barros* (No. 1) [187] 3 P.D. 1, 6-7 (C.A.); see also *Lundrum v. Chackravarti* [1929] S.L.T. 96 at 103; *Webster v. Webster* [1866] 14 R. 90; *Martin v. Burret* [1938] S.L.T. 479.
- 164- *Sottomayer v. De Barros* {No. 1} [1877] 3 P.D. 1, 5, 7.
- 165- *Sottomayer v. De Barros* (No. 2) [1879] L.A. 5 P. D. 94.
- 166- *Ibid.*, at p.104 where Sir James Hannen P. stressed Cotton, L.J. statement: "No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgement in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country." See *Sottomayer v. De Barros* (No. 1) [1877] 3 P. D. 1, 7. It is worthy of note that the decision of Sir James Hannen, P. has been favoured by the decision of the court of appeal in *Ogden v. Ogden* [1908] P. 46, though the decision was based on another ground; and followed in *Chetti v. Chetti* [1909] p.67. See also *Vervaeck v. Smith* [1981] Fam. 77, 122 (C.A.).
- 167- For the distinction between form and essence of marriage see *Mette v. Mette* [1859] 1SW 47-416; *Brook v. Brook* [1861] 9 H.L.C. 193; *Sottomayer v. De Barros* [1877] 3 P.D. 1. However, the decision in *Sottomayer v. De Barros* (No. 2) is based on decisions such as: *Scrimshire v. Scrimshire* [1752] 2 Hag. Con. 395, 161 E. R. 782; *Simonin v. Mallac* [1860] 2 SW. Tr. 67.
- 168- See *Sottomayer v. De Barros* (No. 2) [1879] L.R. 5 P.D. 94 at p.104; see also *Chetti v. Chetti* [1909] P. 67.
- 169- See *Scott v. Att. Gen.* [1886] L.R. 11 P.D. 128; *Chetti v. Chetti* [1909] P. 67; *Cheni v. Cheni* [1965] P. 85. Certainly such reasoning is inconsistent with the decision in *Sottomayer v. De Barros* (N° 1), since if the prohibition is contrary to the public policy the decision would be in favour of the validity of the marriage.
- 170- See Clive, E.M., *Op.Cit.*, (1982), pp. 153-54, See now 3rd ed., 1992, pp. 139-40; Anton, A.E., *Op.Cit.*, pp. 280-81, See now 2nd ed., 1990, pp. 429-30.
- 171- *Ibid.*, see also *MacDougal v. Chitnavis* [1937] S.C. 390, 404; Maher, G. *International private law: Cases and statutes*, 1985, p. 75-6.
- 172- See *MacDougal v. Chitnavis* [1937] S.C. 390, 402-403 (Per Lord President Normand).

- 173- Lendrum v. Chakravarti [1929] S.L.T. 96, 103.
- 174- Marriage (Scotland) Act 1977, Sec. 5(4)(F) and Sec. 2(3)(a); see also, Clive, E.M., *Op.Cit.*, p. 154, See now 3rd ed., 1992, pp. 140; Walton, Husband and Wife, (1951) 3rd ed., p. 325.
- 174a- Scottish Law Commission, Discussion Paper N° 85, Family Law: Pre-consolidation reforms, 1990, para. 9.14; Scottish Law Commission [Scot. Law Com. N° 135], Report on Family Law, 1992, para. 14.14.
- 175- Dicey and Morris, *Op.Cit.*, pp. 638-39, See now 12th ed., 1993, pp. 679-80.
- 176- Falconbridge, Essays on the conflict of Laws, 2nd ed. (1954) p.711; see also Radwan v. Radwan (No. 2) [1973] Fam. 35, 50; Lendrum v. Chakravarti [1929] S.L.T. 96, 102-03; Miller v. Teale [1954] 92 C.L.R. 406, 414; Dicey and Morris, *Op.Cit.*, p. 640, See now 12th ed., 1993, p. 680 (where it is stated that the scope of this exception is limited by the Marriage (Enabling) Act 1960, Section 1(3)); Cheshire and North, *Op.Cit.*, 11th ed. (1987), pp. 585-86, See now 12th ed., 1992, p. 597; Palsson, L. *Op.Cit.* (1981) pp.182-84; Gravesson, R.H., *Op.Cit.*, 7th ed., 1974, pp. 261-63; Clive, E.M., *Op.Cit.*, pp. 153-54, See now 3rd ed., 1992, pp. 139-40.
- 177- Re Paine [1940] Ch. 46, see also Mette v. Mette [1859] 1SW Tr. 416.
- 178- Anton, A.E., *Op.Cit.*, p. 281 where he expressly said "The view of the majority of the court in Ross Smith ([1963] A.C. 290) that the ratio decidendi of Simonin v. Mallac can no longer be supported deprives the second Sottomayer v. De Barros case and in turn the cases which followed it of such authority as they may have hitherto possessed in Scotland", See now 2nd ed., 1990, p. 432; Palsson, L., *Op.Cit.*, p. 185.
- 179- See Hague Convention on Celebration and Recognition of the validity of Marriage 1976, article 3(1); see also Reese (1977) 25 Am. Jo. Comp. Law. 393.
- 180- Law Com. [N°89] & Scots. Law com. [N°64], (1985) para: 3.17, see also para 3.6; Scottish Law Commission, Discussion Paper N° 85, Family Law: Pre-consolidation reforms, 1990, para. 9.14; Scottish Law Commission [Scot. Law Com. N° 135], Report on Family Law, 1992, para. 14.14.; Morris J.H.C., *Op.Cit.*, (1984), p. 164.
- 181- Ibid, paras: 3.45-3.48.
- 182- See Article 13 of Algerian Civil Code 1976, which provides: "Dans les cas prévus par les articles 12 et 13, si l'un des deux conjoints est Algerien, au moment de la conclusion du mariage, la loi Algerienne est seule applicable, sauf en ce qui concerne la capacité de se marier."; see also Issad, M., *Op. Cit.*, p. 250. It is interesting to note that the solution is originally supported by the doctrine in France, see Niboyet, J.P. Traite de droit international privé Français, Vol. V. 1948, pp.338-360, Le Project de Codification de droit International privé Français de 1950, [1950] R.C.D.I.P. 111.
- 183- Algerian civil status code 1970, article 97, supra note 203. it is noticeable that the rule prohibiting marriage of muslim women with a non-muslim (article 31 of Algerian Family Code 1984; circulaire No. 286 du 02/01/1967) is in conflict with the article 28 of the Algeian constitution 1989 which provides: "Les citoyens sont égaux devant la loi, sans que puisse prévaloir aucune discrimination pour cuase de naissance, de race, de sexe, d'opinion ou de toute autre condition ou circonstance personnelle ou sociale"
- 184- See Issad, M., *Op.Cit.*, pp. 250-51; see also Louis-Lucas, Le developpement de la

- Compétence du droit Français dans les règles de conflit de lois, Mélanges Ripert, v. 1, p. 271; Vincent, J. & Ponsard, A., La codification du droit international privé, 1956, p. 1715; Louis-Lucas, (1951) R.C.D.I.P. 611.
- 185-** See Dicey and Morris, *Op.cit.*, p. 623 ss, See now 12th ed., 1993, p. 664 ss; Morris, J.H.C., *Op.Cit.*, p. 159 s; Cheshire and North, *Op.Cit.*, p.574 ss, See now 12th ed., 1992, p. 587 ss; Anton, A.E., *Op.Cit.*, p. 276 ss, See now 2nd ed., 1990, p. 428 ss; Batiffol, H., *Op.Cit.*, (1983). vol. II, p.37 s; Bischoff, Rept. Dr. Int. (1969), p.286 s; Issad, M., *Op.Cit.*, p. 248 s. See also *Brook v. Brook* [1861] 9 H.L.C. 193; *Mette v. Mette* [1859] 1S.W. and Tr. 416; *Padolechia v. Padolechia* [1968] p.314; For France, see Trib. Seine, 21/06/1967; R. 1968, 294; Trib. Paris, 15/03/1972, R. 1973, p. 510.
- 186-** *Re Paine* [1946] Ch. 46; see also *Sottomayer v. De Barros* (No. 1) [1877] L.R. 3 P.D. 1.
- 187-** See Morris, J.H.C., *Op.Cit.*, p. 164, see also Dicey and Morris, *Op.Cit.*, p. 637, See now 12th ed., 1993, p. 677; Cheshire and North, *Op.cit.*, (1987, 11th ed), p 585-86, See now 12th ed., 1992, pp. 597-99; Jaffey, A.J.E. Introduction to the conflict of Laws, 1988, p. 39; Collier, J.G., Conflict of laws, (1988), p.265.
- 188-** Morris, J.H.C. Ibid, and at p.168.
- 189-** *Breen v. Breen* [1964] p.144.
- 190-** The wife based her allegation on Article 41, s. 3(3) of the Irish Constitution 1937 which states: "No person whose marriage has been dissolved under the civil law of any other state but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this constitution shall be capable of contracting a valid marriage within the jurisdiction during the lifetime of the other party to the marriage so dissolved."
- 191-** *Breen v. Breen* [1964] p.144 at 152. The Learned Judge has referred to the Irish case of *Mayo-Perrot v. Mayo-Perrot* [1958] I. R. 336 where Maguire C.J., on one hand, was of opinion that the marriage dissolved under the law of another state remains, in the eyes of Irish law, a subsisting valid marriage (at p.344) but, Kingsmill Moore, J., the view of whom preferred by Karminski, J. said that article 41(3) of the Irish constitution did not deny recognition to all foreign divorces (at p.348). See now *Bank of Ireland v. Caffin* [1971] I. R. 123; *Gaffney v. Gaffney* [1975] I.R. 133.
- 192-** Dicey and Morris, *Op.Cit.*, p. 638, See now 12th ed., 1993, p. 678. See also Morris and North, *Cases and materials on Private International Law*, 1984, p.169 where they expressly stated that if Karminski J. "had preferred the other set of dicta [viz. those of Macquire C.J. in *Mayo-Perrott's* case]; see Ibid note 30, he would evidently have been prepared to hold that the remarriage was void, even if this meant declining to recognise a decree of divorce pronounced by the High Court of England."; Collier, J.G. ,*Op.Cit.*, p. 266; Law. Com. Report No. 137 (1984).
- 193-** Bradshaw, D. Capacity to marry and the Relevance of the *lex loci celebrationis* in Commonwealth Law , [1986] 15 Ang.-Amer. L. R. 112, at. 116-117, see also Unger, J. Capacity to marry and the *lex loci celebrationis* [1961] 24 M.L.R. 784 s; Webb, P.R.H. Foreign Marriages Following English Divorces [1962] 11 I.C.L.Q. 251, at pp. 254-55.

- 194-** In will of Swan [1871] 2 V.R. (I.E 4 M) 47. See also Fleming, Australian Commentary: Marital Capacity, [1951] 4 Int. L. G. 389 at p.393.
- 195-** Cheshire and North, *Op.Cit.*, (1987), p. 586, See now 12th ed., 1992, p. 598; Dicey and Morris, *Op. & Loc.Cit.* where it is said that "the case cannot be regarded as an authority on the conflict of laws.", See now 12th ed., 1993, p. 678; Jaffey A.J.E. *Op.Cit.* (1988), p. 39; Law Com. and Scot. Law Com. (1985), para. 3.7.
- 196-** See Walton, Husband and wife, (1951 3rd ed), p.317 and pp.319-321; Anton, A.E., *Op.Cit.*, p. 278, See now 2nd ed., 1990, p. 429 ; Lendrum v. Chakravarti [1929] S.L.T. 96, at p.103 where Lord Mackay said that "the capacity of each spouse is ruled primarily by the laws of his own domicile, but also [agreeing on this with Westlake] he must be able to satisfy the law of capacity for marriage of the *lex loci celebrationis*."
- 197-** Anton, A.E., *Ibid*, p. 279, See now 2nd ed., 1990, p. 430.
- 198-** Reed v. Reed [1969] D.L.R. (3rd) 617; see also in Will of Swan [1871] 2 V.R. (I.E. & M.) 47.
- 199-** *Ibid*, p. 621, and see pp. 618-19; see also Cheshire, G., Private International Law, 3rd ed, p. 277, Brook v. Brook [1861] 9 H.L.C. 193, p.207.
- 200-** *Ibid*, pp. 620-21. (Cf. Law Com. and Scot. Law Com. 1985, Para. 3.44.
- 201-** The Bahamas supreme court case No. 787 of 1975, decided on April 16, 1985, discussed by Bradshaw, *Op.Cit.* [1986] 15 Ang.-Amer. L. R. 112, at pp.113-115; see also note 14, 15, 16, 17 or that article. It is worthy of note that nothing said about the wife's domicile.
- 202-** *Ibid*, at p.11. Cf, Law. Com. and Scot. Law Com. (1989) para. 3.44.
- 203-** See Morris, J.H.C., *Op.Cit.*, p. 164; see also Dicey and Morris, *Op.Cit.*, p. 637, See now 12th ed., 1993, p. 679; Cheshire and North, *Op.Cit.*, p. 586, See now 12th ed., 1992, p. 598; Jaffey, A.J.E., *Op.Cit.*, (1988) p. 39; Gravesson, R.H. Conflict of Laws, 7th ed, (1974), p. 238; Law. Com. & Scots. Law Com. (1985), para. 3.8.
- 204-** See Westlake, Private International Law, 7th ed (1925), Section 19; it is interesting to note that the cases to which he referred "do not require the adoption of this principle". see Dicey and Morris, *Op. & Loc.Cit.*, note 87.
- 205-** Schwebel v. Ungar [1963] 42 D.L.R. (2d) 622, [1964] 48 D.L.R. (2d) 644 (Sup.Ct.C.); see also, Castel, [1969] Clunet, 746.
- 206-** Graveson, R.H. Conflict of Laws, 7th ed, 1974, -.258.
- 207-** Marriage (Scotland) Act 1977, S.1(2); Cf. The Marriage Act 1949, S.2; Pugh v. Pugh [1951] p. 482.
- 208-** *Ibid*, S.2(1); see also Clive, E.M. The Marriage (Scotland) Act 1977, [1977] S.L.T. (News) 225.
- 209-** See Batiffol and Lagarde, *Op.Cit.* 91983) Vol. II, 39-40, No. 415; Bischoff, Rep. dr. Int. 1969, pp. 291-92, No. 61-66; Audinet, E., [1926] 1 R.C.A.D.I. p.175 at pp.183-189; Loussouarn, et Bourel, Droit International, 1980, 2nd ed. p. 398; Trib. grd. Inst. Seine 21/06/1967, [1968] R.C.D.I.P. 294.
- 210-** See Issâd, M., *Op.Cit.* p.250 and pp.210-213; see also Algerian civil code 1976, Art. 24: "L'application de la loi étrangère, en vertu des articles précédents, est exclue si elle est contraire à L'ordre public ou au bonnes moeurs en Algerie"; Algerian Family Code 1984 (Loi

- N°4/1 du 9/06/1984), Art. 8, "Il est Permis de contracter mariage avec plus d'une épouse dans Les Limites de la chari'a..."; Loi N°63-224 du 29/06/1963, Age of marriage, Article 1 & 2, JORA, 2/7/1963 p. 680.
- 211-** See Law Com. & Scots. Law. Com. (1985) paras: 3.40-3.44; see also Clive, E.M. Husband and wife, 1982, 2nd ed., p. 148, note 54, See now 3rd ed., 1992, pp. 133-34.
- 212-** Hartely, Op.Cit. [1972] M.L.R. (Vol. 35) p.576-577; see also Bradshaw, D., Op.Cit. [1986] 15 Ang.-Amer. L. R. 122-131.
- 213-** See supra Chapter 1, Section II, p. 20.
- 214-** Palsson, L. Op.Cit. (1982), pp.140-41, see also Castel, J.G. Canadian conflict of laws Vol. I (1975) pp. 177-196; Gordecki, J.K. Interremportal conflict of laws, Int. Encyclopedia of Comparative Law, Chapter 8, pp. 13-16, 17-20; Vincent, J. and Ponsard, A. Formation du mariage -conditions de Fond du mariage: J.C.I.D.I., Fasc. 546A, No. 30; Mann, 31 B.Y.B. Int. L. 217.
- 215-** See, Ibid, see also, Dicey and Morris, *Op.Cit.*, p. 626, See now 12th ed., 1993, p. 668; Clive, E.M., *Op.Cit.*, (1982 - 2nd ed), p. 158, See now 3rd ed., 1992, pp. 144-45; Wilson, Validation of void marriages in Scots law, [1964] J.R. 199; Re Pozot's settlement [1952] 1 All. E.R. 1107, 1109 (C.A.) cf. Prawdzc-Lazarka v. Prawdzc-Lazarski [1954] S.C. 98.
- 216-** Algerian Family Code 1984, (loi No. 84-11, Jus 9106/1984), article 31 provides "La musulmane ne peut épouser un non-musulman..."
- 217-** Gordecki, Op. Cit., p. 20; Palsson, L., Op. Cit., (1981), pp. 141-42; Castel, J.G., Op. Cit., (1975) p. 193; Hartley, T.C. Bigamy in the conflict of laws: [1967] 16 I.C.L.Q. 690, 702.
- 218-** Ibid.
- 219-** Ambrose v. Ambrose [1961] 25 D.L.R. (2d ) 1 (B.C.C.A.), For comment on this case see: Castel, [1961] 39 Can. Bar Rev. 604-24.
- 220-** Palsson, L. Op.Cit. pp. 143-45; Gordecki, Op.Cit. pp. 19-20; Castel, supra note 219; Hartley, T.C., [1967] 16 I.C.L.Q. 690, at 700-03; Swan, J. Op.Cit. [1974] 24 U.T.L.J. 17, at note 27; see also Giardina, Les Lois étrangères en matière de mariage et de régimes matrimoniaux, [1972] R.C.D.I.P. 401, 416, N° 21; Knittel, The temporal Dimension in the conflict of laws rules, [1964] 40 B. YB. Int. L. 105, 124-25.
- 221-** Gordecki, Op.Cit. and Loc.Cit.
- 222-** Swan, J. Op.Cit. and Loc. Cit.
- 223-** Palsson, L. Op.Cit. p.141; Gordecki, Op.Cit. p.20; Graulich, Conflit de lois dans Le temp: Repertoire de droit International I (Paris 1968) pp.504-414; Cavalda, Les conflits dans le temps en droit international privé, Thesis, paris 1955, 324-333; Rigaux, Le conflit mobile en droit international privé: [1966] Recueil des Cours 329, at 404-05.
- 224-** Gordecki, Ibid; see also Morris, The time factor in the conflict of laws [1966] 15 I.C.L.Q. 422-35; Spiro, the incidence of time in the conflict of laws [1960] 9 I.C.L.Q. 357, at 370; Mann, [1954] 31 B. YB. Int. L. 217, at 245.
- 225-** As to form of marriage see the French decision: Trib. Tulle 06/01/1944, [1947] R.C.D.I.P. 304; see also Gordecki, Conflict of Laws in Time [1959] 35 B. YB. Int. L. 58, 75.
- 226-** See Palsson, L. Op.Cit. (1981) pp. 145-47; Hartley, Policy Basis of the English Conflict of

- Laws of Marriage, [1972] 35 M.L.R. 571, at 573; Jaffey, A.J.E. Introduction of the conflict of law, 1988, pp. 48-50; Rabel, E. The conflict of laws: A comparative study, 1958, Vol. I., 2nd ed., pp. 283-84; see also Loussouarn and bourel, Droit international privé, 1980, N° 302; Mestre, J. Droit international privé Français, Marriage: J. CL. dr. Int. Fasc. 546-A (1982), N° 46, Niboyet, Traité de droit international privé Français, 1948, Vol. V, pp. 337, 340-41; Trib. gr. Inst. Seine 10 Janv. 1962: [1962] Gaz. Pal., I, 284; R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956.
- 227-** Palsson, L. Ibid p.147.
- 228-** bid; p.147-148, where Palsson expressly suggests that there is no sound justification for considering the forum's reference to the foreign law as to include its choice of law rules, if the forum regards the personal law as relevant on the sole basis of its being "the law of the country with which, in the eyes of the forum, the party is most closely connected.
- 229-** The Marriage (Scotland) Act 1977, S. 3(5); see also Clive, E.M. The Marriage (Scotland) Act 1977: [1977] S.L.T. (News) 225, 228. [emphasis added].
- 230-** R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956. For comment on this case see Wengler [1969] Rev. Crit. dr. Int. pr. 491; [1974] 90 L.Q.R. 430, p. 448, 49; Carter, P.B. [1968] 43 Brit. YB. Int. L. 239, at pp.242-44; Hartley, T.C. [1972] 35 M.L.R. 571 at pp .581-82; Palsson, L., Op. Cit., p. 147; cf. Family Law Act 1986, S. 50.
- 231-** It is worthy of note that the parties tried to marry in Switzerland, but the Swiss registrar refused to celebrate the marriage relying on Swiss decision, see [1968] Q.B. 956; see also Caliaro and wydler v. Canton of Aargau B.G. 11 Nov. 1954, B.G.E. 80 I 427; Wengler [1957] Rev. Crit. dr. Int. pr. 50; [1956] 5 I.C.L.Q. 144, Cf. the Swiss decision in Del Bosco and Wlather v. Canton of Berne, B.G. 03 Juin 1971, B.G.E. 90 I 389, commented in [1976] Clunet 439.
- 232-** R. v. Brentwood registrar of marriages [1965] 2 Q.B. 956 at pp.970-72.
- 233-** See Hartley, T.C., [1972] 35 M.L.R., 573, 582; Jaffey, A.J.E., Op.Cit., (1988), p. 50.
- 234-** Hartley, T.C., Ibid, p .571; see also Jaffey, A.J.E., Op. & Loc.Cit.
- 235-** Ibid.
- 236-** Law Com. & Scot. Law. Com., (1985), para: 3.39; and recommendation N° 16, p. 158; See also Scottish Law Commission [Scot. Law Com. N° 135], Report on Family Law, 1992, para. 14.5.
- 237-** See Issad, M., Op.Cit., p. 176.
- 238-** Dicey and Morris, *Op.cit.*, 10th ed., (1980), rule 35 and 37, See now 12th ed., 1993, pp. 687-94; Cheshire and North, *Op.Cit.*, 10th ed., (1979), 298-302, See now 12th ed., 1992, pp. 610-12; Jaffey, A.J.E., Conflict of laws, (1988), pp.51-53, idem: [1978] 41 M.L.R. 38; Colier, J.G., Conflict of laws, (1988), p. 276-77; Law. Com. No. 42, 1971, para 10(a), 18-19; Hyde v. Hyde [1866] L.R. 1 P. and M. 130; Re Bethel [1887] 38 Ch. D. 220; Chetti v. Chetti [1909] P. 67; Bandail v. Bandail [1946] p.122; Srinivasan v. Srinivasan [1946] p.67; Macdougall v. Chitnavis [1937] S.C.390; Risk v. Risk [1951] p.14, 20: Muhammad v. Suna [1956] S.C. 366; Quershi v. Quershi [1972] Fam. 173; cf. Hussain v. Hussain [1982] AL

- E.R. 369, [1983] Fam. 26; Stone, P.A., Capacity for polygamy... [1983] 13 Fam. L. 76.
- 239-** Jaffey, A.J.E., *Op.Cit.*, (1988), p. 52; see also *Re Bethel* [1887] 38 Ch. D. 220; Palsson, L., *Op.Cit.*, (1981), p. 207.
- 240-** *Warrender v. Warrender* [1835] 6 E.R. 1239 at 1256, see also *Kenward v. Kenward* [1951] P. 124 at p. 144-46 where Denning, L.J. expressed that the nature of a marriage could be affected by the law of the parties domicile and the intended matrimonial home; *Sowa v. Sowa* [1961] P. 70 (C.A.) *Cheni v. Cheni* [1965] P.85; *Iman Din v. National Assistance Board* [1967] 2 Q.B. 213, 218-19 (per Salmon L.HJ.).
- 241-** See the Matrimonial Causes Act 1973, Section 11(d).
- 242-** Dicey and Morris, *Op.Cit.*, (1980), pp. 316-19, See now 12th ed., 1993, pp. 698-703; Morris, J.H.C., *Op.Cit.*, 1971, p. 121; Cheshire and North private International law, 8th ed. (1970), p. 303; *Idem*, 10th ed. (1979) pp. 349-50, See now 12th ed., 1992, pp. 617-21, cf. 7th ed, p. 267; Davis J.L.R. [1973] F.L.R. 294; Karsten, I.G.F. [1973] 36 M.L.R. 291; Wade, J.A. [1973] 22 I.C.L.Q. 571; *Re Ullee* [1885] 53 L.T. 711, 712; *Morris v. Morris* unreported, 22 April 1980 (Wood J.); *Hussain v. Hussain* [1983] Fam. 26.
- 243-** See Law Com. No. 42 (1971) paras 18-19, 88-9; Davis, J.L.R. [1973] 5 F.L.R. 294; Morris, J.H.C. *Op.Cit.* (1971) p.121; Maher G. International private law: cases and statutes, 1985, p. 90, Hartley, The Law Commission - report on polygamous marriages [1971] 34 M.L.R. 305; Poulter, *Hyde v. Hyde -A Reappraisal* [1976] 25 I.C.L.Q. 475.
- 244-** *Re Bethel* [1887] 38 Ch. D. 220, 234-236; see Dicey and Morris, *Op.Cit.*, (10th ed. 1980), rule 37, See now 12th ed., 1993, pp. 701-02, Karsten I.G.F. [1973] 36 M.L.R. 291, at pp. 294-95; Law Com. No. 42, 1971, paras 18-19 and 88-89; cf., Stone: [1983] 13 Fam. L. 76, 78; Davis, J.L.R., [1973] 5 F.L.R. 294, at 295.
- 245-** *Re Ullee* [1885] 53 L.T. 711, 712; see Dicey and Morris, *Supra* note 244; Cheshire and North, *Op. Cit.*, 8th ed., p. 303, See now 12th ed., 1992, pp. 617-18; cf. Davis, J.L.R., *Op. & Loc. Cit.* The decision in this case seems to indicate that a married person, though has capacity to enter into a subsequent and co-incident marriage by his personal law, cannot validly celebrate a subsequent monogamous marriage in England. See *Ali v. Ali* [1968] P. 564 where Cumming-Bruce J. was of opinion that the husband "has, by operation of the personal law he has made his own precluded himself from polygamous marriage to a second wife...", at pp. 576-77.
- 246-** *Lendrum v. Chakravarti* [1929] S.L.T. 96; Dicey and Morris, *Op.Cit. and Loc.Cit.*, See now 12th ed., 1993, p. 72 ; Cheshire and North, *Op. & Loc.Cit.*, See now 12th ed., 1992, p. 617. Lord Mackay dictum appears, however, to suggest that a marriage solemnised in Scotland is monogamous and precludes the husband, though he belongs to a country the law of which permits polygamy, from marrying again everywhere. See Palsson, L., *Op. Cit.*, 207.
- 247-** *Ibid*, at p. 99.
- 248-** *Alhaji Mohamed v. Knott* [1969] 1 Q.B. 390, 397; see also *Sowa v. Sowa* [1961] p.70 (C.A.); The Law Commission (N°42), 1971 relied also on the decision in *Risk v. Risk* [1951] P. 50, as lending support for the dual domicile rule. More interestingly, the decision in *Chaudhry v. Chaudhry* [1976] Fam. 148, 152, in which it has been successfully argued that

the English courts would give to parties who had been married "according to the law of their domicile", the status of husband and wife, notwithstanding that the marriage was potentially polygamous.

- 249-** The Matrimonial Causes Act 1973, S.11(d) re-enacting the Matrimonial Proceeding (Polygamous Marriage) Act 1972, Sec. 4.
- 250-** Radwan v. Radwan (No. 2) [1973] Fam. 35. For approving comments see: Jaffey [1978] 41 M.L.R. 38; Stone [1983] Family Law 76, 80; Carter, P.B. Classification of a marriage as monogamous or polygamous: a point of statutory interpretation [1982] B.Y.B.I.L. 298, 301-302.
- 251-** Ibid at p. 52, 54; cf. Ali v. Ali [1968] P.564, at 576-77 (per Cumming-Bruce J.).
- 252-** Ibid.
- 253-** See Matrimonial Proceeding (Polygamous Marriages) Act 1972, S.4 re-enacted by section 11(d) of Matrimonial Causes Act 1973, which provides that: "A marriage celebrated after July 31st 1972 should be void on the following grounds only:... (d) In the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales..."
- 254-** The Nullity of Marriage Act 1971, s.4(1), see now the Matrimonial Causes Act 1973, s.14(1) read as follows "1- Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private International law) by reference to the law of a country outside England and Wales, nothing in Section 11 shall (a) preclude the determination of that matter as aforesaid..."
- 255-** Radwan v. Radwan [1973] Fam. 35, at 52; see also Jaffey, A.J.E., Conflict of Laws, 1988, pp. 31-32; idem: [1978] 41 M.L.R. 38.
- 256-** The Nullity of Marriage Act 1971, s.1 [as amended by s.4 of the Matrimonial Proceeding (Polygamous Marriages) Act 1972]; see now: The Matrimonial Causes Act 1973, s. 11.
- 257-** It appears clearly from the fact of Radwan case that the husband divorced his wife 1952, see: Radwan v. Radwan [1973] Fam. 35. For the support of this view see: Morris, J.H.C., Op. Cit., (1971) p. 119; Collier J.G., Conflict of Laws, (1988), p. 278.
- 258-** See Karsten, I.G.F. [1973] 36 M.L.R. 291; Wade J.A. [1973] 22 I.C.L.Q. 571; Davis, J.L.R. [1973] 5 F.L.R. 294; pearl [1973] C.L.J. 43; Dicey and Morris, Op.Cit., 10th ed., (1980), pp. 316-319; Law Com. (No. 89) and Scot. Law Com. (No. 64), (1985), para. 3.16.
- 259-** See supra page 18 (this point), see also Law Com. No. 83 and Scots. Law Com. No. 56, paras. 2.1-2.11; (1982); Law Com. No. 146 and Scot. Law Com. No. 96, 1985, paras. 2.4-2.16; Stone [1983] Family Law 76; Poulter, [1983] 13 Family Law 72; Dicey and Morris, Op .Cit., 10th ed., (1980), p. 317; Cheshire and North, Op. Cit., 10th ed., (1979), pp. 298-302.
- 260-** Poulter, [1983] Family Law 72; Stone [1983] 13 Family Law, 76; see also Palsson, L. Op. Cit., (1981), pp. 202-203; Law. Com. No. 146 and Scots. Law Com. No. 96, 1985, paras. 2.13-2.15.
- 261-** Stone, Op.Cit., at 78, 80; By analogy. See Ali v. Ali [1968] 564 (Per cumming-Bruce J.).
- 262-** Hussain v. Hussain [1983] Fam. 26; and see Briggs, [1983] 32 I.C.L.Q. 737; Schuz, [1983]

- 46 M.L.R. 633; Stone, [1983] 13 Fam. Law 76; Poulter, [1983] 13 Fam. Law, 72; [1982] 12 Fam. Law, 211.
- 263-** Ibid, at p.33.
- 264-** Ibid; and see also Stone [1983] 13 Fam. Law 76, at p.77.
- 265-** See, By analogy the Cumming-Bruce J.'s decision in *Ali v. Ali* [1968] p.564 appears to suggest the conversion of potentially polygamous marriage to a monogamous one by virtue of the subsequent acquisition by the husband of an English domicile.
- 266-** *Hussain v. Hussain* [1983] Fam. 26, at 32-35; see also Poulter, [1983] 13 Fam. Law, 72, 75; Law Com. No. 146, and Scot. Law Com. No. 96, 1985, paras. 2.09-2.10.
- 267-** See Law Com. No. 146 and Scot. Law Com. No. 96, 1985, para. 2.14; Stone, [1985] 13 Fam. Law 76, at 77, 80; Poulter, [1983] 13 Fam. Law, 72, at 75.
- 268-** Ibid, para 2.15; see also Pounter, *Op.Cit.* p.75; European Convention on Human Rights, 1950, 23 U.N.T.S. 221, articles 8, 12, 14, to the same effect see International Covenant on Civil and Political Rights, G. A. Res. 2200 (XXI) of 16 Dec. 1966, art. 23(4).
- 269-** See Law Com. [N° 146] and Scot. Law Com. [N° 96], paras 2.17; Law Com. [N° 83] and Scot. Law Com. [N° 56], 1982, paras. 1.9, 5.2-5.7 and 7.4.
- 270-** Law Com. [N° 146] and Scot. Law Com. [N° 96], paras. 2.18-2.25.
- 271-** Ibid, paras 2.11-2.12, 2.16; see also Poulter, [1983] 13 Fam. Law, 72, at p.75.
- 272-** Ibid, para 2.32; see also Law Com.[N°83] & Scots. Law Com. [N°56] [1982], paras. 6.1-6.4 & 7.4.
- 273-** Ibid, para 2.17; See Law Com. [N°83] & Scot. Law Com. [N°56], paras, 1.9, 5.2-5.7, 6.1-6.4 & 7.4.
- 273a-** Private International Law (Miscellaneous Provisions) Act 1995, section 5.
- 273b-** Ibid, section 7.
- 274-** See, *supra* chapter 1, pp. 30-31
- 275-** See, Lauterbach, *le Droit International Privé de la Famille en France et en Allemagne*, p. 20s.; Batiffol et Lagarde, *Droit International Privé*, 1983, vol.II, pp. 39-40; Bischoff, *Marriage*, [1969] R.Dal.D.I., n° 39-40; Issad M., *op. cit.*, pp. 249 (1986); Palsson L., *op. cit.*, 1981, p. 107s.
- 276-** Algerian Family law Code 1984, art. 25 provides: "Les femmes prohibées par la parenté sont les... filles du frère et de la soeur."; Benmelha, Gh., *Éléments du droit Algerian de la famille*, 1985, p. 55.
- 277-** Palsson L., *op. cit.*, 1981, pp. 112-13.; Loussouarn et Bourel, *Droit International Privé*, 2nd ed., 1980, p. 397; La Pradelle G., *Les conflict de lois en matière de nullités*, 1967, pp. 153-55; Rabel E., *The conflict of laws*, Vol.I, 2nd ed., 1958, pp.286-95.
- 278-** Palsson L., *op. cit.* pp.112-19; L:oussouarn et Bourel, *op.& loc. cit.*; Lauterbach, *op.& loc. cit.*; Batiffol et Lagarde, *op. cit.*, p. 40; Mayer, P., *Droit International Privé*, 2nd. ed., pp. 432-34
- 279-** Issad M., *op. & loc. cit.*
- 280-** Ibid, See also, Algerian Civil Code 1976, art.24 [public policy], and art. 13, as to the consequences of the rule in art. 13, see, *supra*, chapter 1, section II.
- 281-** Palsson, L., *op. cit.*, p. 108, note 351; See also Hartley, T.C., [1967] 16 I.C.L.Q. 680, at

- 682-83; North, P.M.; *The Private International Law Of Matrimonial Causes.....*, 1977, pp. 225, 378-79; *The Matrimonial causes Act 1973*, Sec. 11(b); Anton, A.E., *op. cit.*, pp. 268-73, 276-79, See now 2nd ed, 1990, pp. 418-20 & 428-44; Dicey & Morris, *op. cit.*, 11th ed., pp. 657 et seq., See now 12th ed., 1993, pp. 664 et seq.; Maher, G., *op. cit.*, (1985), pp. 90-91.
- 282-** Padolechia v. Padolechia [1968] P. 314, 336; see also Breen v. Breen as explained by Lipstein: [1965] Clunet 453.
- 283-** Stone, O.M., [1952] 15 M.L.R. 90.
- 284-** Palsson, L., *op. cit.*, p. 119; Mayer, P. *op. & loc. cit.*; Loussouarn & Bourel, *op. cit.*, p. 398.
- 285-** Palsson, L., *op. cit.*, pp. 120-27; Hartley, T.C., *op. cit.*, pp. 694-99; North, P.M., *op. & loc. cit.*, and also at p. 120; Anton, A.E., *op. cit.*, pp. 76-77, 277; Kahn-Freund, [1974] 143 (III) R.C.A.D.I. 139 at 190; Unger, J., [1952] 15 M.L.R. 88-89.
- 286-** Palsson, L., *op. cit.*, 1981, pp. 318-19.
- 287-** *Ibid.* See also, Batiffol & Lagarde, *op. & loc. cit.*; Batiffol, H., [1968] R.C.D.I.P. 300; Loussouarn & Bourel, *op. cit.*, p. 397; Issad, M., *op. & loc. cit.*; Jaffey, A.J.E., *Conflict of laws*, 1988, p. 29; *Idem*, [1978] 41 M.L.R. 38; North, P.M., [1980] 166(I) R.C.A.D.I., p. 57 et seq.; Dicey & Morris, *op. cit.*, 1987, p. 629, See now 12th ed., 1993, pp. 670-71; Morris, J.H.C., *Conflict of laws*, 1984, p. 165.
- 288-** See Palsson, L., *op. & loc. cit.*, and at p. 112; Batiffol, H., [1968] R.C.D.I.P. 299; Rigaux, *Droit International Privé*, 1968, p. 350; Loussouarn & Bourel, *op. & loc. cit.*; Malaurie, [1967] R.C.D.I.P. 530.
- 289-** Pugh v. Pugh [1951] P. 482; Cf. Dicey & Morris, *op. & loc. cit.*; Jaffey, A.J.E., *op. & loc. cit.*; Hartley, [1972] 35 M.L.R. 571, at p. 577-78.
- 290-** Pugh v. Pugh [1951] P. 482.
- 291-** *Ibid.*, at 494, and see also at p. 492 [*emphasised*]
- 292-** *The Age of marriage Act 1929*, Sec. 1; see now, *The Marriage Act 1949*, Sec. 2
- 293-** See Morris, J.H.C., *op. & loc. cit.*; Dicey & Morris, *op. & loc. cit.*, See now 12th ed., 1993, pp. 670-71; Brestler: [1951] 4 I.C.L.Q. 478; Palsson, L., *op. cit.*, pp. 113, 119; Jaffey, A.J.E., *op. & loc. cit.* 1988, p.29: "If the judge's construction of the English statute is correct, it should be amended to avoid this result."; Unger, [1952] 15 M.L.R. 88.
- 294-** Jaffey, A.J.E., [1978] 41 M.L.R. 38 at p. 46.
- 295-** *The Marriage (Scotland) Act 1977*, Sec.1(1); See also Clive, E.M., *op. cit.*, 1982, p. 149, See now 3rd ed., 1992, p. 135, *idem*, [1977] S.L.T.(Notes) 225; AB v. CD [1957] S.C. 415, at 423.
- 296-** *Ibid.*, Sec.1(2).
- 297-** See, supra, {section II p. 6 et seq.}
- 298-** Mohamed v. Knott [1969] 1 Q.B. 1; For comments see, Karsten, *Child Marriages*, [1969] 32 M.L.R. 212. This decision, however, is against Dr. Cheshire's view on capacity.
- 299-** See, Algerian Family code 1984, Art. 7 provides: "La capacité de mariage est réputée valid a ving et un (21) ans révolus pour l'homme et à dix huit (18) ans révolus pour la femme."

- Toutefois, le juge peut accorder une dispense d'age pour une raison d'intérêt ou dans un cas de nécessité."; Hamdan, L., *Les Difficultés de Codification du Droit de la Famille Algérienne*, [1985] R.I.D.C. 1001, 1009; Issad, M., *op. cit.*, pp. 249-50; Cf Benmelha, Gh., *op. cit.*, (1985), pp. 44-45.
- 300-** Issad, M., *op. & loc. cit.*; See also, Batiffol & Lagarde, *op. cit.*, pp. 42-43; Cf. Palsson, L., *op. cit.*, (1981), p.320; Hague convention 1902, art. 2; Rabel, E., *op. cit.*, (1958), pp. 297-98.
- 301-** Palsson, L., *op. & loc. cit.*
- 302-** See, Batiffol & Lagarde, *op. cit.*, p.43; Mestre, J., *Juris-classeur*, fasc. 546-A., pp. 221-26; Mayer, P., *Droit International Privé*, pp. 434-35; Bischoff, *op. cit.*, p. 290, n° 51-53; Loussouarn & Bourel, *op. cit.*, pp.397-98; Dicey and Morris, *op. cit.*, 11th ed., 1987, pp. 642-43, See now 12th ed., 1993, pp. 682-85; Cheshire and North, *op. cit.*, 10th ed., 1979, p. 401, See now 12th ed., 1992, pp. 644-48; Jaffey, A.J.E, *op. cit.*, (1988), pp. 40-41; Morris, J.H.C., *op. cit.*, 3rd ed., 1984, pp. 173-75; Palsson, L., *op. cit.*, 1981, pp.285-87.
- 303-** For instance, mistake as to the moral and social qualities induced by the fraudulent misrepresentation or concealment of facts constitute a defect of consent under the Algerian law, but it is irrelevant under Scots law. See Lang v. Lang 1921 S.C. 44; Benmelha, Gh., *op. cit.* [1985], p. 52; cf. Bencheneb, A., *La formation du lien Matrimonial...*, University of Algiers, Memoire, 1973, p. 207.
- 304-** Benmelha, Gh., *op. cit.*, pp.46-53; Ch. Rev. Mus. 11 Avril 1922, [1922-23] 2 Rev. Alg. 183; Ordonnance n° 59/274, du 4/2/1959, art. 2 alinea 1; Trib. d'Alger, 1ère Ch. Civ., 23/7/1965. [1968] 4 Rev. Alg. 1194; Cour Mostaganem, Ch. Civ., 3/11/1966, [1968] 4 Rev. Alg. 1200; Haddad, R., *La Jeune Fille et le Consentement au Mariage*, [1975] 3 Rev. El-Mouhamat, 9.
- 305-** Issad, M., *op. cit.*, [1986], pp. 249-50; see also, Soulieman, A.A., *Notes on the Algerian Private international law*, 1984, pp. 69-70 [In Arabic]; Batiffol et Lagarde, *op. & Loc. cit.*
- 306-** The position is different if the marriage in this hypothetical example is between a French subject and an Algeveian citizen. see, supra, [Section 2] p. 4 et esq.
- 307-** Issad, M., *op. & loc. cit.*; see also Batiffol et Lagarde, *op. cit.*, p. 43.
- 308-** Palsson, L., *op. cit.*, pp. 290-91; Bischoff, *op. cit.*, n° 66; see also, supra note 307.
- 309-** See Long v. Long 1950 S.L.T. (Notes) 32; Johnston v. Brown (1823) 2 S. 495; Ford v. Stier (1896) P. 1; Valier v. Valier [1925] 133 L.T. 830; M'Leod v. Adams 1920 1 S.L.T. 229; Singh v. Singh [1971] P. 226 (C.A.); H. v. H. [1954] P. 258; Orlandi v. Castellì 1961 S.C. 113; See also, Clive, E.M., *op. cit.*, (1982), pp. 100-04, See now 3rd ed., 1992, pp. 142-43. Cf. the position in English law, where absence of free consent merely renders a marriage voidable: *The Matrimonial Causes Act 1973*, s. 12(c).
- 310-** Johnston v. Brown (1823) 2 S. 495.
- 311-** Lendrum v. Chakravarti 1929 S.L.T. 96; MacDougal v. Chitnavis 1937 S.C. 390; Noble v. Noble 1947 S.L.T. (Notes) 62; Di Rollo v. Di Rollo 1959 S.C. 75; Orlandi v. Castellì 1961 S.C. 113; Mahmud v. Mahmud 1977 S.L.T. (Notes) 17; Akram v. Akram 1979 S.L.T. (Notes) 87.
- 312-** Clive, E.M., *op. cit.*, (1982), p. 156, See now 3rd ed., 1992, p. 142.

- 313-** See Cheshire, G.C., *Private International Law*, 7th ed., 1965, pp. 320-22, See now 12th ed., 1992, p. 645; Anton, A.E., *op. cit.*, p. 293, See now 2nd ed., 1990, pp. 442-44; Carter, F.G., *Proxy Marriages*, [1957] 35 *Can. Bar Rev.*, 1195, 1198; Ryan, S., [1950] 28 *Can. Bar Rev.* 964, at 992; *Parojcic v. Parojcic* [1958] 1 *W.L.R.* 1280, 1283; *H. v. H.* [1954] P. 258; *Di Rollo v. Di Rollo* 1959 S.C. 75, 78; Cf. Webb, [1959] 22 *M.L.R.* 198; North, P.M., *op. cit.*, (1977) pp. 265-66; The Royal Commission on Marriage and Divorce, Cmd 9678, para. 887.
- 314-** *Di Rollo v. Di Rollo* 1959 S.C. 75, 78; Cf. Webb, [1959] 22 *M.L.R.* 198.
- 315-** Woudhouse, [1954] 3 *I.C.L.Q.* 454, 463; See also Dicey & Morris, *op. cit.*, (1987), pp. 644-45, See now 12th ed., 1993, pp. 683-84; Morris, J.H.C., *op. cit.*, (1984) p. 174; Palsson, L., *op. cit.*, (1981) pp. 288-89; Graveson, *Conflict of Laws*, 7th ed., 1974, pp. 252-53; North, P.M., *op. cit.*, (1977) pp. 124-25, 130; *Mehta v. Mehta* [1945] 2 *All E.R.* 690; *Apt v. Apt* [1948] P. 83; *Way v. Way* [1950] P. 71; *Szechter v. Szechter* [1971] P. 286; Liptstein, [1973] *Clunet* 417.
- 316-** *Apt v. Apt* [1948] P. 83, 88; see also *Silver v. Silver* [1955] 2 *All E.R.* 614; *Kassim v. Kassim* [1962] P. 224; *Buckland v. Buckland* [1968] P. 296. It is worth noting that the issue of consent in these cases was decided without any indication as to the foreign *lex loci celebrationis.*; Turpin, [1963] *C.L.J.* 48-50; Webb, [1963] 26 *M.L.R.* 85-87.
- 317-** See Law Com. [N° 89] & Scot. Law Com. [N° 64], [1985], p. 121, note 375.
- 318-** *Ibid.*
- 319-** Clive, E.M., *op. cit.*, 1982, pp. 156-57, Cf. 3rd ed., 1992, pp. 142-44; and see also Dicey and Morris, *op. cit.*, 1987, p. 645, See now 12th ed., 1993, pp. 684-85; Morris, J.H.C., *op. cit.*, 1984, p. 174; *Way v. Way* [1950] P. 71; *H. v. H.* [1954] P. 258; *kassim v. Kassim* [1962] P. 224; *Buckland v. Buckland* [1968] P. 296.
- 320-** Palsson, L., *op. cit.*, 1982, n° 944.
- 321-** See Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.17, 3.19; Dicey and Morris, *op. & loc. cit.*, See now 12th ed., 1993, pp. 684-85.
- 322-** Hartley, [1972] 35 *M.L.R.* 571, at p. 580; Dicey and Morris, *op. cit.*, pp. 645-46, See now 12th ed., 1993, pp. 684-85.; Palsson, L., *op. cit.*, pp. 290-91; *Buckland v. Buckland* [1968] P. 296.
- 323-** Clive, E.M., *op. & loc. cit.*, Cf. 3rd ed., 1992, pp. 142-44; Dicey and Morris, *op. cit.*, p. 646, See now 12th ed., 1993, pp. 684-85.
- 324-** *Vervaecke v. Smith* [1983] 1 *A.C.* 145, 165-66.
- 325-** Law Com. & Scot. Law Com., supra note 321, paras. 5.13, 3.20.
- 326-** Dicey and Morris, *op. cit.*, p. 643, See now 12th ed., 1993, p. 683; Morris, J.H.C., *op. & loc. cit.*; Jaffey, A.J.E., *op. cit.*, 1988, pp. 40-41; Palsson, L., *op. cit.*, p. 287.
- 327-** *Szechter v. Szechter* [1971] P. 286.
- 328-** *Ibid.*; *Way v. Way* [1950] P. 71, 78, where Hodson J. said "Question of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made"; *Kenward v. Kenward* [1951] P. 124, 134; *Apt v. Apt* [1948] P. 83, 88.

- 329-** Dicey and Morris, *op. cit.*, p. 642, cf. p. 644, See now 12th ed., 1993, p. 682, cf. p. 683.
- 330-** Law Com. & Scot. Law Com., [1985], para. 3.23.
- 331-** Cheshire and North, *Op. cit.*, 10th ed., 1979, p. 401, See now 12th ed., 1992, p. 647; Jaffey, A.J.E., *op. & loc. cit.*; Dicey and Morris, *op. cit.*, p. 642.
- 332-** See, supra, chapter one, [section 1] pp. 12-18; see also Issad, M., *op. cit.*, p. 249, Batiffol et Lagarde, *op. cit.*, p. 43; Audinet, Les Conflit de Lois en Matière de Mariage, [1926] R.C.A.D.I., 170, at pp. 185-87, Loussouarn et Bourel, *op. cit.*, (1980), p. 399.
- 333-** Issad, M., *op. & loc. cit.*; Batiffol et Lagarde, *op. cit.*, p. 40; Loussouarn et Bourel, *op. cit.*, p. 397.
- 334-** Contrast the position where an Algerian is involved, see, supra, chapter one [section one] p. 14, Issad, M., *op. cit.*, p. 250.
- 335-** See Walton, Husband and Wife, p. 15; Clive, E.M., Husband and Wiffe, 1982, pp. 32-34 & 90-91, See now 3rd ed., 1992, pp. 21-23 & 136; Thomson, J.M., Family Law in Scotland, 1987, pp. 21-24; Marriage (Scotland) Act 1977, S.2, Schedule 1; Marriage (Prohibited Degrees of Relationship) Act 1986, para. 2 (b & C) of schedule 2; Nichols, [1986] S.L.T. (News) 299. For the Algerian law, See Benmelha, Gh., *Élément du droit Algerienne de la Famille*, 1985, Vol. 1, pp. 54-58; Saad, F., *Algerian Family Law (Marriage and Divorce)*, Vol. 1, 1986, pp. 135-150 {in Arabic}. Hamdan, L., *Les Difficultes de Codification du Droit de la Famille Algerienne*, [1985] R.I.C.D. 1001, at pp. 1010-1011; Algerian Family Code 1984. Arts. 23-29, 34.
- 336-** See Marriage (Scotland) Act 1977, S. 2, Schedule 1.
- 337-** Adoption does not constitute legal impediment to marriage simply because it is not recognised as a legal institution according to the Algerian and Islamic Laws, Algerian Family Code 1984, Art.46 "L'adoption est interdite par la Charia et la loi"; Hamdan, L., *op. cit.*, p. 1013; An impediment from fosterage will arise when the woman's milk has found its way into the child's system either by mouth or the nose, during the first two years of infancy. For instance, when a woman has suckled a male child, by only single act of suckling, her daughters and her husband's daughters, whether previously or subsequently begotten, are the sisters of the suckling. Thus, the suckling cannot marry his foster mother or his foster-sisters, Algerian Family Code 1984, Arts.27-29.
- 338-** See Cretney, S.M., *Principles of Family Law*, 1974, pp. 11-14; Palsson, L., *op. cit.*, 1981, pp. 323-25; Clive, E.M., *op. cit.*, pp. 32-34, See now 3rd ed., 1992, pp. 21-23; Jaffey, A.J.E., introduction to the Conflict of Laws, 1988, pp. 26-7; Thomson, J.M., *op. cit.*, 1987, p. 24; Sellar, D., *Forbidden degrees of Matrimony*, [1977] S.L.T. 1; *Philip's Trustees v. Beaton* 1938 S.C. 733, at 745 where Lord President referred to the doublepurpose of the rules preventing marriage between certain categories of relatives, one being to prevent the corruption of the stock, the to preserve the purity of the family. See also, the Report of the Kilbrandon Committee on the Marriage law of Scotland (1969), Cmnd 4011, para 34; Benmelha, Gh., *op. cit.*, pp. 54-8; Saad, F., *op. cit.*, pp. 137, 138, 142 {In Arabic}; Chalabi, M.M., *Islamic Family regulations*, 4th. ed., 1983, pp. 118, 196 223-24 {In Arabic}.
- 339-** Dicey & Morris, *op. cit.*, 1987, pp. 627-28, See now 12th ed., 1993, pp. 668-70; Clive,

- E.M., *op. cit.*, 1982, p. 149, See now 3rd ed., 1992, p. 136; *Idem*, [1977] S.L.T. 225; Anton, A.E., *Private International Law*, 1967, pp. 276-77 & 279-80, See now 2nd ed., 1990, pp. 431-39; Cheshire & North, *op. cit.*, 1987, p. 574, See now 12th ed., 1992, pp. 586 et seq.; Batiffol et Lagarde, *op. cit.*, 1983, pp. 39-42; Hisham Ali Sadek, *Lectures in Private International Law*, pp.206-10 {In Arabic}; Issad, M., *op. cit.*, pp.248-49; Peyrard, G., *La Solution des conflits de lois en Algerie*, [1977] R.C.D.I.P. 381, at pp. 395-949; Loussouarn et Bourel, *Droit International Privé*, 2nd. ed., 1980, p. 395; Palsson, L., *op. cit.*, 1981, p. 324; Brook v. Brook (1861) 9 H.C.L. 193; Sottomayer v. De Barros [N° 1] (1877) 3 P.D. 1 (C.A.), In re De Wilton [1900] 2 Ch. 481; Robertson v. Channing 1928 S.L.T. 376.
- 340- Ibid; See also Mette v. Mette (1859) 1 Sw. & Tr. 416, 16 E.R. 792, In re Paine [1940] Ch. 46; Graveson, *Conflict of Laws*, 1974, pp. 259-60, 263, 265; Marriage (Scotland) Act 1977, S.2; *Cf.* Sottomayer v. De Barros [N° 2] (1879) 5 P.D. 94.
- 341- See Rabel, E. *The conflict of law: A comparative study*, 1958, pp 288-95; Bishoff; *op. cit.* n 27-32; Issad, M, *op. cit.* p 249; cf. Palsson, L, *op. cit.* (1981) pp 117-18.
- 342- Algerian civil code 1984; Article 34, provides: " Tout mariage contracte avec l une des femmes prohibees est declare nul avant et apres sa consommation. Toutes fois, la filiation qui en decoule est confirmee et la femme est astrie a une retraite legale."; see also, Algerian civil code 1976, Article 11; Issad, M , *op. cit.*, pp. 248-250; Peyrard, G., *op. cit.* pp .397-99; Benmelha, Gh., *op. cit.*, pp. 55-58.
- 343- Algerian civil code 1976, article 13, see supra, section 2 (this chapter); Issad, M. *op. cit.* pp. 250; Peyrard, G., *op. cit.* pp.395-97; le projet de codification de droit international prive 1950, [1950] R C D I P. 111.
- 344- Issad, M., *droit international prive*, v1, 1986, p.250; Peyrard, G. [1977] R.C.D.I.P.380, at 398; Soulieman, A.A., *commentaries on the Algerian private International Law*, pp.68-70 ( in arabic); see also Batiffol et Lagarde, *op. cit.*, (1983).v.2, pp.42,44-45.
- 345- The result will be different if the parties have obtained a papal dispensation according to their national law, since Portuguese law, as noted in Sottomayer v. De Barros (N 1) (1877) 3 P.D 1 (C.A), requires papal dispensation in this particular case. See also Batiffol et Lagarde, *op. & loc. cit.*
- 346- Palsson, L. *op. cit.*, 1981, p. 325, see also Issad, M., *op. & loc. cit.*
- 347- Issad, M., *op. & loc. cit.*; Algerian Civil Code 1976, Arti.24: "L'application de la loi étrangère, en vertu des articles précédents, est exclue si elle est contraire à l'ordre public ou au bonnes moeurs en Algerie."
- 348- cf. Issad, M., *op. cit.*, p. 250, the view of whom that implies: Public policy will intervene to deny recognition to a marriage entered into abroad in accordance with the relevant foreign law.
- 349- see Palsson, L., *op. cit.*, 1981, pp. 327-28; Hague Convention on Marriage 1902, art. 2, Actes et documents, La Haye I, 1893, 46-47; II, 1894, 48; III, 1900, 170-73. English and Scottish laws take the same attitude -Cf. Cheni v. Cheni [1962] 3 All E.R. 873.
- 350- Sottomayer v. De Barros (N°1) (1877) 3 P.D. 1 (C.A.); See also, Brook v. Brook (1861) 9 H.L.C. 193; In Re Dewilton [1920] 2 Ch. 481; Robertson v. Channing 1928 S.L.T. 376; Webster v. Webster's Trustee (1866) 14 R. 90; Dicey and Morris, *Op. Cit.*, 1987, p. 627, See now 12th ed., 1993, pp. 668-71; Morris J.H.C., *Op. Cit.*, 1984, pp. 162-64; Jaffey,

- A.J.E., Conflict of laws, 1988, p. 27; Anton A.E., Private international law, 1967, pp. 276-78, See now 2nd ed., 1990, pp. 436-39; Clive E.M., husband and wife in Scotland, 1982, p. 149, See now 3rd ed., 1992, p. 136.
- 351-** Sottomayer v. De Barros (N°2) (1879) 5 P.D. 94. This decision is not applicable where the parties are from different countries other than England, see Cf. Re Paine [1940] Ch. 46 the implication of which suggests the recognition of the marriage validity where neither party is domiciled in England.
- 352-** The Marriage (Scotland) Act 1977, Section 2 (1) (b); See also Scots Law Com. [Discussion Paper N° 85], family Law, 1990, paras 9.5-9.7.
- 353-** Jaffey, A.J.E., The essential Validity of marriage in English Conflict of Laws, [1978] 41 M.L.R. 38, at pp. 44-45; see also his book on the conflict of laws, 1988, pp. 26-27.
- 354-** Re Paine [1940] Ch. 46; see also Mette v. Mette (1859) 1Sw. & Tr. 416, 164 E.R. 792; Cf. Ungar v. Ungar [1967] 2 N.S.W.R. 618.
- 355-** see, supra, note 352.
- 356-** The Marriage (Scotland) Act 1977, Section 2(3)(a); Clive E.M., [1977] S.L.T. (News) 225; Cf. Sottomayer v. De Barros (N°2) (1879) 5 P.D. 94, where a marriage celebrated in England between first cousins, one of whom was domiciled in Portugal, was held valid on the sole ground that the other party was domiciled in England. For comments on this case see, supra, section two this chapter, pp. 3-4; Jaffey A.J.E., *op. cit.*, 1988, p. 28; Dicey and Morris, *op. cit.*, 1987, p. 624, See now 12th ed., 1993, pp. 664-65 & 679-80; Cheshire and North, *op. cit.*, 1987, p. 585, See now 12th ed., 1992, pp. 595-97.
- 357-** The Marriage (Scotland) Act 1977, Section 2(1)(a); Clive E.M., *op. cit.*, p. 149 See now 3rd ed., 1992, p. 136; Anton A.E., *op. cit.*, pp. 279-83, See now 2nd ed., 1990, p. 434; Cheshire G.C., The English Private international Law of Husband and Wife, [1963] 108 (I) R.C.A.D.I., 115 at p. 138; Graveson R.H., Conflict of Laws, 1974, p. 258; Hartely, The Policy Basis of the English Conflict of Laws of Marriage, [1972] 35 M.L.R. 571 at p. 577.
- 358-** Cheni v. Cheni [1965] P.85; see also In Re Bozzelli's Settlement [1902] 1Ch. 751; Anton A.E., *op. cit.*, p. 279, See now 2nd ed., 1990, p. 439; Cheshire and North, *op. cit.*, 1987, p. 587, See now 12th ed., 1992, pp. 599; Palsson L., *op. cit.*, 1981, p. 327.
- 359-** Cheni v. Cheni [1965] P.85 at p. 99.
- 360-** Clive E.M., *op. cit.*, 1982, p. 153, See now 3rd ed., 1992, p. 139; see also Anton A.E., *op. & loc. cit.*, See now 2nd ed., 1990, p. 439.
- 361-** Dicey and Morris, On The Conflict of Laws, 12th ed., 1993, p. 668.
- 362-** Palsson L., *op. cit.*, 1981, p. 327; The Hague Convention of 1902, Art. 2 para.2; Rabel E., The conflict of Laws, 1958, vol.1, pp. 279-78; Travers M., La convention de La Haye relative au Marriage , 1912, vol.1, pp. 265-370.
- 363-** Cheshire and North, *op. cit.*, 1987, p. 586 & 611, See 12th ed., 1992, p. 603; Clive E.M., Husband and Wife, 1982, p. 130, See 3rd ed., 1992, p. 136; Morris J.H.C., Conflict of Laws, 1984, p. 164; baindail v. Baindail [1946] P. 122; Srinivasan v. Srinivasan [1946] P. 67; Hashmi v. Hashmi [1972] Fam. 36; Muhammad v. Suna, 1956 S.C. 366 at 370; The Matrimonial Causes Act 1973, section 11(b); Audinet E., Les Conflits de Lois en Matière de

- Marriage et de Divorce, [1926] 1 R.C.A.D.I. 175 at p. 186; Fadlallah, La Famille Légitime en Droit International Privé, n° 198.
- 364-** See Conway v. Beazley (1831) 3 Hagg.Ecc. 639, at 647, 652; Brook v. Brook (1861) 9 H.C.L. 193, at 211-12; Shaw v. Gould (1868) L.R. 3 H.L.55, 71; Padolechia v. Padolechia [1968] P. 314, 336; R v. Brentwood Marriage registrar [1968] 2 Q.B. 956; Hussain v. Hussain [1983] Fam. 26 (C.A.); Miller v. Teale [1954] 92 C.L.R. 406; Schwebel v. Ungar [1963] 42 D.L.R. (2d) 644; Batiffol et Lagarde, Droit International Privé, 7th ed., 1983, pp. 40-41, & 95; Loussouaren et Bourel, droit International Privé, 2nd ed., 1980, p. 397; Trib. gr. inst. Seine 21 Juin 1967: [1968] R.C.D.I.P. 294; Cour de Lyon 21/5/1974: D.S., 1957, p. 9.
- 365-** Shaw v. Gould (1868) L.R. 3 H.L.55; see also Morris J.H.C., *op. cit.*, 1984, p. 167.
- 366-** *Ibid.*, p. 71; Lord Cranworth said: "if the first marriage here was not dissolved here could not have been a second marriage. Til the first was dissolved there was no capacity to contract a second".
- 367-** Padolechia v. Padolechia [1968] P. 314, 336 [*Obiter*], Breen v. Breen [1964] P.144 as explained by Lipstein, case note [1965] Clunet 453; Hartley, T.C., Bigamy in the Conflict of laws, [1967] 16 I.C.L.Q. 680, at 681-83; North P.M., The Private International law of Matrimonial Causes..., 1977, pp. 225, 378-9; Van Mehran v. van Mehran 1948 S.L.T. (Notes) 62; Palsson L., *op. cit.*, 1981, pp. 108-09; Stone O.M., [1952] 15 M.L.R. 90; Cour Reims 19 Janvier 1976, [1976] Clunet 916; l'exigence de monogamie concerne: "les caractères objectifs du lien et non des caractères propres de la person qui pourraient être considérés distributivement chez chacun des futures epoux." Batiffol, H., [1968] R.C.D.I.P. 300.
- 368-** The Matrimonial Causes Act 1973, section 11 (b). *Cf.* Radwan v. Radwan [N°2] [1973] Fam. 34, where the application of another rule has led to a different result.
- 369-** White v. White [1937] P.111, at 125 where Bucknill J. said: "There cannot be any conflict of laws between different jurisdictions, because it is clear that the ceremony was bigamous, and therefore, by the law of every christian community, there never was any matrimonial status common to the petitioner and the respondent."
- 370-** The Scottish law is applicable here as being mainly the personal law of the parties governing the essential validity of the proposed marriage.
- 371-** See Dicey and Morris, *op. cit.*, 11th ed., 1987, vol.1, pp. 49-50.
- 372-** See Dicey and Morris, *op. cit.*, 11th ed., 1987, vol.2, pp. 623-39, See 12th ed., 1993, pp. 664-75; Morris J.H.C., *op. cit.*, 1984, pp. 159, 163; Anton A.E., *op. cit.*, 1967, pp. 276-80, See 2nd ed., 1990, pp. 431-38; Clive E.M., *op. cit.*, 1982, p. 150, See 12th ed., 1992, p. 136; Palsson L., *op. cit.*, 1981, pp. 106-07; Mette v. Mette (1859) 1 Sw. & Tr. 416; Re Paine [1940] Ch. 46; Padolechia v. Padolechia [1958] P. 314.
- 373-** *Ibid.*, and see, *supra*, section 2.
- 374-** Carter B.P., Capacity to Remarry after a Foreign Divorce, [1985] 10 L.Q.R. 496 at 503.
- 375-** Jaffey A.J.E., The Incidental Question and Capacity to Remarry, [1985] 48 M.L.R. 465 at 469; see also Palsson L., *op. cit.*, 1981, p. 263.
- 376-** As to the promotion of the respect of human rights and fundamental freedoms, see New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10th December 1962; The Universal Declaration of Human Rights, Paris 10th

December 1948, art.2 & 16; The International Convention on the Elimination of all Forms of Racial Discrimination, New York, 7th March 1966, art. 5; International Covenant on Civil and Political Rights, New York, 16th December 1966, Art. 23; The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th November 1950, Art.12 & 14; C.I.E.C. Convention Designed to Facilitate the Celebration of Marriages Abroad, Paris 10th september 1964.

- 377-** Ibid.
- 378-** See Dicey and Morris, *op. cit.*, 1987, vol.2, pp. 641-42, See now 12th ed., 1993, pp. 672 & 681-82; Clive E.M., *op. cit.*, 1982, pp. 152-53, See now 3rd ed., 1992, pp. 136 & 138-40; Schmittohof C.M., *The English Conflicts of Laws*, 3rd ed., 1954, p. 331.
- 379-** See Mette v. Mette (1859) 1 Sw. & Tr. 416; Re Paine [1940] Ch. 46.
- 380-** See Palsson L. *op. cit.*, 1981, p. 239; Dicey and Morris, *op. cit.*, 1987, pp. 630-31, See now 12th ed., 1993, pp. 671-72; Morris J.H.C., *op. cit.*, 1984, pp. 166-67; Wengler W., Case Notes [1957] R.C.D.I.P. 50 at p. 57; Bischoff, [1969] R.D.I. 285 at p. 288, n°29; Loussouaren et Bourel, *op. cit.*, n°303; Cour de Lyon 21 Mai 1974, [1975] D.S. 9 note Guiho P.; batiffol H., [1968] R.C.D.I.P. 294 at p. 300 where he said: " L'exigence de monogamie concerne les caractères objectifs du lien et non des futurs epoux." For English decisions See, Brook v. Brook (1861) 9 H.L.C. 193, 211-12 *per* Lord Cambell; Shaw v. Gould (1868) L.R. 3 H.L. 55, 71 *per* Lord Cranworth; Padolechia v. Padolechia [1968] P. 314, 316 *per* Simon P.
- 381-** R v. Brentwood Superintendent Registrar, Ex Parte Arias [1968] 2 Q.B. 956; For comments on this case see, Cohn E.J., Capacity to Marry- A Postscript, [1974] 90 L.Q.R. 448; Hartley P.C., [1972] 35 M.L.R. 571 at pp. 581-82; Chesterman M.R., A "Limoing Divorce", [1969] 32 M.L.R. 84.
- 382-** Ibid at 971, The possibility of a marriage solemnised in England between the would-be spouses might be recognised in Switzerland has been rejected as the chances of such recognition are minimal, and because it is not for an English court to impose on Switzerland its views as to capacity of persons domiciled there to marry. See also Cohn E.J., Capacity to Marry -A Postscript, [1974] 90 L.Q.R. 448 at pp. 449-50.
- 383-** The first wife, being a Swiss national, has subsequently remarried in Switzerland. See Chesterman, M.R., A "Limoing Divorce", [1969] 32 M.L.R. 84.
- 384-** R v. Brentwood Superintendent Registrar, Ex Parte Arias [1968] 2 Q.B. 956 at 968.
- 385-** Igra v. Igra [1951] P. 404, at 412 [*per* Pearce J.]
- 386-** R v. Brentwood Superintendent Registrar, Ex Parte Arias [1968] 2 Q.B. 956 at 969. Although Igra v. Igra was a case concerned with recognition of a foreign divorce, the learned Lord Justice said that "*Mutatis mutandis*, to my mind, that passage applies equally where questions of capacity to marry come under consideration." His Lordship has also pointed out *obiter* that "One might perhaps add that those who live in legal glass houses, however, well constructed, should perhaps not be over-astute to throw stones at the laws of other countries. Our own divorce laws have facets which may well seem unusual to or even to lack attractions for those who apply a continental system of jurisprudence. For instance, as a result of sec. 40

(1) of the matrimonial causes Act 1965, An Italian wife after residing for three years in this country can secure a decree of divorce against an Italian domiciled husband, yet the husband in question is not entitled in the proceedings here to cross-petition for divorce against the wife even though the offence of which he complains is graver and earlier than that complained by her."

- 387- Ibid, at 970.
- 388- Ibid, at 971.
- 389- Rojas, Petr. 1967 S.L.T. (Sh. Ct.) 24.
- 390- Ibid, see also the report on the marriage law of Scotland, [1969] Cmnd 4011, para.77, case F.
- 391- Palsson L., *op. cit.*, 1981, pp. 239-40.
- 392- Ibid; see also Hartley T.C., [1967] 16 I.C.L.Q. 680 at 690-91.
- 293- Ibid.
- 394- Ibid.
- 395- Ibid at p. 241.
- 396- Shaw v. Gould (1868) L.R. 3 H.L. 55.
- 397- Palsson L., *op. cit.*, 1981, pp. 241-42; Wolff, *Private International Law*, 2nd ed., p. 206 *et seq.*
- 398- Hartley T.C., [1972] 35 M.L.R. 571 at p. 582; See also, *supra*, note 381.
- 399- This hypothetical example is based on the fact of French case: Sciachi c. Sciachi, Trib. seine March 17, 1948: [1948] R.C.D.I.P. 112; See Hartley T.C., *supra*, note 292. The French decision in this case seems to be based on the fact that the second wife was of French nationality and domicile; *Cf. Dame Petrone c. Petrone*, Trib. Civ. Seine 2nd June 1942: [1943] *Nouvelle Revue de Droit International Privé* 117.
- 400- Hartley T.C., [1967] 16 I.C.L.Q. 680 at 690.
- 401- Ibid.
- 402- In this case, the marriage will be held void unless it is valid by both parties' personal laws at the time of the marriage, since the latter law is the one designated by the general conflict rule.
- 403- Wolff, *op. cit.*, 1950, p. 209.
- 404- Russel case [1901] A.C.446; See Webb, [1965] 14 I.C.L.Q. 662.
- 405- Ibid; See also Palsson L., *op. cit.*, 1981, p. 242.
- 406- Palsson L., *op. cit.*, 1981, p. 243.
- 407- The Domicile and Matrimonial Proceedings Act 1973, Ss. 2(3) and 15(2). The principle embodied in this section is expressed in the 1970 Hague Convention, art. 11: "A state which is obliged to recognise a divorce under this convention may not preclude either spouse from remarrying on the ground that the law of another state does not recognise that divorce."; See also *Actes et Documents de la Onzieme Session -Divorce*, 1970, vol. II, pp. 221-54; C.I.E.C. Convention on the recognition of Decisions involving Marital Status, 8th September 1967, art. 9; Von Overbeck A.E., *Le Remariage du Conjoint Divorcé Selon le Projet de Convention de La Haye sur la reconnaissance des Divorces et Selon les Droit Almandet Suisse*, [1970] R.C.D.I.P. 45.
- 408- Dicey and Morris, *op. cit.*, 1987, vol.1, p. 54; Jaffey A.J.E., *op. cit.*, 1988, p. 34; also [1985] 48 M.L.R. 465 at 467; Hartley T.C., [1972] 35 M.L.R. 571 at 582.

- 409- North P.M., *op. cit.*, 1977, p. 195; Karsten I.G.F., The Recognition of Divorces and Legal Separations Act 1971, [1972] 35 M.L.R. 299 at p. 302; Clive E.M., *op. cit.*, 1982, pp. 150-51, See now 3rd ed., 1992, pp. 136-38; Morris J.H.C., *op. cit.*, 1984, pp. 168-69; Law Com. [N°89] and Scot. Law Com. [N°64], 1985, paras: 3.09, 3.13, 3.50; Law Com. [N°137] and Scot. Law Com. [N°88], 1984, para: 6.49.
- 410- See Shaw v. Gould (1868) L.R. 3 H.L. 55, Russell Case [1901] A.C. 446.
- 411- See *infra*
- 412- Perrini v. Perrini [1979] Fam. 84, [1979] 2 W.L.R. 472, [1979] 2 All E.R. 323.
- 413- *Ibid*, [1979] 2 All E.R. 323 at 326-28. Sir George Baker P.'s view seems to be based on: Indyka v. Indyka [1969] 1 A.C. 33, Law v. Gustin [1976] Fam. 155; Travers v. Holley [1953] P. 246; Robinson-Scott v. Robinson-Scott [1958] P. 71.
- 414- *Ibid* at 328.
- 415- It is submitted that the same result could have been achieved on the ground of the rule in Sottomayer v. DeBarros [N°2] (1879) 5 P.D. 94. For critical comments See Collier J.G., Recognition of Foreign nullity Decrees -Capacity to Marry in the Conflict of Laws, [1979] C.L.J. 289; Carter P.B., Case notes: [1979] B.Y.B.I.L. 250-52.
- 416- Cheshire and North, *op. cit.*, 1987, p. 591, See now 12th ed., 1992, p. 603; North P.M., *op. cit.*, 1977, p. 193; Hill J., Remarriage after an Overseas Divorce, [1985] 36 N.I.L.Q. 250; Palsson L., *op. cit.*, 1981, p. 254.
- 417- Lawrence v. Lawrence [1985] 1 All E.R. 506, [1985] 2 All E.R. 733 (A.C.).
- 418- *Ibid* at p. 509 [*per* Antony Lincoln J.]; See also Jaffey A.J.E., [1985] 48 M.L.R. 465; Hill J., [1985] 36 N.I.L.Q. 250 at p. 252; Collier J.G., [1985] C.L.J. 378 at 379; Carter P.B., [1985] 101 L.Q.R. 496 at 497; Downes T.A., [1986] 35 I.C.L.Q. 170.
- 419- It was held at common law that fraud as to the jurisdiction of the foreign court would result in recognition being refused, See Middleton v. Middleton [1967] P. 62; Shaw v. Gould (1868) L.R. 3 H.L. 55, where the marriage was held void as the divorce was not recognised in England for the reason that there was no *bon fide* domicile in Scotland.
- 420- Lawrence v. Lawrence [1985] 1 All E.R. 506 at 511.
- 421- *Ibid* at 512
- 422- *Ibid*.
- 423- Lawrence v. Lawrence [1985] 2 All E.R. 733 (C.A.), at 737.
- 424- *Ibid*, at 739.
- 425- Carter, P.B., Capacity to Remarry After a Foreign Divorce, [1985] 101 L.Q.R. 496 at p. 502; See also. Hill, J., Remarriage After an Overseas Divorce, [1985] 36 N.I.L.Q. 251 at p. 253; Downes, T.A., Recognition of Divorce And Capacity to Remarry, [1986] 35 I.C.L.Q. 170 at p. 172; Collier, J.G., [1985] C.L.J. 378, at p. 380.
- 426- Carter, P.B., *Ibid*.
- 427- *Ibid*, at p.503.
- 428- Lawrence v. Lawrence [1985] 2 All E.R. 733 at 743. See now, Family Law Act 1986, S. 50.
- 429- *Ibid*, at 745.
- 430- Carter, P.B., [1985] 101 L.Q.R. 496 at p. 501.

- 431- Ibid; see also the references cited supra, note 425.
- 432- Jaffey, A.J.E., [1985] 48 M.L.R. 465, at p.468.
- 433- Lawrence v. Lawrence [1985] 2 All E.R. 733, at 746.
- 434- Carter, P.B., supra note 430, at p. 503-04.
- 435- Lawrence v. Lawrence [1985] 1 All E.R. 506, 510 [emphasis added]
- 436- The Law Com. [N°137] & The Scot. Law Com. [N°88], [1984], para. 6.56, 6.49-6.60; See also Jaffey, A.J.E., [1985] 48 M.L.R. 465 at 466; Contrast The Law Com. [N° 89] & The Scot. Law Com.[N° 64], para. 3.19.
- 437- The Family Law Act 1986, Sec. 50, See also, Scot. Law Com. [Disc. P. N° 85], Family Law: Pre-consolidation reforms, 1990, para. 9.11; Scottish Law Commission [Scot. Law Com. N° 135], Report on Family Law, 1992, para. 14.11.
- 438- See Palsson, L., *op. cit.*, [1981], p. 256.
- 439- Such as the claim of alimony, the legitimacy of a born child after more than ten months, see Wengler, W., Case Notes, [1957] R.C.D.I.P. 50 at p. 58.
- 440- Palsson, L., Ibid, supra note 436.
- 441- Smith, R., Recognition of Foreign Nullity Decrees, [1980] 96 L.Q.R. 380, at p. 401.
- 442- See, Brook v. Brook (1861) 9 H.C.L. 193, at 212, 220.(per Lord Chancellor), and at p. 224
- 443- See Shaw v. Gould (1868) L.R. 3 H.L. 55; Russell v. Russell [1901] A.C. 446; In Re Sterling [1908] 2 Ch. 344; See also Clive, E.M., The Law of Husband and Wife in Scotland, 3rd ed., 1992, pp. 137-38.
- 444- See, Matrimonial Causes Act 1973, Sect. 11 (b); The Marriage (Scotland) Act 1977, sect. 5 (4) (b); The Family Law Act 1986, section 50 which fails to deal with the case where a divorce or annulment is not recognised in England and Scotland but is recognised by the law of the domicile and the law of the place of celebration..
- 445- See, Pearl, D., [1987] C.L.J. 35, 38.
- 446- Ponticelli v. Ponticelli [1958] P. 204, 215-16; see Law Com. [N° 89] and Scot. Law Com. [N° 64], 1985, para. 3.19.
- 447- Lawrence v. Lawrence [1985] 1 All E.R. 506, 510, 512; For a discussion of the cases on this subject See, Gotlieb, A.E., The Incidental Question in Anglo-American Conflict of Laws, [1955] 33 Can. Bar Rev. 523, at 534-41; Gotlieb, A.E., "The Incidental Question Revisited: Theory and Practice in the conflict of laws", [1976] 26 I.C.L.Q. 734; Palsson, L., *op. cit.*, 1981, pp. 244-55; & 262 where he said that although the remarriage should be permitted as a rule according to the lex fori approach, "a different evaluation may be appropriate in some exceptional cases where the proposed union lacks any connection with the country of the intended celebration".
- 448- See, Dicey & Morris, *op. cit.*, 1987, Vol. 1, p. 50, Gotlieb, A.E., [1955] 33 Can. Bar Rev. 523, 555 Where he said that: "There is really no problem of the incidental question, but as many problems as there are cases in which the incidental questions can arise"
- 449- See R. v. Brentwood Registrar [1968] 2 Q.B. 956; Rojas, Petr. 1967 S.L.T. (Sh. Ct.) 24; Hartley, T.C., [1972] 35 M.L.R. 571, 582; Contrast, Smith, R., [1980] 96 L.Q.R. 380, 400.
- 450- See, Carter, P.B., [1985] 101 L.Q.R. 496, 504-505; Jaffey, A.J.E., [1985] 48 M.L.R. 465, 471; [1978] 41 M.L.R. 38, 40; [1982] 2 O.J.L.S. 368, 381.

- 451- As to Choice of law rules in nullity, see, *infra*; and see also Cheshire and North, *op. cit.*, 1987, p. 637; Collier, J.G., *Conflict of Laws*, 1987, pp. 284-85.
- 452- See Hartley, T.C., [1967] 16 I.C.L.Q. 680, at 684-687; Hooper, A., A New Rule For Recognition of Foreign Divorces?, [1964] 27 M.L.R. 727, at 730-31; Jaffey, Recognition of Extra-Judicial Divorces, [1975] 91 L.Q.R. 320, at 322-23; Jaffey, [1985] 48 M.L.R. 465, at 469; Travers, M., *La Convention de la Haye relative au mariage*, 1912, vol 1, pp. 323-361; Hague Convention on Marriage of 1902, art. 2 para. 3; Trib. Seine 2 June 1930, [193] Clunet 1078; Trib. Seine 25 April 1938, [1939] R.C.D.I.P. 103; Cf Cour Paris 15 Nov. 1960, [1961] R.C.D.I.P. 397; Cf, North, P.M., *The Private International Law of Matrimonial Causes...*, 1977, pp.199-200, 224-25.
- 453- See, Scot. Law Com. [N° 85], 1990, para. 9.6; Law Com. [N° 89] and Scot. Law Com. [N° 64], 1985, paras. 3.8, 3.40-3.42; Clive, E.M., *op. cit.*, 1982, pp. 151-52; Marriage (Scotland) Act 1977. sec. 5 (4)(b); See also *Padolechia v. Padolechia* [1968] P. 314, 336 where Sir Jocelyn Simon P. stated that "Nobody who is still married can validly contract a marriage in a monogamous country, nor can anybody validly contract marriage with a person who is already married...".
- 454- See, *De Massa v. De Massa* [1939] 2 All E.R. 150 n (P); *Galene v. Galene* [1939] P. 237.
- 455- See, *Gray v. Formosa* [1963] P. 259, 269-71, 273; *Lepre v. Lepre* [1965] P. 52, 63-65.
- 456- Family Law Act 1986, sec. 44 (1); See also The Domicile and Matrimonial Proceeding Act 1973, sec. 16 (1) which provides that: "no proceeding in the United Kingdom, the channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries". For the common law rule in England, see North, P.M., *op. cit.*, 1977, pp. 222-24, 225-30, 237-38, Jaffey, [1975] 91 L.Q.R. 320-23.
- 457- Cf. North, P.M., *op. cit.*, p. 224 where he pointed out that the incidental question should be determined by the *lex causae* even in the case of remarriage in England.
- 458- Hartley, T.C., [1967] 16 I.C.L.Q. 680, at 686, *Shaw v. Gould* [1868] L.R. 3 H.L. 55; Hooper, A., [1964] 27 M.L.R. 727, at 730-31.
- 459- *Schwebel v. Ungar* [1963] 42 D.L.R. (2d) 622; See, Castel, [1964] Clunet, 888; Wengler, [1965] R.C.D.I.P., 321; For further comments on this case See Rigaux, F., *Le Conflit Mobile en Droit International Privé*, [1966] 117 (1) R.C.A.D.I. 329, at pp. 421-22, 429-30; Wengler, W., *Nouvelles Reflexions sur les "Question Préalables"*, [1966] R.C.D.I.P. 165, 187-88.
- 460- *Ibid*, at p. 633.
- 461- *Schwebel v. Ungar* [1965] 48 D.L.R. (2d) 644 [S.C.C.], The approach adopted in this case was approved *obiter* in the English case of *Padolechia v. Padolechia* [1968] P. 314, 338-39.
- 462- See, Palsson, L., *op. cit.*, 1981, p.226
- 463- *Schwebel v. Ungar* [1965] 48 D.L.R. (2d) 644, at p. 649, See Castel, [1969] Clunet 746.
- 464- Webb, P.R.H., Bigamy and Capacity to Marry, [1965] 14 I.C.L.Q. 659, at p. 662; Lysyk, K., [1965] Can. Bar Rev., 363.
- 465- See, *Cheni v. Cheni* [1965] P. 85, See also *Mohamed v. Knott* [1969] 1 Q.B. 1.
- 466- Lysyk, K., [1965] Can. Bar Rev., 363, at p. 369.

- 467- Ibid, at p. 370. Lysyk has suggested that by way of analogy to Pugh v. Pugh [1951] P. 482.
- 468- Ibid, at p. 378. It has been submitted that the decision in this case is alternatively open to the explanation that the court intended to lay down a new exception to the traditional conflict of law rules, see Hooper, A., [1964] 27 M.L.R. 727-33; Webb, [1965] 14 I.C.L.Q. 659-63.
- 469- Jaffey, A.J.E., Introduction to the Conflict of Laws, 1988, p. 36; See also Jaffey, [1985] 48 M.L.R. 465, at 469, Dicey and Morris, *op. cit.*, 1987, Vol.1, p. 51; Hartley, T.C., [1967] 16 I.C. L.Q. 680, at 684 et seq.; Palsson, L., *op. cit.*, 1981, p. 216; Hooper, A., [1964] 27 M.L.R. 727, at 730.
- 470- Law Com. & Scot. Law Com., Unpublished consultation Paper circulated to a selected audience in May 1983, See now and Contrast, Law Com. [N° 137] & Scot. Law Com. [N° 88], 1984, para. 6.60; See also Morris, J.H.C., Conflict of Laws, 1984, p.169; Collier, J.G., Conflict of laws, 1988, p. 268; Hartley, T.C., [1967] 16 I.C.L.Q 680, 684-687.
- 471- Pearl, D., [1987] C.L.J. 35, at pp. 37-38.
- 472- See, Shaw v. Gould [1868] L.R. 3 H.L. 55; France: Trib. Seine 10 July 1901, [1901] Clunet 967; Cour Paris 15 Nov. 1960, [1961] R.C.D.I.P. 937; West Germany, KG 20 May 1975, IPRspr. 1975, n° 36; KG 13 Jan. 1925, JW 1925, 2146. In the latter case the *lex fori* approach was not applied even though the remarrying party was a German national at the time of the divorce, but acquired American citizenship before he remarried an American woman in the USA. See also Palsson, L., *op. cit.*, 1981, 213-225.
- 473- See Law Com. [N° 137] & Scot. Law Com. [N° 88].
- 474- See Hague convention on Marriage 1902, art. 2 para. 3 which provides: " Sous la réserve de l'application du premier alinéa de l'article 6 de la present convention, aucun État contractant ne s'oblige a faire célébrer un mariage qui, à reason d'un mariage antérieur ..., serait contraire à ses lois. La violation d'un empêchement de cette nature ne pourrait pas entrainer la nullité du mariage dans les pays autres que celui où le mariage a été célébré."
- 475- See The Marriage Act 1949, section 32 (2) (a); The Marriage (Scotland) Act 1977, Section 5 (3) & (4); Hartley, T.C., [1972] 35 M.L.R. 571, at p. 577.
- 476- See Dicey and Morris, *op. cit.*, 1987, pp. 636-38, See now 12th ed., 1993, pp. 677-79; Hartley, T.C., [1972] 35 M.L.R. 571, at pp. 576-77; Jaffey, A.J.E., *op. cit.*, 1988, p. 39.
- 477- See Dicey and Morris, *op. cit.*, 1987, p. 631, See now 12th ed., 1993, p. 673;; Cheshire and North, *op. cit.*, 1987, pp. 593-94, See now 12th ed., 1992, pp. 605-06; Hartley, [1967] 16 I.C.L.Q. 680 at p. 695; Morris, J.H.C., *op. cit.*, 1984, p. 170; Graveson, R.H., Conflict of Laws, 1974, pp. 261, 288.
- 478- Warter v. Warter (1890) 15 P.D.152, Le Mesurier v. Le Mesurier [1930] 46 T.L.R.203; Hellens v. Densmore [1957] 10 D.L.R.(2d) 561, 581-83 (S.C.C.); Miller v. Teale [1954] 92 C.L.R.406, [1955] 29 Aust.L.J.91, Boettcher v. Boettcher [1949] 93 S.J. 237; *Cf Wall v. De Thoren* (1874) 1 R. 1036, (1876) 3 R. (H.L.) 28, cited in Anton, A.E., P.I.L., 1967, p. 277; Pezet v. Pezet [1947] 47 S.R. (N.S.W.) 45 a decision which was overruled in Miller v. Teale, [1954] 92 C.L.R. 406.
- 479- Miller v. Teale [1954] 92 C.L.R. 406, [1955] 29 Aust.L.J. 91 (H.C.A.).
- 480- Palsson, L., *op. cit.*, 1981, p. 269.

- 481- De Thoren v. Att. Gen. (1876) 1 A. C. 686 (H.L.).
- 482- See *supra* note 478, at p. 155.
- 483- Boettcher v. Boettcher [1949] 93 S.J. 237, at p. 238; See also, Le Mesurier v. Le Mesurier [1930] 46 T.L.R. 203, at p. 204 [*per* Lord Merrivale]
- 484- Miller v. Teale [1955] 29 Aust.L.J. 91 (H.C.A.), at p. 94
- 485- Ibid.
- 486- Ibid, at p. 95-96. [*per* Kitto J.]. Hartley, [1967] 16 I.C.L.Q. at note 70, stated that the learned judge explained the *dictum* of Sir James Hannen P. referred to above as implying merely that the dissolution was not indefeasible as long as the decree absolute was liable to be discharged on appeal.
- 487- Marsh v. Marsh [1945] A.C. 271, at p. 278 [*Per* Lord Goddard]; see also Dryden v. Dryden [1973] Fam. 217, 239
- 488- Hartley, T.C., [1967] 16 I.C.L.Q. 680, at 698
- 489- Scott v. Att. Gen (1886) 11 P.D. 128; See also Dicey and Morris, *op. cit.*, 1987, pp. 632-33, See now 12th ed., 1993, pp. 673-74; Cheshire and North, *op. cit.*, 1987, p. 594, See now 12th ed., 1992, p. 606; Morris, J.H.C., *op. cit.*, 1984, p. 170; Graveson, R.H., *op. cit.*, 1974, p. 262; North, P.M., *op. cit.*, 1977, pp. 131, 191; Holder, W.E., Public Policy And National Preferences -The exclusion of Foreign law in English Private International Law, [1968] 17 I.C.L.Q. 926, 948; Wolff, M., P.I.L., 1950, pp. 172, 339, 378; For a comparative study see Palsson, L., *op. cit.*, 1981, pp. 273-79.
- 490- Warter v. Warter (1890) 15 P.D. 152, 155.
- 491- Hartley, [1967] 16 I.C.L.Q. 680, 699; For the consideration of this restriction as unilateral or bilateral, see Palsson, L., *op. cit.*, 1981, pp. 280-82.
- 492- Lundgren v. O'Brien [N° 2] [1921] V.L.R. 361.
- 493- Morris, J.H.C., *op. cit.*, 1971, p. 108, for further comments on this case see, Webb, P.R.H. and Davies, J.L.R., A Casebook on the Conflict of Laws, 1970, 294, 513; Hartley, *supra* note 491; Palsson, L., *op. cit.*, 1981, p. 283.

## Chapter Three

### Nullity of Marriage in The Conflict of laws

#### Introduction

Nullity of marriage constitutes one of the main selective areas of matrimonial causes where the conflict of laws problems loom large and where the *lex fori* is not applied automatically. In granting a decree of nullity the court declares the alleged marriage between the parties to have been and to be absolutely null and void to all intents and purposes whatsoever, and the pursuer to have been and to be free from all ties of marriage with the defender. It is important to bear in mind that the declaration of nullity of marriage is entirely different from a decree of dissolution of marriage "both in respect of its causes and of its effects".

It is the object of the nullity decree to avoid a marriage *ab initio* and declare it to be legally non-existent on the basis of defects which can only be *ex causae precedenti*, while divorce dissolves a validly subsisting marriage *a praesenti* on account of supervening misconduct or objective disruption that can only be *ex causae subsequenti*. Professor Anton has pointed out that in nullity actions the court orders also "a mutual restitution of property to restore the parties, as far as possible, to their respective positions before the marriage, but in divorce there are special statutory provisions governing the spouse's proprietary rights from the date of the decree".<sup>(1)</sup> This logical distinction is now maintained in Scots law.<sup>(2)</sup> But it was only sustained in English law partly until the promulgation of the M.C.A. 1937 whereby it was provided that nullity can be based on a ground *ex causae subsequenti*, i.e. wilful refusal to consummate, and in part until the enactment of the Nullity of Marriage Act 1971 whereby the vestiges of the retrospective effect of a decree annulling a voidable marriage has been abolished.<sup>(3)</sup> Section 16 of the Matrimonial Causes Act 1973, re-enacting the Nullity of Marriage Act 1971, provides clearly that "A decree of nullity

granted after 31st July 1971 in respect of a voidable marriage shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time".

Accordingly, it is commonly agreed that a distinction between void and voidable marriages exists in English and Scottish law because certain defects render the marriage legally non-existent, while others render it only voidable.<sup>(4)</sup> The essence of this dichotomy has been authoritatively stated in De Reneville v. De Reneville where Lord Greene M.R. submitted that "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is the issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it".<sup>(5)</sup> Along the same line of reasoning, Lord Morris has stated in Ross-Smith v. Ross-Smith<sup>(6)</sup> that "A void marriage is no marriage. Considered literally the expression is self-destructive and contradictory. But without misleading anyone it serves to denote the situation where a ceremony of marriage does not bring about a marriage". There is no need therefore to institute proceedings so as to establish the nullity of a void marriage simply because it is in fact legally non-existent and cannot confer on the parties the status of husband and wife. Nevertheless, it is interesting to note that a decree of nullity should be obtained in all cases for the sake of certainty so as to clarify the parties' status, to obtain maintenance for any child of the marriage and to avoid any subsequent difficulties that may arise as to the remarriage of either party.<sup>(7)</sup> The underlying reason is that the parties are unable to know with certainty whether the alleged defect renders the marriage void or voidable unless they happen to be lawyers specialised in conflict of laws, since the effects of defects of marriage vary considerably between legal systems. It is undoubtedly clear that the effect of a decree annulling a void marriage is merely to declare authoritatively that the parties have never acquired the status of husband and wife. Moreover, a decree annulling a void marriage may be

sought by either party, or any person with a sufficient interest in establishing the status of the spouses, even after the death of both or one of them.<sup>(8)</sup>

A voidable marriage, on the other hand, as Lord Greene has stated, "is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction".<sup>(9)</sup> Consequently, a person whose marriage is voidable cannot remarry without first securing a nullity decree, and if it happens that he remarries nevertheless, the remarriage will be declared void for bigamy. A judicial declaration of nullity is therefore necessary in all cases in which the married status of the parties is merely voidable, since the marriage will be valid and all the legal consequences of a lawful union will ensue, both *inter se* and as regards third parties if a decree of nullity has not been pronounced by a competent court. However, the validity of a voidable marriage may only be attacked by one of the spouses during their joint lifetime, and thus it cannot be annulled after the death of either or both of the parties.<sup>(10)</sup> Moreover, the fundamental consequence of a voidable marriage, as far as jurisdiction at common law was concerned, was formerly that the wife did by the so-called marriage automatically acquire the husband's domicile.<sup>(11)</sup>

This distinction, of course, has been of paramount importance within the sphere of nullity at common law both in England and Scotland where the courts were obliged to put the cart before the horse, and proceed in this manner far down the road to discover whether a marriage is void or voidable before being able to come to a decision on their own jurisdiction. The existing judicial authorities illustrate clearly that English and Scottish courts' jurisdiction in actions of nullity involving void marriages was founded on a wider basis than in voidable marriages. Although the dichotomy is now of little jurisdictional significance in the U.K. after the enactment of Domicile and Matrimonial Proceedings Act 1973 which has simplified the jurisdictional grounds, it is still relevant in matters of choice of law and, to a lesser extent, of recognition of foreign nullity

decrees.<sup>(12)</sup> This seems to be well justified simply because there is no unified criterion which is in use in all legal systems for distinguishing defects rendering a marriage void from those treating it as merely voidable. An illustrative example is provided by the defect of non-age which amounts to the declaration of a marriage as being void both in English and Scottish laws, but renders it only voidable under Algerian and French law.

A related problem requiring consideration here concerns the applicable law to determine whether the alleged marriage is voidable or void. It is interesting to note that the academic authorities are divided with respect to characterisation by the law governing the ground of invalidity and classification by the *lex fori*. Seeing that the characterisation of any alleged defect in marriage as formal or essential is a matter to be entirely referred to the *lex fori* according to the general principles prevailing in conflict of laws, Dr. Morris<sup>(13)</sup> has submitted that the question of whether the alleged matrimonial defect renders the marriage void or voidable must be determined by the law of the *forum*. In support of this view the learned writer stated two reasons which mainly concern the existing divergences between legal systems as to the classification of defects rendering a marriage either void or voidable. In the first place, It has been pointed out that the consideration of a marriage as void in many continental European countries cannot be construed in the sense of that term as understood in the United Kingdom, inasmuch as a decree of nullity of a competent court is always required by the laws of these countries.<sup>(14)</sup> Secondly, it has been submitted that in certain Canadian provinces, unlike in the United Kingdom, consanguinity and affinity is a ground for treating the marriage as being not void but merely voidable.

This view, it is argued, derives support from Corbett v. Corbett, where Bernard J. submitted that "Undoubtedly a marriage to which one of the parties had not the capacity to contract would be regarded as a void marriage by English law".<sup>(15)</sup> It is submitted that this means clearly that the classification of a marriage as void or voidable is to be

referred to the English law *qua lex fori*. Dr. Morris also supports this proposition on the ground that Lord Greene's judgement in De Reneville v. De Reneville "seems to have been overtaken by oblivion, and it may well be that it no longer represents the law".<sup>(16)</sup> This contention is mainly based on the authority of the House of Lords in - Ross-Smith v. Ross-Smith<sup>(17)</sup> where it was held that the English court had jurisdiction to annul a void but not a voidable marriage celebrated locally. Since the marriage in this case was characterised as voidable without any reference to the Scots law, i.e. the *lex domicilii*, the learned writer therefore openly stated that the House of Lords' judgement can only be read as implying the reference of this issue to the English law *qua lex fori*. It is suggested that Morris's view seems unlikely to reflect the true conclusion drawn at the end of Ross-Smith case, or the right interpretation of their Lordships' silence on this issue, inasmuch as the House of Lords takes judicial knowledge of Scots law. It is thus submitted in this respect that "Although a link in the chain of reasoning in the House of Lords is missing this is a feature all too common in nullity cases and the silence of the House of Lords on this issue provides scant authority against reference to the law of the domicile and in favour of the law of the forum".<sup>(18)</sup>

Moreover, the classification of a defect as rendering the marriage void or voidable is far from being relevant only in the jurisdiction context. It is also important as far as choice of law issues and recognition of foreign nullity decrees are concerned. To use the existing differences between legal systems as to the classification of defects as an argument in favour of characterisation by the *lex fori* is, with all respect, not apt. One can envisage situations where such an approach will be highly unsatisfactory and would work injustice to one of the parties, as well as creating a limping marriage. Suppose, for instance, there is a marriage celebrated in England between parties both of French domicile. After the death of the husband, a third party having an interest in annulling the union petitioned the English court for a decree of nullity on the ground

that the husband was under age at the time of ceremony in England. It is important to bear in mind that non-age renders the marriage void under English law, whereas it renders the marriage merely voidable by French law and becomes valid if an annulment has not been sought prior to "the under-age husband attaining the age of eighteen and half".<sup>(19)</sup> The English court would assume jurisdiction [at common law] on the ground that the marriage was celebrated in England, since the marriage is void according to English law qua *lex fori*. Therefore, the court would declare the marriage void *ab initio*, even though it is valid under the law of the parties domicile, unless a different classification is adopted when considering the choice of law issue.<sup>(20)</sup>

Furthermore, it is cogently pointed out that the difficulty in classifying the marriage by the *lex fori* can be seen from the case of Corbett v. Corbett,<sup>(21)</sup> where it was held that the law of the *forum* is the most appropriate law to determine the characterisation of marriage. English law did not recognise religious incapacity as a ground for declaring a marriage either void or voidable. Yet, the judge classified the marriage as being void on the basis of the English rules relating to capacity to marry.

On the other hand, the alternative view which appears to be adopted by the overwhelming majority of courts and writers assumes that the character of a marriage as void or voidable, as being a part of the issue of its validity or invalidity, must be determined by the law governing the latter issue under the relevant conflict rule. Professor Cheshire has expressly stated that "The role of the proper law, whether it is the law of the place of celebration or the law of the parties' domicile, is to determine whether the alleged defect is sufficient ground for annulment and if so what consequences ensue, assuming its existence to be proved".<sup>(22)</sup> The underlying justification of Prof. Cheshire's view lies in the consideration of the marriage character, void or voidable, as the extent of the invalidity of the marriage. It is respectfully submitted, however, that the preliminary characterisation of the alleged defect as one

pertaining to formal validity or essential validity is a matter for English or Scottish law *qua lex fori*, according to the prevailing general principles in the modern conflict of laws. "Once that classification is made, the effect of the defect on the validity of the marriage will be determined not by the law of the forum but by that law which, according to English choice of law rules, governs alleged defect of that kind."<sup>(23)</sup>

This view was first envisaged by the English court of Appeal in De Reneville v. De Reneville,<sup>(24)</sup> where a wife, domiciled in England before her marriage and resident there at the time of the proceedings, petitioned for the annulment of her marriage to a domiciled Frenchman celebrated in France, on the alternative grounds of his impotence or wilful refusal to consummate. The husband was resident and domiciled in France at the time of the proceedings. The English courts could assume jurisdiction only if the wife was domiciled in England and that depended on the marriage being void. Lord Greene, with whose reasons Somervell L.J. agreed, held that French law must determine the character of the marriage as being void or voidable since it is the law applicable, by the appropriate English conflicts rule, to determine whether the marriage is valid or invalid. The Master of Rolls therefore expressly submitted that:

"In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage".<sup>(25)</sup>

Since French law on the matter had not been pleaded, it was assumed to be the same as English law by virtue of which the marriage was voidable, and thus the wife's petition was dismissed. Despite the various interpretations which have been placed on De Reneville,<sup>(26)</sup> there is no doubt that Lord Greene believed that the character of a

marriage as void or voidable must be determined by the law designated by the appropriate conflicts rule for governing the effect of an alleged defect on the validity of a marriage.

The English and the Scots law Commissions have recently discussed the issue and recommended provisionally that the void or voidable character of marriage must be determined by the law governing its validity. This is because the adoption of any other solution "could result in the virtual negation of the choice of law rule in any case where a legal incapacity for marriage makes the marriage void *ab initio* by the law of the domicile, is not contrary to any country's public policy, but has no effect by the internal law of any other legal system".<sup>(27)</sup>

Although supporting the determination of the marriage as void or voidable by the law governing its validity, Dr. Cheshire has suggested that the effect of a decree of nullity [whether it operates retrospectively or prospectively] must be determined by the law of the forum. The most specific reason underlying this view is that the effect of a nullity decree is a procedural matter that comes within the scope of the *lex fori* according to the general principles of private international law.<sup>(28)</sup> Suppose, for instance, a wife with a Scottish domicile is petitioning in England for the annulment of her marriage to a domiciled Scotsman celebrated in Scotland on the ground of his impotence. The jurisdiction of the court is established on the parties' residence in England and the decree of nullity is granted on the ground that impotence renders the marriage voidable under Scots law, i.e. *lex domicilii*. The decree of nullity in this case should operate prospectively since the marriage is merely voidable, even though a decree annulling a voidable marriage has retrospective effect under Scots law as the law of domicile.

With the examination of these preliminary issues, we come to the purpose of this

chapter, which is to review the existing rules concerning the nullity of marriage in the conflict of laws within two different and interrelated contexts, namely, jurisdiction, and choice of law. In the first place, jurisdiction, as logically the first matter for consideration in any action, will be examined with reference to the Domicile and Matrimonial Proceedings Act 1973 by virtue of which the jurisdictional grounds have been simplified and placed on an exclusively statutory basis both in England and Scotland. It is important to bear in mind that the jurisdiction of the English and Scots courts for entertaining nullity proceedings at Common law was very complex, since the grounds upon which it was founded varied according to whether the marriage was void or voidable. For this reason, both English and Scots courts were involved in considering the difficult problem of choice of law before being able to decide the question of their jurisdiction. Moreover, the unity of domicile of the husband and wife had created many problems for a wife who had been deserted by her husband. The consideration of the Common law rules of jurisdiction, though now matters of historical interest, will be also analysed in order to understand the bases of the reforms brought into light by the 1973 Act. Nationality, as a ground of jurisdiction, though it has been rejected in the U.K, falls to be considered here since it forms an exception to the general rules of jurisdiction in the Algerian Civil Proceedings Code 1966.

Secondly, the choice of law rules in nullity, it is submitted, are essentially the same as those relating to the initial validity of marriage which have been already examined in the previous chapters. This has been justified on the ground that "a nullity decree is concerned with the validity of the creation of a marriage". However, the discussion of the choice of law rules in the context of nullity will be limited to the issues which are more problematical and which have perplexed the majority of the academic authorities. The most interesting question arising here concerns the choice of law for the physical defects, namely, impotence and wilful refusal to consummate. The English and Scottish authorities are far from clear as to what law is to govern these defects, and

academic authorities are mainly divided between the application of law of the domicile and the law of the forum. Seeing that a decree of nullity is concerned with the validity of the creation of a marriage, the question which requires consideration is whether impotence and wilful refusal to consummate, being a defect *ex causae subsequenti*, will be maintained as a ground of nullity. Another problem of choice of law which must be adverted to is whether the forum's court may annul a marriage on the ground unknown to the law of that country.

### **Section One**

#### **Basis of Jurisdiction over Nullity Proceeding**

Before 1973 the jurisdiction of the Scottish and English courts to entertain nullity proceedings exhibited an alarming state of confusion and had not been precisely cleared by judicial authorities. The underlying reason was that the jurisdiction founded on various grounds depending on the distinction between void and voidable marriages, by which the courts felt obliged to consider as a first step the choice of law rules to identify the proper law which determined whether the alleged defect rendered the marriage void or voidable. It is submitted that both the Scots and English courts assumed jurisdiction on a wider basis in nullity cases involving void than in voidable marriages. This might be justified, it is argued, on the ground that a void marriage neither effects a change in the parties' status, nor confers the husband's domicile on the wife by operation of law. Another point of significant importance in the present context is the doctrine of unity of domicile by virtue of which the wife acquires automatically the domicile of her husband if the marriage is voidable. This has narrowed the jurisdictional grounds in cases involving voidable marriages creating hardship for the wife. The piecemeal legislation enacted to redress the hardships at common law had increased the inelegance of the law as to jurisdiction over nullity proceedings simply because of their inadequacy and

unnecessary complexity.

The position has been simplified by the Domicile and Matrimonial Proceedings Act 1973 by virtue of which the jurisdictional grounds in nullity rest exclusively on a statutory footing. With the consideration of void and voidable marriages dichotomy as no longer relevant as regards jurisdiction, as well as the abolition of the unity of domicile rule, domicile and residence are recognised as the only grounds upon which the courts in the United Kingdom may assume jurisdiction over nullity proceedings. The connecting factors which received judicial approbation at common law for the purposes of jurisdiction in the present context, namely, domicile, residence and the place of celebration of a marriage, will be considered in the present section. The second matter that falls for examination is the principle of nationality which has been accepted in nullity according to the Algerian Civil Proceedings Code 1966.

#### **A- Domicile as a basis of jurisdiction**

It is commonly agreed that the parties' common domicile was mainly treated at common law as the most relevant basis upon which the Scots and English courts assumed jurisdiction over nullity proceedings, whether the marriage was void or voidable.<sup>(28)</sup> However, the jurisdictional competence of the common domicile's courts has been established beyond any doubt by the House of Lords in Salveson v. Administrator of Austrian Property,<sup>(29)</sup> where the recognition of a foreign nullity decree was in issue. It should be noted that the parties in this case had each independently acquired a German domicile, whatever the legal standing of the marriage. Lord Phillimore has therefore expressly stated that

"For the purpose of pronouncing upon the status of the parties as well as for the purpose of affecting that status, the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively".<sup>(30)</sup>

It has been argued that this decision, though it concerns only the recognition of a foreign nullity decree, implies clearly that the Scots and English courts have jurisdiction in a case where the parties are domiciled in Scotland or England respectively. This is because it has been proceeded on the assumption that the court of common domicile is the natural forum to pronounce on the parties' status.

There is no doubt that a common domicile is easily ascertainable in the case of a voidable marriage in so far as the husband's domicile is necessarily communicated to the wife by operation of law. However, the Scottish courts will have jurisdiction to entertain nullity proceedings if the husband is domiciled in Scotland.<sup>(31)</sup> Since a void marriage does not confer on the wife the husband's domicile, on the other hand, it is very difficult to ascertain that the parties share a common domicile unless the wife has acquired a domicile of choice in the country of the husband's domicile. Accordingly, if the jurisdiction of the Scots or English court is invoked by reason of a common domicile in a case where the wife was domiciled abroad at the time of the marriage, it must be proved that she has in fact acquired a Scottish or an English domicile of choice.<sup>(32)</sup>

Since it may prove impossible to find a common domicile in the case of a void marriage, It has been submitted that either party's domicile is sufficient to found jurisdiction of the courts both in England and Scotland. The underlying reason lies in that if the courts of a common domicile have conclusive jurisdiction over nullity proceedings, the question of jurisdiction might be insoluble . In Balshaw v. Kelly,<sup>(33)</sup> however, Lord Kissen has clearly pointed out that:

"There are bound to be anomalies in any case where there is an action of declarator of nullity of a marriage which is void *ab initio* because the woman does not take the man's domicile. It seems to me to be in accordance with principle that either party should be entitled to invoke the law of that party's domicile on the question of status".

It has been clearly established that the domicile of the petitioner, whether the husband or the wife, suffices to confer jurisdiction on the Scots and English courts. In White v. White,<sup>(34)</sup> for instance, the wife whose domicile was English petitioned in England for the annulment of her marriage to a domiciled Australian man celebrated in Australia, on the ground of bigamy. Bucknill J., having assumed jurisdiction on the ground that the petitioner was domiciled and resident in England, granted a decree notwithstanding that the respondent was neither resident nor domiciled there. Moreover, Lord Greene's judgement in De Reneville case proceeded on the assumption that if the marriage was void, the English domicile of the petitioner wife alone would have conferred jurisdiction on the English court.

It has been also submitted that the jurisdiction of the Scottish and English courts can be found on the ground of the respondent's domicile in the forum. This jurisdictional ground was considered in the Scottish case of Aldridge v. Aldridge,<sup>(35)</sup> where a domiciled English woman, who was resident in England, petitioned in Scotland for the annulment of her marriage to a domiciled Scots man solemnised in Durham, on the ground of bigamy. Having decided that there was no binding authority which prevented, expressly or impliedly, the court of the defender's domicile from assuming jurisdiction, the Lord Justice Clerk declared the marriage void *ab initio*. The Lord Justice Clerk justified his view on the basis that if the petitioner's domicile alone was a sufficient jurisdictional ground, there are equally strong reasons for asserting the sufficiency of the respondent's domicile, namely, that the court of the respondent's domicile has power to determine his status. Moreover, it has been argued persuasively that it would be difficult to deny jurisdiction for the court of the defender's domicile, since the court of the respondent's residence had such power to adjudicate on the respondent's status.<sup>(36)</sup>

It has been submitted that serious difficulties emerged in the case of a voidable marriage, because the wife could not bring nullity proceedings in England or Scotland unless her husband was domiciled there.<sup>(37)</sup> This was because the wife was unable to acquire a separate domicile under the unity of domicile doctrine by virtue of which the husband's domicile would be communicated to the wife by operation of law. The hardship caused for the wife, whose husband was no longer domiciled in England, by the application of this rule had been partly alleviated by a statutory provision enabling the English court to exercise jurisdiction in nullity proceedings by a wife, *inter alia* in certain cases where she had been deserted by her husband or he had been deported. However, the court would assume jurisdiction in such cases if, and only if, the husband and therefore the wife were domiciled in England at the time of the desertion or deportation.<sup>(38)</sup> Although this exception contributed to the mitigation of the most serious hardships occasioned by the existing jurisdictional rule, it was generally considered inadequate, insufficient and unnecessarily complicated since it did not "establish the law on a rational and satisfactory basis".

It has been thus argued that "The inconveniences and anomalies remaining are such as to throw doubt on the basis of the principle under which the wife acquires and retains her husband's domicile throughout her married life".<sup>(39)</sup> This rule has been judicially stigmatised as "the last barbarous relic of a wife's servitude",<sup>(40)</sup> and has been criticised as discriminatory and contrary to the modern established principle of equality of the sexes.<sup>(41)</sup> Consequently, it would surely be absurd to regard the wife's domicile as a basis of jurisdiction if the marriage is void, and yet she is unable to rely on independent domicile as a basis of jurisdiction for obtaining relief in the case of a voidable marriage where a decree is necessarily required for the annulment of that marriage. Although the rule that the husband's domicile is automatically communicated to the wife by operation of law might be justified in other legal contexts, it has been criticised as being extremely artificial in the jurisdiction context. The underlying

justification lies on the fact that that principle is mainly based on an outmoded legal concept which is neither applicable to the question of whether the marriage has been validly entered into, nor acceptable in the modern conflict of laws simply because the practice shows clearly that it is not the wife who necessarily acquires the husband's domicile.<sup>(42)</sup>

However, the English and Scottish Law Commissions, though they limited the recommendation to jurisdictional purposes, came out strongly in favour of a separate domicile: "We are in danger of becoming the last country to cling to an obviously anachronistic and unjust rule", and thus "there seems to be everything in favour of, and nothing serious against, allowing a wife to have a domicile separate from her husband's for the purposes of matrimonial jurisdiction".<sup>(43)</sup> As a result, the Domicile and Matrimonial Proceedings Act 1973 went further and abolished the wife's dependent domicile not only in respect of jurisdiction but generally. Section 1 of this Act provides clearly that the domicile of a married woman, after the coming into force of the Act, should be ascertained separately from her husband's domicile for all purposes. It has been made clear that the established rules for the ascertainment of a domicile remain unchanged.<sup>(44)</sup>

The dichotomy between void and voidable marriages is no longer significant in the context of jurisdiction. The 1973 Act has clearly stated that the Scottish or English courts have jurisdiction over nullity proceedings if either of the parties to the marriage, whether husband or wife, petitioner or respondent, is domiciled in Scotland or England at the time when the proceedings are begun, notwithstanding that the marriage is voidable or void.<sup>(45)</sup> The domicile of either party to the marriage for jurisdictional purposes must be ascertained at the time of the commencement of the proceedings. It is therefore undoubtedly clear that a change of domicile between the filing of the petition and the actual trial is irrelevant. The rationale of this rule lies in the desire to prevent a

respondent domiciled in England or Scotland from frustrating the objectives of the pursuer, domiciled and resident abroad, by abandoning his domicile in order to prevent the trial of the case. Relying on the rule that "once competent, always competent", it has been submitted that the court will decide the action even if the party, whose domicile has been the basis of the court's competence, has severed all his relation with the forum's country before the case being heard.<sup>(46)</sup>

One might therefore conclude that the importance of domicile, in its amended form, as an appropriate jurisdictional ground in nullity actions has been greatly increased simply because the wife's dependent domicile has been abolished. The underlying justification for this solution lies in the paramount policy consideration of protecting the interest of the petitioner, who, as the innocent party, is seeking relief and therefore should not be compelled to bring proceedings elsewhere. Since the domicile of the wife or the husband within the forum confers jurisdiction on the courts whether the marriage is void or voidable, it is no longer necessary for the courts to consider foreign law so as to determine the character of a marriage as void or voidable.

So far as the Algerian law is concerned, the Algerian courts have jurisdiction to entertain nullity proceedings if the defender is domiciled in Algeria.<sup>(47)</sup> It is, however, interesting to note that the concept of domicile in Algerian law, unlike its counterpart in English and Scots laws, means ordinary residence, and will usually be interpreted in this way by the forum. The aim of the rule is, it is submitted, to permit domiciled foreigners to settle their matrimonial differences before the local courts instead of compelling them to travel to their national countries.<sup>(48)</sup> It might be argued that the paramount consideration for regarding the domicile of the defender as the basic jurisdictional ground in Algerian law is the desirability of avoiding hardships to the respondent. Since the establishment of a domicile is not subjected to vigorous

conditions, it has been submitted that the domicile of the petitioner is unacceptable as a ground for jurisdiction, inasmuch as it may lead to evasion of laws, and would open up the prospect of forum-shopping.

### **B- Residence of the Parties**

As early as 1931, it was held in Inverclyde case that at common law the courts of the parties' common domicile have exclusive jurisdiction to annul a voidable marriage, since the effect of the so-called nullity decree is to dissolve an existing marriage and therefore changes the parties' status.<sup>(49)</sup> This decision has come in for severe criticism on the ground that the Lord Philimore's *dictum* in Salvesen case, even though it may be correct, is not a persuasive statement providing support for the decision in Inverclyde case, for celibacy is as much a status as marriage. Accordingly, this view had been overruled by the English court of Appeal in Ramsay-Fairfax v. Ramsay-Fairfax,<sup>(50)</sup> where it was held that the residence of both parties in England at the time of the institution of the proceedings was a sufficient ground for nullity jurisdiction in the case of voidable as well as void marriages. The underlying justification is, as Denning L.J. pointed out, that jurisdiction in nullity cases derived from the Matrimonial Causes Act 1857 which provided that the courts should act and give relief in nullity cases on the ground of principles developed in the ecclesiastical courts whose jurisdiction had been based on the residence, not the domicile, of the parties within the diocese.<sup>(51)</sup>

Another persuasive argument in favour of common residence of the parties as a sufficient ground for jurisdiction in nullity cases is the desirability of avoiding hardship to the parties, and thus it is convenient for the spouses to settle their matrimonial causes in their country of residence. If, for instance, the courts of the parties' residence are not competent to entertain nullity proceedings, the parties will be compelled to travel to their country of domicile. It had been, however, argued that "It would be absurd that a

Canadian soldier married to an English woman should have to go to the courts of Canada to get his remedy (or, conversely, that she should) when they were both resident here"<sup>(52)</sup> Wilmer, J, therefore submitted that "Common sense and reason demand that the court of the common residence of the parties should have jurisdiction, subject to the proviso that the court applies the proper law, i.e the law of the domicile".<sup>(53)</sup>

In Ross-Smith v. Ross-Smith, Lord Morris said *obiter* there is no doubt that the case of Ramsay-Fairfax v. Ramsay-Fairfax was rightly decided in ruling that "there is jurisdiction in the High court to grant a decree of nullity in respect of a marriage existing between persons who are resident within the jurisdiction".<sup>(54)</sup> While the court of Appeal in Ramsay-Fairfax case was concerned with the parties' common residence, the reliance on residence was solely justified on the ground that the ecclesiastical courts assumed jurisdiction merely upon residence. Denning, L.J., pointed out that, to the ecclesiastical courts, the residence of the respondent alone was the only important jurisdictional ground.<sup>(55)</sup> However, it has been clearly submitted that the respondent's residence at common law in England was apparently a sufficient jurisdictional ground in nullity suits whether the marriage was void or voidable, inasmuch as the petitioner *ipso facto* submitted to the jurisdiction by invoking it.<sup>(56)</sup> Moreover, this viewpoint has been supported by various *dicta* from a number of subsequent cases. In Ross-Smith v. Ross-Smith, for instance, it was pointed out that the decision in Inverclyde v. Inverclyde was clearly wrong in principle in that it did not recognise the respondent's residence in England as a sufficient ground for jurisdictional purposes.<sup>(57)</sup>

The important consideration for requiring the proceedings to be brought in the jurisdiction of the respondent's residence was to prevent injustice, and hardship to the respondent, i.e. incurring great expenses and trouble in travelling to another jurisdiction

to defend the case. The respondent's ability to defend and to take part in the proceedings, as well as the ancillary facilities, are relevant to the practicability and fairness of the process determining the plaintiff's case and is a significant factor from which support for this jurisdictional ground appears to be derived. Consequently, it is argued that there seem to be considerable reasons of convenience and justice for the courts where the respondent resides to assume jurisdiction over nullity proceedings.

The question that has been also considered is whether the residence of the petitioner is sufficient to found jurisdiction of the English courts. It is interesting to emphasise that the decisions in Roberts v. Brennan,<sup>(58)</sup> and Robert v. Robert<sup>(59)</sup> in which jurisdiction had been sustained on the ground of the petitioner's residence alone was emphatically rejected by the court of Appeal in De Reneville v. De Reneville.<sup>(60)</sup> It had been established quite clearly that at common law the petitioner's residence in England was insufficient to found jurisdiction of the court in respect of a voidable marriage, and it was very doubtful whether the sufficiency of this ground was accepted in the case of a void marriage.<sup>(61)</sup> However, the underlying justification was that the petitioner's residence alone as a ground of jurisdiction might cause intolerable hardship and inconvenience to the respondent, as well as promoting forum-shopping. Lord Greene, M.R. therefore expressly stated:

"That a wife who is resident but, ex hypothesi, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and convenience".<sup>(62)</sup>

It is worth noting that the residence basis of jurisdiction in nullity had not been accepted in Scotland. To this extent, Professor Anton has submitted that at common law in Scotland "jurisdiction does not appear to have been assumed on the basis of the residence of the defender but, even if it had been, it has not expressly approved by

statute and must be held to have been superseded by the cases of *Le Mesurier* and *Von Lorang*".<sup>(63)</sup> It has been submitted that the only residential ground of jurisdiction acceptable in Scotland, and applicable in England is the statutory exception of the petitioner's residence introduced by the 1949 Act.<sup>(64)</sup> The Scottish or English courts had jurisdiction to entertain nullity proceedings instituted by a wife, notwithstanding that the husband was not domiciled in the forum, if she was resident in Scotland or England and had been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings provided that the husband was not domiciled in any other part of the British Isles. It has been submitted, however, that the term "ordinarily resident" has not been satisfactorily defined with precision, but it might be construed as connoting a physical presence with some degree of continuity and permanence. It has been clearly established that uninterrupted presence was not necessary for ordinary residence, and thus a temporary absence, e.g. for holiday purposes, might be innocuous.<sup>(65)</sup>

This statutory exception has been criticised as being discriminatory in nature, inasmuch as jurisdiction on the basis of three years' ordinary residence was only available to a wife. The anomaly of this rule was, it is argued, that while the courts have jurisdiction to entertain a wife's nullity petition on the basis of her three years' ordinary residence, they had no jurisdiction to entertain a husband's cross-petition.<sup>(66)</sup> Although the exception was clearly designed to mitigate hardship and injustice to the wife by providing a compensatory jurisdictional ground for her lack of control over her domicile, it is unlikely that a nullity decree granted under this Act would attract international recognition.

The English and Scots Law Commissions considered the question of whether residence is an appropriate jurisdictional ground. They expressly pointed out that the consideration of the petitioner's residence as a sufficient ground for jurisdiction may

open up the prospect of forum-shopping that may be alleviated by requiring a residence of a certain nature and duration. Moreover, if the residence of the respondent or of both parties is required this would allow the respondent to deny relief to the petitioner by moving his place of residence. The gordian knot, therefore, was cut by suggesting that jurisdiction should be based on the habitual residence of either party.<sup>(67)</sup> The underlying reason is, it is submitted, that domicile as an appropriate traditional connecting factor cannot be accepted as a conclusive jurisdictional ground in nullity even though it meets the needs of both those who have been settled permanently in, and those who live abroad with the intention of returning to, England or Scotland; for it may prevent those who have an established residence there, and whose future intention is uncertain, from seeking relief before English or Scottish courts.<sup>(68)</sup>

The Law Commissions' recommendation was translated into law by the Domicile Matrimonial Proceedings Act 1973 which provides clearly that habitual residence of either party, whether husband or wife, in England or Scotland for one year is a sufficient jurisdictional ground in nullity, as well as in other matrimonial causes.<sup>(69)</sup> It is undoubtedly clear that the Scots or English courts may assume jurisdiction to entertain nullity proceedings if either the petitioner or the respondent was habitually resident in the forum throughout the period of one year ending with the commencement of the proceedings. Consequently, it is argued that the commencement of the proceedings has been determined as the only relevant date which may establish the court's jurisdiction on the sole ground of preventing the respondent from frustrating the petitioner's purposes by abandoning his habitual residence upon which the court has assumed jurisdiction. "This time factor", as Cheshire has pointed out, "is even more significant in the case of habitual residence than domicile for it is easier to change one's residence than domicile".<sup>(70)</sup> Therefore, it is clear that a party, who is domiciled and resident abroad, may petition for the annulment of a marriage on the ground of the defendant's habitual residence within the forum.

It is also submitted with respect that a spouse, who has severed all his connection with England or Scotland after being habitually resident there for one year, cannot invoke the courts' jurisdiction for annulling a marriage simply because he, or the respondent, was habitually resident there for a year back in the past before the commencement of the proceedings. This is because the 1973 Act provides that jurisdiction is founded on the ground of habitual residence in England, or Scotland, throughout the period of one year ending with that date when the action or proceedings are begun.<sup>(71)</sup> Moreover, it has been suggested that it is not necessary that a spouse should be habitually resident in England or Scotland for the one year period as a married person,<sup>(72)</sup> and thus antenuptial residence would be significant for determining that required period. "A wife who had been habitually resident in Scotland for over a year but who had been married only for three months could use her habitual residence to found jurisdiction."<sup>(73)</sup>

It will be noticed that the residence founding jurisdiction of the Scots and English courts must be 'habitual'. The precise meaning of the term 'habitual residence' has caused difficulty, for the academic authorities are divided as to the exact meaning of that concept. The law commission has declared that 'habitual residence' is similar to 'ordinary residence' that has conferred jurisdiction over the wife's petition under the 1949 Act, but the former concept has been preferred because of its international acceptance.<sup>(74)</sup> This view has been applied in a case concerned with the issue of divorce jurisdiction, i.e. Kapur v. Kapur<sup>(75)</sup> where Bush J. has clearly stated that

"There is no real distinction between 'ordinary' and 'habitual residence'. It may be that in some circumstances a man may be habitually resident without being ordinarily resident, but I cannot at the moment conceive of such a situation... 'Habitually' means settled practice or usually,... the same as ordinary residence-a voluntary residence, with a degree of settled purpose".

The Scots law commission, on the other hand, has rejected "ordinary residence" because of the courts' failure to distinguish that concept from "residence".<sup>(76)</sup> However, this implies clearly that "habitual residence" differs markedly from "ordinary residence" in that the commission has suggested the adoption of the former as the type of residence providing a sufficiently close connection with the country to justify the assumption of jurisdiction.

Consequently, Lane J. in a case concerned with the recognition of a foreign divorce<sup>(77)</sup> has pointed out that "habitual residence" denotes a regular physical presence enduring for some time, and that it differs from "ordinary residence" in that the former is something more than the latter and is similar to the residence required as part of domicile, but excluding the *animus manendi* that is necessary in domicile. To describe habitual residence, it is argued, in terms of a regular physical presence enduring for some time would not appear to take one much further than ordinary residence. Moreover, to consider habitual residence as being similar to the residence required as part of domicile is not apt, inasmuch as the former is a qualified form of residence requiring demonstrable regularity of conduct which may show a more stable territorial connection than at times is necessary under the present complexities of the English and Scottish rules of domicile.<sup>(78)</sup>

The core of the concept of "habitual residence" is distinguishable from that of domicile in that it does not require the necessary domicile element of *animus manendi* as to the future. To this extent, it has been submitted that habitual residence as a jurisdictional test is designed to meet the needs of the parties who have been living in the forum for some time, but who have not acquired a domicile of choice because of the strictness of the test which must be satisfied before a person can acquire such a domicile there. It is therefore clear that intention as to the future "is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show a

substantial links between a person and his country of residence".<sup>(79)</sup> Moreover, Lane J.'s view, that an intention to reside is required for establishing habitual residence, has been stigmatised as being idiosyncratic, for "it is not by naked assertion, but by deeds and acts that one [habitual residence] is established". It has been nevertheless submitted that intention to reside, though it may clarify the nature of presence as well as a person's degree of connection with a country, is not in itself a sufficient policy factor for establishing habitual residence.<sup>(80)</sup> It is therefore clearly submitted that habitual residence is a factual situation dependent on the assessment of the relevant facts. This essentially factual nature "serves to exclude the legal artificialities of domicile such as domicile of dependency".<sup>(81)</sup>

Consequently, habitual residence has been regarded as the qualified type of residence that establishes the necessary connection upon which jurisdiction might be founded, for it is more than transient or casual residence. "Once established, however, it is not necessarily broken by a temporary absence."<sup>(82)</sup> It is suggested that this jurisdictional ground should be sufficiently strengthened by a specified period of time to discourage forum-shopping and to ensure the recognition of decrees pronounced on this ground abroad so as to obviate, as far as possible, limping marriages. Hence, The English and Scots Law Commissions have inclined in favour of regarding, and the 1973 Act provides clearly that, habitual residence for one year in the forum is sufficient to denote the necessary substantial connection that may found the English or Scottish courts' jurisdiction over the marriage.<sup>(83)</sup> It is interesting to note that this period of one year has been severely criticised in that it is too short, for ensuring the existence of substantial connection with the country of residence, as well as for discouraging forum-shopping. This line of argument has been decisively, and very properly, rejected on the ground that no length of residence is by itself a sufficient guarantee either for the durability of a person's connection with a country, or against forum-

shopping. Hence, the one year period is fully justified solely because "the need to ensure durability of connection must be balanced against the need to ensure that a spouse whose marriage has in fact broken down should not have to wait too long for his matrimonial affairs to be regularised". Moreover, the dangers of forum-shopping are reduced by the fact that resorting to England or Scotland for jurisdictional purposes so as to obtain relief is frustrated by insuperable barriers, namely, costs and the strictness of immigration controls.<sup>(84)</sup>

As regards Algerian law, it is well established that residence is a sufficient ground for jurisdiction generally, notwithstanding that the parties, or one of them, are foreign subjects. The Algerian courts have jurisdiction to entertain proceedings if the defender is resident in Algeria at the time of the commencement of the proceedings.<sup>(85)</sup> It is interesting to note that the term residence has been interpreted as meaning "résidence de fait" [residence short of legal domicile] which is conceived as implying a mere presence within the jurisdiction that must not be casual or transient. According to the Algerian Civil Proceedings Act 1966, this connecting factor is only important where the defendant's domicile is abroad or unknown. The Act thus provides clearly that the defendant's residence as a jurisdictional ground is available to the courts if, and only if, his domicile is unknown.<sup>(86)</sup>

The acceptance of the residence as a ground for jurisdiction has been justified on the basis that it is indefensible to exclude foreigners from referring to Algerian justice for settling their matrimonial affairs. It is submitted that the residence of the defender is the only relevant ground for the jurisdiction of the courts simply because it may discourage forum-shopping whilst avoiding hardship to the respondent and the petitioner so as to avoid the creation of limping marriages.<sup>(87)</sup>

### C- Place of Celebration as a basis of jurisdiction

It is commonly agreed that the place of celebration of the marriage was considered at common law, both in England and Scotland, as a well established jurisdictional basis in nullity cases involving void marriages. It is thought to be natural that the country where the marital status come into existence should also be given the opportunity to undo the act of creation. This argument has carried particular weight under the influence of a contractual view of marriage according to which the court of the place of celebration is the natural forum to determine whether the marriage is validly created.<sup>(88)</sup>

According to English law, it was established beyond any doubt that the celebration of void, as distinct from voidable, marriage in England was in itself sufficient to found jurisdiction in nullity cases, even though the parties were neither domiciled nor resident in England. The jurisdictional competence of the forum celebrationis has been justified as early as 1860 in Simonin v. Mallac,<sup>(89)</sup> solely on the proposition that "the parties, by professing to enter into a contract in England, mutually gave each other the right to have the force and the effect of the contract determined by an English tribunal". However, it is noteworthy that the majority of the House of Lords submitted in the Ross-Smith case that this jurisdictional ground could not be supported on the reasons given by Sir Cresswell Cresswell, nor on historical grounds.<sup>(90)</sup> Nevertheless, the decision in the Simonin case had been affirmed firmly in so far as it related to void marriages simply because of its being a long-standing authority.

However, Sir Jocelyn Simon P. had expressly submitted in Padolecchia v. Padolecchia that "*Simonin v. Mallac* and the cases which followed it are still authority for the jurisdiction in nullity of the English court in cases where the marriage is alleged to be void *ipso jure*".<sup>(91)</sup> Although convenience is not sufficient to determine jurisdiction, the learned judge justified the jurisdictional competence of the forum celebrationis on

the considerations that he described as "public convenience". Accordingly, He pointed out that " the court of the place of the ceremony is especially well qualified to decide on validity of marriage in point of form" Moreover, the country of celebration has an interest to see that its civil registers are accurate.<sup>(92)</sup>

The position of Scottish law is different, in so far as the celebration of the marriage in Scotland is not sufficient to confer jurisdiction upon the courts unless the defender has been personally cited within the territory or consented to the exercise of jurisdiction.<sup>(93)</sup> Lord Sands clearly pointed out in the *Von Lorang* case<sup>(94)</sup> that the Scottish courts claim to exercise jurisdiction as the forum celebrationis only when the defender is personally cited in Scotland. Moreover, Lord Hunter, explaining the grounds of his decision in Miller's case, expressly submitted that the defender's consent to the exercise of the jurisdiction was equivalent to his personal citation in Scotland, for it satisfied the effectiveness of the decree to be pronounced.<sup>(95)</sup>

Although the sufficiency of this jurisdictional ground as regards void marriages had been fully asserted, it was ascertained beyond any doubt that the competence of the forum celebrationis ought to be rejected in so far as it relates to voidable marriages. This view had been enunciated for the first time by the court of Appeal in Casey v. Casey.<sup>(96)</sup> In this case, the wife was petitioning in England for the annulment of her marriage to a domiciled Canadian man celebrated in England, on the ground of his wilful refusal to consummate. Bucknill L.J., having inclined in favour of the view that domicile should be the basis of jurisdiction in cases of voidable marriages, with a possible exception where both parties reside in the forum, submitted that there is no necessity for "making an exception on the ground that the marriage has been celebrated in the country where jurisdiction is invoked".<sup>(97)</sup>

However, the question of jurisdiction over voidable marriages on the ground of local

celebration of the marriage was examined more fully by the House of Lords in Ross-Smith v. Ross-Smith.<sup>(98)</sup> In this case the wife, who was resident in England, petitioned for a decree of nullity on the alternative grounds of her husband's impotence or wilful refusal. The husband was resident in Kuwait, and both parties were domiciled in Scotland. The majority of the House of Lords, Lord Hudson dissenting, decided that the fact that a marriage was celebrated in the forum could not confer jurisdiction upon a forum's court to hear a nullity suit in which it was alleged that the marriage was voidable. The essence of the House of Lords decision was that the jurisdictional competence of the forum loci celebrationis had not been maintained by the doctrine and the practice of the ecclesiastical courts,<sup>(99)</sup> as well as that the authorities upon which the decision in Simonin case was based were concerned more with choice of law, i.e. the law to be applied in determining the force and effect of the contract, than asserting the bases of jurisdiction.<sup>(100)</sup>

Lord Morris, distinguishing Simonin v. Mallac as being related to a void marriage, was opposed to extending the rule to voidable marriages solely because of the insufficiency of celebration alone as a connecting factor to justify the forum celebrationis involving itself in the status of parties not domiciled or resident within the forum, for "the court is being invited to bring marriage status to an end and to do so with retrospective effect".<sup>(101)</sup> His Lordship thus concluded that there is no good reason "for applying the jurisdiction so as to cover one who is not domiciled or resident in England, and who is the respondent to a petition to annul a voidable marriage".<sup>(102)</sup> Finally, it is interesting to note that the House of Lords' decision in this case was mainly based on the desirability of preventing limping marriage, the promotion of which is inescapable if jurisdiction could be assumed merely on the ground of celebration in the forum, for the grounds of voidability vary considerably. For example:

"Let me suppose that the ground is wilful refusal. In some countries no relief is given on this ground, in others it may be regarded as desertion. Suppose a case where the law of the parties' domicile gives no relief on this ground. It seems to me quite contrary to principle that the wife should be able to come here and seek relief on that ground. If the husband goes to the court of the domicile, the validity of the marriage will be affirmed". (103)

The English and Scottish Law Commissions examined this jurisdictional ground and suggested that it should no longer found jurisdiction of the courts, both in England and Scotland, as regards void marriages, for it does not satisfy the requirement of real and substantial connection upon which the jurisdiction should be exercised. Furthermore, the celebration of marriage in England or Scotland does not mean that English or Scottish law will determine whether the marriage is void, "since it is the law of the domicile at the date of the marriage which determines their [parties] capacity to marry", and one cannot assume that the case will always concern matters of correct form. It had also been submitted that the authorities in which the jurisdictional competence of the forum celebrationis was confirmed were all decided at the time when the unity of domicile principle was predominant, and thus "at the time when there was pressure to discover grounds of jurisdiction in favour of the wife". Consequently, it had been argued that the reasons referred to above in support of the forum celebrationis "are slender justifications for a departure from the general principle that matters of status are appropriately governed by a legal system which has a serious interest in determining the status of at least one of the parties to the marriage". For instance, the reason that the *lex loci celebrationis* is the proper law to determine the formal validity of the marriage should not be regarded as a sufficient justification for conferring jurisdiction on the forum celebrationis' courts. It is therefore suggested that the courts of the place of celebration might be extremely inconvenient to both parties if neither of them was domiciled or resident in that country. The Law Commissions concluded the arguments by recommending that this basis of jurisdiction should be abolished, for the only connection of the parties with the country of celebration "is wholly past and far too

slight in itself" so as to justify the assumption of jurisdiction over nullity suits.<sup>(104)</sup> This recommendation had been implemented by the Domicile and Matrimonial Proceedings Act 1973 the provisions of which provided that jurisdiction of the English or Scottish courts may only be founded on the domicile, or habitual residence for one year, of either party in England or Scotland, respectively.<sup>(105)</sup>

#### **D- Domicile and Habitual Residence at Death**

The Scots and English courts have jurisdiction to entertain nullity suits if the party, who died before the proceedings were instituted, was domiciled at death in Scotland or England, or had been habitually resident there for the year immediately preceding the death.<sup>(106)</sup> However, the distinction between void and voidable marriage remains important in this situation, for the nullity of a voidable marriage can only be invoked by one of the spouses and during their joint lifetime. It is therefore undoubtedly clear that the jurisdiction of the courts may be found on this particular ground if, and only if, the alleged defect renders the marriage void *ab initio*, even though this has been expressly stated by the provisions of the 1973 Act. The underlying justification for this special jurisdictional ground is, it is argued, that the nullity of a void marriage may be invoked after the death of one or both of the parties by a third party who has a sufficient interest in establishing the status of the would be spouses. It is also submitted that the validity of a marriage might be examined in a nullity action even after the death of one or both of the parties, as in cases of intestate succession or the legitimacy of children.<sup>(107)</sup>

#### **E- Nationality as a ground of jurisdiction**

Nationality has, in general, been widely adopted by civil law countries as a sufficient ground for exercising jurisdiction by the courts over their own nationals, in addition to its consideration as the appropriate test for determining personal law. Consequently, jurisdiction in nullity actions is often assumed when one of the parties is a national of

the forum country irrespective of their domiciles. The underlying reason is, it is argued, that the courts of the forum country are concerned *prima facie* with cases in which at least one of the parties is a national of the forum, for the nationality principle is to be regarded as "La base politique de la competence".<sup>(108)</sup> Moreover, the acceptance of this principle within the sphere of jurisdiction has been supported on the grounds that most people do have real ties and, are substantially connected, with the country of their nationality, and that nationality is easily ascertained for a change of nationality involves a public act. Moreover, it is submitted that the universal recognition of the decrees in the country of nationality will be ensured.<sup>(109)</sup>

However, the Algerian courts have jurisdiction to entertain nullity actions only if either the plaintiff or the defender is an Algerian national at the time when the action is begun. Although a narrow interpretation of articles 10 and 11 of the Civil Proceedings Code 1966 may restrict the scope to the contractual obligation, it has been submitted that the reason for a wide interpretation appears to be evident inasmuch as the jurisdiction is founded not on the nature of the action but on the nationality of the parties.<sup>(110)</sup> However, the Algerian Supreme court, affirming this view and proceeding along the lines of French courts, has submitted that this ground of jurisdiction is also available insofar as personal actions are concerned. This has been justified on the ground that the national law, as the personal law of the parties, is the proper law to determine the substantive requirements of the "statut personnel" of the parties.<sup>(111)</sup>

Finally, it is interesting to underline that this jurisdictional ground is an exception to the general rules referred to above, namely, the defendant's domicile or residence within the jurisdiction, and thus it cannot be invoked if the defendant is domiciled or resident in Algeria. It is therefore evident that this particular ground can only be invoked for founding the courts jurisdiction in cases where the plaintiff is domiciled or resident in Algeria, or where neither of them has a domicile or residence there.<sup>(112)</sup>

## Section Two

### The Problem of Choice of Law in Nullity Proceedings

#### A- Introduction

It is universally agreed that a marriage complying with the *lex loci celebrationis* regarding formalities and with the law of each party's personal law [whether determined by domicile or nationality] as regards essential requirements cannot be held invalid or annulled, even if it is invalid by the law of the forum or by the law of the country where the parties have established their matrimonial home after the marriage ceremony. Consequently, it has been argued that it is very natural to determine the effects of marriage failure to meet those requirements, in general, by the law which should have been, but was not, properly observed and according to which the marriage is considered invalid. It is therefore clear that a marriage which fails to comply, say for instance with the formal requirements, cannot be invalidated unless it is regarded as such by the *lex loci celebrationis*. This solution is certainly very sound and logical inasmuch as the grounds of nullity decrees bears a necessary relation to the conflict rules on constitution of marriage relationship. However, it would be highly inconvenient and undesirable to refer questions of nullity to a legal system other than that governing the initial validity of the marriage. To apply the law of the forum to determine, for instance, the choice of law issues in nullity actions would distort the laws involved and produce unnecessary complexities in the structure of choice of law rules, as well as promote limping marriages.

it is well settled, both in England and Scotland, that the choice of law issues in a nullity suit should be decided by the law which determines the validity of the marriage with respect to the matter on account of which the marriage is alleged to be invalid and null. The Matrimonial Causes Act 1973 provides clearly that where, apart from the Act, any matter affecting the marriage validity would, under the English conflict rules, fall to be

determined by foreign law, the provisions of sections 11 to 13 of the Act shall neither preclude the determination of that matter as aforesaid, nor require the application to the marriage of the grounds set forth therein.<sup>(113)</sup> It is interesting to underline that the ascertainment of the proper law in nullity actions depends mainly on the characterisation of the alleged defect. There is no doubt that an English or a Scottish court, after surmounting the issue of jurisdiction, would apply its own characterisation rules to determine whether the alleged defect is as to form or essential validity. It is a well established principle that the *lex loci celebrationis* as the only relevant law which decides all questions relating to the validity of the ceremony should apply in general if the allegation is that the marriage is void for want of form.<sup>(114)</sup> Where, on the other hand, the allegation is that the marriage is void for want of capacity, the antenuptial personal law of each party appears to be the most appropriate law to decide whether the alleged defect renders the marriage invalid.<sup>(115)</sup>

Although it seems well established that questions of formal defects must be referred to the *lex loci celebrationis* and the questions of essential defects to the parties' antenuptial domiciliary laws, the legal effect of alleged defects of physical incapacity, viz. impotence and wilful refusal to consummate,<sup>(116)</sup> is a matter of great doubt and uncertainty. The underlying reason appears to be that the courts in cases of nullity based on one or both of these grounds were mainly concerned with jurisdiction, and thus the issue of choice of law was not given adequate consideration. The purpose of the present section is to examine the various rules which have been proposed by judicial and academic authorities in order to determine the exact nature of these alleged defects, as well as the appropriate law which might govern the legal effect of such defects. Seeing that these grounds are not regarded as prohibitive impediments preventing the celebration of marriage, it is very important to consider the issue, which has been a subject of academic controversy, whether impotence and wilful refusal to consummate

should be retained as ground of nullity. Another issue which will be adverted to is whether a marriage might be annulled on some ground unknown to the law of the forum.

### **B- Impotence And Wilful Refusal as Challengeable Grounds**

It is well established that a marriage is voidable, according to English law, if it has not been consummated owing to the incapacity of either party or owing to the respondent's wilful refusal to consummate it.<sup>(117)</sup> The position in Scottish law, on the other hand, differs markedly insofar as a marriage is only voidable if one of the parties is incapable of consummating it <sup>(118)</sup> However, it is interesting to note that impotence, like the postnuptial fact of wilful refusal, is regarded not as an impediment preventing the celebration of a marriage but only as a ground for annulling it afterwards at the instance of either party. Furthermore, incapacity to consummate is less likely than wilful refusal to raise a conflict of law problem. The main justification, it is argued, is that impotence is fairly common ground for annulment nearly in all legal systems, whereas wilful refusal is not universally recognised as such, for it is sometimes a ground for divorce, as in French and Algerian laws, and sometimes is not an independent ground for matrimonial relief at all, as in Scots law.<sup>(119)</sup>

The question of which law is to determine the legal effect of these defects on marriage is the subject of much controversy and uncertainty amongst the English judicial authorities which provide support for various choice of law rules, viz. *lex fori*, *lex loci* and *lex domicilii*. In the first instance, it has been argued that in nearly all cases involving impotence and wilful refusal to consummate there is a strong tendency for applying the law of the forum by some means or other. Until 1947, it had been assumed that the English courts, after surmounting the question of jurisdiction, had applied the English domestic law as a matter of course without considering the choice of law issue and irrespective of the parties' domiciliary law.<sup>(120)</sup> This may be

illustrated by Hudson J.'s judgement in Easterbrook v. Easterbrook,<sup>(121)</sup> in which a Canadian domiciliary petitioned for annulment of his marriage to an English woman celebrated in England on the ground of her wilful refusal to consummate. Having assumed jurisdiction on the ground of both parties' residence in England, the learned judge held the marriage to be invalid and null, notwithstanding that the alleged ground [wilful refusal to consummate] was insufficient for rendering the marriage voidable by the husband's prenuptial domiciliary law.<sup>(122)</sup>

Further support for the application of the law of the *forum* may be drawn from the case of Magnier v. Magnier,<sup>(123)</sup> where a marriage between two Irish domiciliaries was celebrated in the Republic of Ireland. The wife had subsequently established residence in England, and the husband sought a decree of nullity on the wife's wilful refusal to consummate the marriage. Judge Mais, being aware of the absurdity of annulling the marriage as neither the husband nor the wife could complain under the law of their domiciles or residence,<sup>(124)</sup> assumed jurisdiction on the basis of the respondent's residence in England, and consequently decided that English law would be the proper law to determine the legal effect of the wife's wilful refusal to consummate the marriage.

It is interesting to underline that these decisions have been severely criticised in that the questions of choice of law in these undefended cases seem to have completely escaped the judges' notice. It is also argued that the judges have failed to indicate whether English law was applied *qua lex fori*, *lex loci celebrationis*, the respondent domiciliary law, or it was applied as the petitioner's domiciliary law on the principle that foreign law, in the absence of evidence to the contrary, is presumed to be the same as English law.<sup>(125)</sup> One might thus conclude that these decisions are not very conclusive authorities on choice of law.

As regards Scottish law, it has been argued that there is no reported case in which the court of Session has granted a decree of nullity on the ground of impotence by applying other than Scots law. This position has been explained on the footing that Scottish law was possibly applied as being the law of domicile, for the court of Session had jurisdiction at common law in cases in which the parties were domiciled in Scotland, or in which the court was statutorily obliged to assume jurisdiction and to apply Scots law thereof.<sup>(126)</sup> This explanation is questionable inasmuch as assumption of jurisdiction on the parties' domicile in Scotland does not mean the application of the Scottish domestic law as the law of the domicile. The underlying reason appears to be that the court must apply the laws which govern the initial validity of the marriage since the parties might have been domiciled in another country at the time of the marriage.<sup>(127)</sup>

Although this explanation might have been correct in common law, it is by no means acceptable since the promulgation of the Domicile and Matrimonial Proceedings Act 1973 by virtue of which the Scottish courts also assume jurisdiction on the basis of either party's habitual residence in Scotland for one year ending with the date when the action is begun. Consequently, it has been respectfully submitted that Scots law would remain applicable in cases involving impotence not as the *lex domicilii* but as the *lex fori*.<sup>(128)</sup> It is therefore undoubtedly clear that a Scottish court would grant a declarator of nullity on this ground whether or not it was recognised as a ground of nullity by the law of the domicile of either party or by the law of the place of celebration.<sup>(129)</sup>

A general application of the *lex fori* has been justified by some academic authorities on the basis that actions of nullity on the ground of impotence and wilful refusal to consummate are analogous to those for divorce, which is admittedly determined by the law of the *forum* according to English and Scottish conflict of laws. Such analogy is certainly well justified partly on the basis that these defects render, both in England and

Scotland, a marriage voidable only, and in part because a decree annulling a voidable marriage, like a divorce, operates prospectively in English law.<sup>(130)</sup> Apart from this pragmatic analogy, it has been submitted that it would be highly inappropriate and undesirable from the practical point of view to characterise impotence and wilful refusal to consummate as prohibitive impediments binding prospectively on a marriage registrar or an authority who is asked to issue a marriage licence or perform a marriage ceremony. The underlying justification is that "the impotent can marry and so can those who later refuse marital intercourse, just as can the psychologically inadequate and those who later commit adultery".<sup>(131)</sup>

It has been also argued that practical convenience should not be underrated as *desideratum* underlying the *lex fori* rule which avoids numerous difficulties inherent in other solutions that impede the swift and inexpensive administration of justice. Such difficulties are, however, encountered both in framing and applying the relevant conflict rules and the relevant foreign substantive law. The latter task is particularly delicate inasmuch as the application of the substantive rules presupposes a thorough knowledge of the practice in the country of origin which often will not be available in the *forum*.<sup>(132)</sup>

This view has been much criticised on the ground that it is based on the construction of existing judicial authorities of the weakest sort that is neither the right, nor the only interpretation which might be given to such decisions. The main justification lies mainly in the fact that the choice of law in such nullity cases appears to have escaped the judge's notice completely, the law of the *forum* being applied as a matter of course once the court assumed jurisdiction. This can be explained on the basis that foreign law was not pleaded or proved, as well as no authority against the *lex fori* was cited to the judge "-not that one would expect to be cited in an undefended case".<sup>(133)</sup>

There is no doubt that the analogy with divorce carries particular weight where the nullity petition is based on the essentially post-nuptial fact of wilful refusal to consummate which was applied even to the existing marriages when it was first made a ground of nullity under English law "just as a new ground for divorce would have been". However, it has been suggested that one way to solve the problem is to apply different choice of law rules for impotence as an ante-nuptial defect, and the post-nuptial defect of wilful refusal to consummate. Although this distinction is generally accepted, it would be awkward and highly undesirable to treat these alleged defects differently since in legal practice they are frequently alleged as ground of nullity in the alternative. Furthermore, it would be repugnant to general principles to apply different choice of law rules depending on whether non-consummation of a marriage was due to inability to consummate or unwillingness to do so. The underlying reason is that consistency requires the application of the same rule in all nullity cases, for inability or unwillingness to consummate are merely two sides of the same coin.<sup>(134)</sup>

One might also argue that it is not easily reconcilable to any sound reasoning to single out physical incapacity from the notion of capacity to marry and assign it to an independent choice of law rules, namely *lex fori* which has been mainly justified on the ground of swift and inexpensive administration of justice that is neither warranted on principle, nor accepted in relation to choice of law in any context other than divorce and torts. This ground is rather precarious and unworthy of a place in conflict of laws where the principle of doing justice seems predominant. However, the reasons for rejecting the law of the *forum* in matters of legal capacity are in general equally applicable here. *Lex fori* rule seems unacceptable in principle for the outcome of the proceedings would be dependent on the petitioner's choice of the *forum*, and thus would open up the prospect of forum-shopping as well as lead to limping marriages. To this extent, one could not agree more with Sachs J.'s statement that,

"[I]t would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue...It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistently decided according to the law of one country alone...and that **consistency cannot be attained if the test is lex fori**".<sup>(135)</sup>

Irrespective of the merits these arguments might have, the consideration of the *lex fori* as a general rule does not obviously fall in line with the courts' reasoning in certain cases on the subject matter. In Robert v. Robert,<sup>(136)</sup> for instance, a marriage was celebrated in Guernsey where both parties were then domiciled. The wife sought a decree of nullity on the ground of her husband's wilful refusal to consummate the marriage. Barnard J., having assumed jurisdiction on the petitioner's residence in England, declared that the issue whether a marriage should be annulled on the alleged ground of wilful refusal to consummate must preferably be determined by the *lex loci celebrationis*. Barnard J. went on to say that this view is appropriate on the basis that the alleged ground cannot be justified as a ground of nullity unless it is considered as a defect in marriage, "an error in the quality of the respondent".<sup>(137)</sup>

The main criticism that may be levelled at this decision, however, concerns the reasoning on which it is based, which indeed seems almost incredibly artificial and conceptualistic, for wilful refusal as a ground of nullity is by no means dependent upon error. This is because section 13 (3) of the Matrimonial Causes Act 1973 does not require the petitioner's ignorance of the alleged facts at the time of the marriage ceremony.<sup>(138)</sup> Furthermore, This decision seems to be an authority of doubtful merit not only because the *lex loci celebrationis* and the parties' domiciliary law coincide, and wilful refusal is equally treated in the same manner under Guernsey and English laws, but also because Barnard J. has questioned the appropriateness of the *lex loci celebrationis*. The learned Judge pointed out that the *lex domicilii* should apply according to Sottomayor v. De Barros,<sup>(139)</sup> if the alleged defect was to be

characterised as a matter affecting the capacity of one of the parties.<sup>(140)</sup>

The *lex loci celebrationis* is also supported by the Northern Irish case Addison v. Addison.<sup>(141)</sup> In this case the marriage took place in Northern Ireland between a woman then domiciled there and a man at all times domiciled in England. The wife sought a decree of nullity on the ground of her husband's impotence, or alternatively on the ground of her wilful refusal to consummate the marriage. Lord MacDermot pointed out that it is very doubtful whether the issue of capacity to marry, being a matter for the law of the domicile, has to do with more than juristic capacity. His Lordship went on to say that "Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with nature and quality of those obligations as to be, naturally and aptly, a matter for the *lex loci celebrationis*".<sup>(142)</sup> It is interesting to note that this decision is not a very strong authority, for the question was not pursued to the length of a decision as there was no difference between the Northern Irish law and English law in substantive result.

The application of the *lex loci celebrationis* to determine matters of impotence and wilful refusal has been heavily criticised on the ground that the defects in question cannot be characterised under any circumstances as relating to formalities of marriage. Moreover, the country of celebration may have no interest in such matters as the *locus contractus* is often chosen for temporary convenience. It would be therefore inappropriate and undesirable to assign these personal defects exclusively to the law of the place of celebration with which the parties may only have a fortuitous or fleeting connection. The adoption of the *lex loci celebrationis* as a general choice of law rule for physical incapacity would be, as Bishop pointed out, contrary "to the whole development of the English family law rules in the conflict of laws since Brook v. Brook".<sup>(143)</sup>

The predominant view which has emerged from the English case Ponticelli v. Ponticelli,<sup>(144)</sup> where the choice of law issue was considered at some length for the first time, is that impotence and wilful refusal must be determined by the *lex domicilii*. In this case, an Italian national who was at all material times domiciled in England married by proxy in Italy an Italian subject domiciled there. The husband sought a decree of nullity on the ground the wife had wilfully refused to consummate the marriage. Sachs J., delivering a judgement which is by far the most substantial on the subject matter, strongly rejected not only the distinction between choice of law rules for impotence and wilful refusal to consummate but also the characterisation of wilful refusal as an issue pertaining to form, as well as its analogy with divorce. The learned judge has therefore established clearly that both impotence and wilful refusal to consummate should be considered as matters affecting personal capacity, and thus subject to the parties' domiciliary laws. His main reason was that:

"It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony..., be consistently decided according to the law of one country alone... and that consistency cannot be attained if the text is *lex fori*".<sup>(145)</sup>

In view of the fact that a voidable marriage conferred the husband's domicile on the wife at that time as a matter of law, and since wilful refusal to consummate renders a marriage voidable only, Sachs J. made it quite clear that the issue before him should be decided by English law not as the *lex fori* but as the law of the husband's domicile. He pointed out that the law of the domicile appears to be the most appropriate to apply for "It would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue".<sup>(146)</sup>

Although Sachs J.'s decision stands out as the main and the most persuasive English authority on the subject matter, the merits of the solution endorsed by it, i.e. the law of

the husband's domicile seems questionable and is now hard to justify on any rational ground for it is based upon a rule which is obsolete and an outmoded legal concept in the contemporary private international law. This rule is neither acceptable since the promulgation of the Domicile and Matrimonial proceedings Act 1973<sup>(147)</sup> whereby a married woman can acquire a separate domicile, nor consistent with the modern trend of sexual equality before the law.

Nevertheless, the adoption of the *lex domicilii* as a general choice of law rule for impotence and wilful refusal has been justified by some writers on the ground that there is no satisfactory reason which requires the extraction of physical incapacity from the notion of capacity to marry, and thus assign it to independent conflicts rules. It is suggested that the application of law of the parties' domicile would guarantee consistency with the treatment of all grounds of invalidity inasmuch as wilful refusal, though is necessarily post-nuptial, has been reaffirmed in England by the Matrimonial Causes Act 1973<sup>(148)</sup> as a ground of nullity.<sup>(149)</sup> The adoption of the domicile rule would therefore avoid different choice of law rules for impotence and wilful refusal, as well as producing a welcome simplification in the structure, though at the structural level, of the conflicts rules.<sup>(150)</sup>

Further, there is an authority for regarding impotence and wilful refusal as defects concerned with essential validity of a marriage. Denning L.J. pointed out, albeit in a jurisdiction case, that "no-one can call a marriage a real marriage when it has not been consummated; and this is the same...whether the want of consummation is due to incapacity or to wilful refusal".<sup>(151)</sup> Palsson Lennart has also suggested that there is, as insinuated in certain English cases, "the analogy with consent to marriage, in particular mistake as to personal attributes". In view of the fact that questions of consent are determined by the law governing capacity to marry, the learned writer believes that "some thorny problems of delimitation will be avoided if the same choice

of law is adopted for impotence as a ground of nullity".<sup>(152)</sup> It is also interesting to note that the rules concerning physical incapacity are mainly designed not to protect the public interest of the interested country but to protect the parties' interests, for the marriage is a good and valid marriage unless one of the parties chooses otherwise by seeking a decree of nullity. In a stimulating article, Jaffey submitted that: "Whether in justice to the parties the marriage should be capable of being annulled on one of these grounds is most appropriately left to the standards of justice of the country to which both parties belong at the time of the marriage".<sup>(153)</sup>

Nevertheless, the acceptance of the domicile rule as a general choice of law rule is not a conclusive solution for all the problems that may potentially arise in a conflict case, in particular if the parties are subject to different domiciliary laws, and more specifically if impotence and wilful refusal are considered as grounds of nullity only by one of the laws involved. The issues which require consideration here concern the determination of the relevant law to be applied if the parties are domiciled in different countries, the relevant date for determining the applicable law, and the solution which need be adopted in case the petitioner's domiciliary law regards impotence and wilful refusal as grounds of divorce. The judicial authorities supporting the domicile rule, as indicated above, inclined in favour of the law of the husband's domicile, a view formulated at a time when the unity of domicile principle was predominant. In fact this view is inconsistent with the contemporary trend of sexual equality, and unacceptable in principle for now a married woman can acquire an independent domicile.

The general editor of Cheshire and North's private international law has submitted that given that the defect is revealed by the impotent or unwilling party, the most appropriate law to determine the effects of impotence and wilful refusal to consummate as grounds of nullity is the domiciliary law of the spouse alleged to be incapable. This view appears to be similar to that generally adopted within the sphere of unilateral

impediments such as lack of age, inasmuch as impotence and wilful refusal are only relevant if, and only if, they are regarded as ground of nullity according to the incapable party's domiciliary law. It is therefore justified on the ground that it is in tune with the general conflict of law rules by virtue of which matters of essential validity are decided.<sup>(154)</sup>

Whatever merit this approach might have within the sphere of unilateral impediments, the application of the law of the incapable or afflicted party as a general choice of law rule is clearly unacceptable in principle simply because the aggrieved party in case of impotence and wilful refusal, unlike unilateral impediments, is the non-afflicted party - the spouse who is rendered unable to consummate the marriage. Furthermore, it would cause injustice to the aggrieved party whose protection is at stake in case impotence and wilful refusal are not grounds of nullity under the domiciliary law of the incapable spouse. Let us suppose, for instance, that an English domiciliary who married a Scottish woman domiciled in Scotland raises an action before an English court seeking a decree of nullity on the ground that the wife had wilfully refused to consummate the marriage. According to this approach, the court must refuse to grant a decree of nullity to which the petitioner is entitled under his domiciliary law which provides for annulment on the ground of wilful refusal. It would be highly inappropriate and undesirable to expect the courts of a given country to which the aggrieved party belongs not to declare the marriage null simply because the impotent or unwilling party is domiciled in a country by the law of which these alleged defects do not affect the marriage. "It is one thing to take a spouse from another country and quite another thereby to forfeit some important right to redress of grievance - to wed not only the spouse but also his (or her) nullity law on the subject of non-consummation".<sup>(155)</sup>

In a relatively recent article, Bishop has clearly submitted that in cases of true conflict,

where the parties' domiciliary law differ markedly on the matter and the petitioner is domiciled in the country the law of which considers both impotence and wilful refusal as grounds of nullity, the English court should opt for the law which grants relief to the aggrieved party; a choice that is best directed by the domestic law's choice -for English law recognises in domestic cases a legitimate grievance. The learned writer has therefore plausibly suggested that the most appropriate law "that ought to govern in cases of wilful refusal and impotence is the law of the petitioner's domicile at the time of the marriage". Relying on the analogy with consent, he has pointed out that the rationale underlying this approach is that a party should only be entitled to the protection that the law of his own community confers on him, and thus the law of his alleged partner's domicile is irrelevant and ought to be ignored.<sup>(156)</sup> The adoption of this approach in this context seems to have the advantage that the petitioner would not be held unwillingly tied to a marriage which is regarded by the law of his own community as a defective marriage. It is therefore clear that the petitioner in the previous example would be able to obtain a decree of nullity on the ground of his wife's wilful refusal to consummate the marriage.

Nevertheless, this approach might be criticised in that assimilation of impotence and wilful refusal cases to the cases of consent is neither right in principle, nor supported by the actual decisions, or at least by the reasoning, in all or nearly all English cases bearing on choice of law in this matter. while the aggrieved party whose protection is at stake in cases of consent is the spouse whose consent is allegedly defective, it is generally agreed that in cases of impotence and wilful refusal the party who is rendered unable to consummate the marriage by reason of his partner's inability or unwillingness to consummate is the only party who has a legitimate grievance. One might therefore argue that the application of the law of the petitioner's domicile in cases of impotence, where the nullity issue is raised by the incapable party, can hardly be justified on the basis of the rule that an aggrieved party should only be entitled to the protection the law

of his country confers on him. The reason underlying this formulation is that the impotent party is given the right to plead his own impotence not to protect his own interests but to free his partner whom he believes would be able to lead a happy and normal life if the impotent marriage is annulled.

Although this approach might possibly be persuasive in cases of true conflict, the application of the law of the petitioner's domicile does not provide a workable test in cases of false conflict where the petitioner is domiciled in the country under the law of which impotence and wilful refusal do not affect the marriage, and in particular where the question of nullity is brought before the court by the impotent party. For instance, suppose that a Scottish domiciliary marries an English woman who is domiciled at all material times in England. The husband sought a decree of nullity before the English court on the ground that his wife had wilfully refused to consummate the marriage. According to this approach, the English court must refuse to grant a nullity decree on the ground that wilful refusal does not constitute a ground of nullity under the petitioner's domiciliary law, notwithstanding its acceptance as such under the law of the respondent's domicile.<sup>(157)</sup> Furthermore, no satisfactory justification has ever been offered why the aggrieved party should be denied protection in case the law of the domicile of the impotent party, who pleaded his own impotence, does not consider impotence as a ground of nullity.

Yet another approach which is suggested by Palsson is to apply the parties' personal laws cumulatively, in that the marriage will be annulled for impotence and wilful refusal to consummate if it is so by either party's personal law regardless of whether the defect is that of the party whose personal law contains the invalidating rule or that of the other party.<sup>(158)</sup> It is therefore clear that the petitioner in both examples referred to earlier would be able to avoid the marriage on the ground of wilful refusal to consummate. This view appears to have the advantage of avoiding the restrictive elements of the other

two approaches examined beforehand, for the aggrieved party would not be held unwillingly bound to a marriage that he and/or his alleged spouse consider as an empty and a defective marriage. Palsson's view can, however, be justified on the ground that it accords with the policy issue of upholding the parties' reasonable expectations. Therefore, to destroy the aggrieved party's assumption of having a normal and consummated marriage can result in a quite natural sense of injustice.

The general editor of Cheshire and North's private international law has argued that this approach leans heavily in favour of annulling a marriage, "with the result that the petitioner would succeed even though there were no grounds for annulment under the law of his domicil and even though he was the person alleged to lack capacity".<sup>(159)</sup> Indeed, this criticism stands if, and only if, the society to which the petitioner belongs has the slightest public interest to hold such a marriage valid. One might therefore argue that this view is the more appropriate in that it would seem odd and unjust to tie the aggrieved party unwillingly to an empty marriage relationship that achieves neither the religious aim of marriage, i.e. procreation, nor the civil aim of marriage that is best attained through consummation.

It has been clearly submitted that the parties' domiciliary law should be applied as at the time of the marriage, inasmuch as the general choice of law rule applicable to matters of essential validity is that the law of the domicile preceding the marriage. There is no doubt that the parties' antenuptial domiciliary laws are applicable even in the case of the post nuptial of wilful refusal to consummate. The underlying justification is that consistency requires the application of the same connecting factor in all cases of nullity. Furthermore, wilful refusal and impotence, as indicated above, are often pleaded in the alternative.<sup>(160)</sup>

The adoption of the law of the domicile as a general choice of law rule for impotence and wilful refusal has been criticised on the ground that the petitioner might be denied a nullity decree if he is domiciled in a country whose law regards impotence and wilful refusal to consummate as sufficient grounds for divorce. A denial of a nullity decree in such cases, it is thought, is most certainly unacceptable and irrational for "it seem an absurd situation that both relevant laws end a marriage, one calling it nullity and the other calling it divorce, and yet because they call it by different names the petitioner, who might be indifferent between labels, cannot obtain relief".<sup>(161)</sup> Bishop has submitted that the relevant issue for consideration in such cases is a matter of characterisation: how the divorce decree in the foreign country is to be classified for the purposes of the English or Scottish choice of law rules as being the law of the forum. As indicated above, characterisation in conflict of laws should be made according to the rules of the *lex fori*, and the *forum's* court should consider in such a process the effects of the foreign decree.<sup>(162)</sup> Accordingly, it has been clearly submitted that an English court should grant a decree of nullity even if the law of the petitioner's antenuptial domicile regards the defect in issue as a ground for divorce, for it is a ground of nullity under English law. The underlying reason is that there is no practical difference between a decree of divorce and a decree annulling a voidable marriage for both decrees operate prospectively and the consequential rights as to financial provisions are identical. Bishop therefore believes that the most appropriate approach is that the foreign decrees of divorce based on impotence or wilful refusal to consummate should be properly classified as decrees of nullity in the English conflict of laws sense.

It has been plausibly suggested that the position in Scots law seems rather different in that a Scottish court would not grant a nullity decree in such cases simply because a decree of nullity based on impotence operates retrospectively, and the court has no authority to grant financial relief following a declarator of nullity. Furthermore, it is

thought that the only possible solution even in the case of wilful refusal, assuming that a Scottish court can grant a decree of nullity on such a ground in a conflict case, is that the court should dismiss the petition. This view has been justified on the ground that a foreign decree of divorce based on wilful refusal cannot be classified as a nullity decree in the Scottish conflict of laws sense, since wilful refusal is not even a ground of nullity under Scots law.<sup>(163)</sup>

It is important in this respect to point out that based on a thorough examination of a wide range of options which essentially amount to the application of either the law of the forum or the law of the domicile, the English and the Scottish Law Commissions have concluded in their 1985 joint report that the choice of law rules governing impotence and wilful refusal to consummate the marriage are uncertain, unclear and undeveloped. The Law Commissions have neither expressed a clear preference for either the law of the forum or the law of the domicile, nor specified which domiciliary law would be applicable in the event the law of the domicile is adopted. The underlying reason is that the comments submitted to the Law Commissions displayed very little consensus, providing them with no clear-cut basis as to the need for reform or the course any reform should take. Nevertheless, the Law Commissions have strongly recommended that whatever choice of law rule is adopted should govern both impotence and wilful refusal to consummate as they are frequently pleaded in the alternative.<sup>(164)</sup>

### **C- The relevance of retaining impotence and wilful refusal as grounds of nullity**

In Inverclyde v. Inverclyde, Bateson J. recognised the validity of the argument that the difference between suits for nullity on the ground of impotence and suits for dissolution of marriage was basically one of form. His position is grounded in the assumption that nullity of marriage on the ground of impotence constitutes fundamentally a suit to dissolve it insofar as “[t]he marriage remains a marriage until one of the spouses seeks

to get rid of the tie".<sup>(165)</sup> A Similar position is assumed by Lord Clyde L.P., who asserts that as concerns Scottish law, impotence is not "...a bar to the constitution of the marriage, but only as a mean of setting it aside, or as a resolutive condition of the contract".<sup>(166)</sup> It is important to note that impotence as a ground of nullity, and not dissolution, before the reformation was justified on the basis that the ecclesiastical courts had no power to dissolve a marriage a *vinculo*, and, furthermore, the early canonical theory clearly established that a marriage comes into existence if, and only if, there had been a *comixtio sexuum*, i.e. there had been both consummation and consent. The question to be considered is whether it is worth preserving impotence as well as wilful refusal to consummate as grounds of nullity in the modern times where divorce is widely accepted by the Church.

It has been submitted that it is no longer necessary to retain impotence and wilful refusal as grounds of nullity, particularly in the light of the greater readiness of the church to recognise divorce and of the fact that parties are now able to obtain a divorce on the irretrievable breakdown of their marriage. The argument in favour of this view is that divorce and nullity on these grounds are in substance similar and the difference between them is only a matter of form.<sup>(167)</sup> "[I]n each case there is a marriage valid until the decree is made and that decree terminates the marriage, but in case of nullity, the decree misleadingly declares the marriage to have never existed; and that being so, it is more logical to terminate the marriage by divorce which records the realities of the situation".<sup>(168)</sup> It is also important to note that the existence of wilful refusal as a ground of nullity is, as Dr Morris pointed out, hard to justify because it is necessarily a post-matrimonial matter.<sup>(169)</sup>

In 1970, after a far-ranging review of the law of nullity of marriage, the English Law Commission has nevertheless accepted as sound and logical the view in favour of retaining impotence and wilful refusal as grounds of nullity. The Law Commission

refused to recognise the validity of the argument that the dichotomy between suits for nullity of voidable marriages and suits for divorce is merely one of form, insofar as “the concepts giving rise to the two decrees are quite different”. The Law Commission, therefore, went on to explain that:

“the decree of nullity recognises the existence of an impediment which prevents the marriage from initially becoming effective, while the decree of divorce records that some cause for terminating the marriage has arisen since the marriage. This distinction may be of little weight to the lawyer, but is a matter of essence in the jurisprudence of the Christian Church”.(170)

It is true that nullity decree is granted for failure to comply with certain requirements that constitute prohibitions which prevent even the celebration of marriage if the marriage registrar is satisfied at the time of the ceremony that the parties have not complied with one or more requirements of marriage. Nevertheless, this line of reasoning is unacceptable and can hardly be invoked to support the view in favour of retaining impotence and wilful refusal as grounds of nullity. The underlying reason is that impotence cannot prevent the celebration of a marriage even if the marriage registrar is aware of the fact as long as the parties agreed to go along with the ceremony. Moreover, it is interesting to note that a decree of nullity can be obtained for wilful refusal, a supervening factor which necessarily occurs after the marriage (and, indeed, it is important to underline that the majority of nullity decrees of voidable marriages are based on wilful refusal). It is therefore clear that impotence and wilful refusal do not constitute prohibitions on the marriage of the impotent or unwilling party and, “at its inception, the marriage is perfectly valid”. The main reason, as Professor Clive pointed out, is that “the impotent can marry and so can those who later refuse marital intercourse, just as can the psychologically inadequate and those who later commit adultery”.(171)

In view of the fact that the Church considers consent as an important prerequisite to

marriage, the Law Commission has also argued that impotence can be regarded as having the effect of vitiating consent on the ground that consent to marriage includes consent to sexual relations. The Law Commission therefore pointed out that

“so radical a change as is involved in the substitution of a decree of divorce for a decree of nullity in respect of matters which the Church regards as relevant to the formation of marriage and irrelevant to divorce, is likely to be unwelcomed to the Church. It is also likely to be resented by people not necessarily belonging to the Church who associate a stigma with divorce and who would therefore prefer to see such matters as impotence and mental disorder, which are illnesses, remain grounds for annulling the marriage rather than causes for dissolving it”.(172)

This argument can be criticised on two bases: narrowly from the consideration of impotence as having the effect of vitiating consent, and on a much broader front from the objection of the Church to the extension of divorce. The consideration of impotence as having effect of vitiating consent is unacceptable and hard to justify simply because the law does not require the petitioner's ignorance of the alleged fact at the time of the marriage. Furthermore, impotence as well as wilful refusal do not constitute prohibitions on the marriage of the impotent or unwilling party and, at its inception, the marriage is perfectly valid. This argument hardly stands up to a rigorous examination insofar as wilful refusal, which is recognised by the Law Commission as the alternative allegation to impotence, cannot be a defect in consent because it is difficult to establish its existence at the time of the ceremony, i.e. whether the party refusing to consummate have the intention to do so at the time of the ceremony. Secondly, the objection of the Church to the extension of divorce is hardly persuasive since the civil law has abandoned any reliance on religious doctrine. It is also important to note that “[i]ndividuals who attach importance to the attitude of the Church to the circumstances in which a marriage is terminated could no doubt seek approval from the Church which would apply the modern canon law”.(173)

Another argument put forward in favour of retaining impotence and wilful refusal as grounds of nullity is that any reform that would cause offence to a significant body of opinion should only be carried out if there is some corresponding advantage to be gained. The Law Commission submitted that the only benefit in such a reform in this case (i.e. the ground of wilful refusal might be considered by some to fit in more neatly among divorces than among nullities) is not a strong reason to justify such a radical reform in itself.<sup>(174)</sup> Professor Cretney criticised this view on the ground that “[n]ullity proceedings involve, by reason of the nature of the allegations made and the methods by which evidence is obtained, considerable humiliation and distress”. The learned author therefore submitted that there is a clear and worthy benefit to be gained from such a radical reform (i.e. the misery necessarily incidental to marital breakdown might be reduced) if a decree of divorce can be obtained without these personal problems being discussed in a court of law.<sup>(175)</sup>

The English Law Commission has also considered the issue of whether wilful refusal to consummate (as a postnuptial fact which occurs after the marriage) is an appropriate ground for nullity that is in principle concerned solely with defects existing at the time of the marriage. The Law Commission had no doubt that wilful refusal to consummate, as the alternative allegation to impotence, should continue to be a ground of nullity simply because it is often uncertain whether the defendant’s failure to consummate is due to his inability to consummate or to his unwillingness to do so. Therefore, it would be undesirable and very odd if “the nature of the relief should depend on the court’s decision whether non-consummation was due to the respondent’s inability or whether it was due to his unwillingness”.<sup>(176)</sup>

More recently, the Scottish Law Commission took a rather different view and recommended that the retention of impotence as a ground of nullity is inconclusive and

a very doubtful issue, since the retrospective effect of a nullity decree of a voidable marriage leads to unnecessary difficulties. The Scottish Commission has thus submitted that there is absolutely no policy justification whatsoever for amending the law to provide that a decree annulling a voidable marriage should only have prospective effect, for “[t]hat would simply be a divorce by another, and singularly inappropriate, name”.<sup>(177)</sup> In the light of the availability of non-fault divorce, as well as the existence of various serious personal inadequacies at the time of the marriage which may lead to the irretrievable breakdown of marriage, it seems that there is no longer any policy consideration for singling out impotence for special treatment. The other convincing argument submitted by the Scottish Commission is that impotence as a ground of nullity leads to unnecessary distinctions void of any meaning “from the view point of the viability of a marriage”. The Scottish Law Commission has therefore submitted that:

“[w]hy should it matter whether impotency was present at the time of the marriage, or supervened a week later? If the sexual side of a marriage has been unsatisfactory from the start, is any good purpose served by a careful consideration of whether a person was capable on one or two occasions of sufficiently complete intercourse for legal purposes or only of insufficiently complete intercourse for such purposes? Why should incapacity for sexual intercourse make a marriage voidable but not a deliberate refusal to attempt sexual intercourse? Why should a woman who marries an impotent man, not knowing of his impotency, be able to obtain a declarator of nullity but a woman who marries a sterile man, not knowing of his sterility, be unable to do so? In either case, if she accepts the position she does not need a legal remedy while if she cannot accept the position and the marriage breaks down irretrievably she has the remedy of divorce”.<sup>(178)</sup>

The Scottish Law Commission’s view is to be welcomed. One might argue, by way of conclusion, that neither the historical reasons behind impotence as a ground of nullity seem to be compelling, nor there is any adequate policy justification for preserving impotence and wilful refusal as grounds of nullity at the present time when divorce is universally recognised as a remedy for marriage breakdown. Since there is no

prohibition on the marriage of the impotent or unwilling, it is submitted that the retention of defects as grounds of nullity would be inconsistent with the well established principle that the grounds of nullity bear a necessary relation to the initial validity of marriage. Relying on the fact that impotence and wilful refusal are no longer grounds of nullity once the marriage has been consummated, there is no doubt that these defects cannot be considered as relating to the formation of marriage. Moreover, it is argued that the reality of the matter is that impotence and wilful refusal are ways out of a marriage which are a kin to divorce. It is therefore clear that impotence and wilful refusal should cease to be grounds of nullity, insofar as nullity cannot be based on grounds other than those constituting prohibitions at the time of the marriage ceremony.<sup>(179)</sup>

#### **D- Nullity on foreign grounds unknown to the law of the forum**

It has been so far assumed that when conflict of law issues arise the ground on which nullity is sought is one which in essence is known to the law of the *forum*. But, practice shows that is not usually the case simply because grounds of nullity differ markedly from one legal system to another. For instance, it has been already indicated that English, unlike Scottish, law recognises wilful refusal to consummate and pregnancy *per alium* as grounds of nullity. Moreover, one might argue that certain legal systems have grounds which are unknown to English and Scottish domestic laws, such as Sterility <sup>(180)</sup> and mistake as to attributes of the other spouse.<sup>(181)</sup> The question for consideration here is whether English and Scottish courts *qua lex fori* would annul a marriage on some ground quite unknown to English and Scottish domestic laws.

As regards English Law, there is a statutory recognition for the application of foreign law to any question affecting the validity of a marriage. Section 14(1) of the Matrimonial Causes Act 1973 provides clearly that where, apart from the Act, any

matter affecting the marriage validity would, under the English conflict rules, fall to be determined by foreign law, the provisions of sections 11 to 13 of the Act shall neither preclude the determination of the matter as aforesaid, nor require the application to the marriage of the ground set forth therein. It is undoubtedly clear that English courts will apply foreign law to nullity suits, and therefore will, subject to overriding effect of public policy, annul marriages on the ground of foreign rules as to invalidity.

So far as the judicial authorities are concerned, it has been already indicated that English and Scottish courts will annul a marriage on the ground of formal invalidity if the formalities of the *lex loci celebrationis* are not complied with, irrespective of whether the foreign ground is co-extensive with a similar English or Scottish ground.<sup>(182)</sup> It is equally clear that English and Scottish courts are prepared to annul a marriage on the ground of an incapacity laid down by the parties' antenuptial domiciliary laws, notwithstanding the marriage was solemnised in the *forum* and was essentially valid according to the domestic law of the *forum*.<sup>(183)</sup> For instance, in Sottomayor v. De Barros<sup>(184)</sup> a marriage between first cousins was declared void simply because the parties were within the prohibited degrees under their domiciliary law, irrespective of the marriage validity under the law of the *forum*. It is important to note that this decision has been explained on the footing that the relevant foreign incapacity is simply a variant of a defect known to English law, i.e. a more extensive list of prohibited degrees. Dr North has submitted that it ought not in principle to make any difference if the defect imposed by the relevant foreign law is wholly unknown to the *forum*. The learned writer therefore pointed out that:

“If the court is prepared to annul a marriage on the ground that the foreign law as to consanguinity has not been complied with, even though the marriage satisfies the domestic law, then this is in effect applying a ground unknown to the *lex fori*. It seems unduly pedantic to that the foreign law is applied because the prohibition on consanguinity is part of the *lex fori*, albeit with a different content”.<sup>(185)</sup>

It remains to consider whether English and Scottish courts will annul a marriage on a foreign ground, wholly unknown to English and Scottish domestic law, which renders the marriage voidable under the parties' domiciliary law. It is interesting to note that there is no reported case in which a marriage alleged to be voidable has been annulled on a ground unknown to English or Scottish domestic laws. Such authority as there is on Anglo-Scottish conflict of laws suggests that English and Scottish courts would refuse to annul a voidable marriage on grounds unknown to English and Scottish domestic laws, irrespective of the parties' domiciliary laws.<sup>(186)</sup> The main reason, it is argued, is that it would be unacceptable to public opinion if an English or a Scottish court would annul an English or a Scottish domiciliary's marriage, which is celebrated in England or Scotland, on a foreign ground which is quite unknown to the law of the *forum*. Moreover, to annul a voidable marriage on a foreign ground unknown to the *forum* is likely to produce greater disquiet than a case where the *forum* annul a marriage on the ground of foreign incapacity.<sup>(187)</sup> As regards Scottish law, one might argue that this view is the inevitable result of the rule that Scottish domestic law should continue to apply as the appropriate law to determine the substantive issues in actions of nullity of voidable marriages.<sup>(188)</sup>

The English and Scottish Law Commissions in their 1985 joint report have neither expressed any positive solution to the problem in question, nor specified the best way to achieve the view that a court in the United Kingdom should not be able to annul a marriage on grounds unknown to the *lex fori*. Nevertheless, the Law Commissions have pleaded for views as to whether a court in the United Kingdom should, or not, be able to annul a marriage on a ground unknown to the domestic law of the *forum*.<sup>(189)</sup> Moreover, the Scottish Law Commission has recently suggested that a marriage, which is initially valid according to the choice of law rules, cannot be annulled or declared null by a Scottish court on any ground other than incurable impotency. The Scots Law Commission justified its position by arguing that the present issue is very similar to the

question whether Scottish courts should grant divorces on grounds unknown to Scots domestic law.<sup>(190)</sup>

Such an automatic application of the *lex fori* is of doubtful merit. Since the Scottish courts are prepared to assume jurisdiction on the ground of domicile or habitual residence of either party, and prepared to apply foreign law to questions of formal validity and legal capacity, it is difficult to see what social or policy justifications could there be for adopting such a restrictive view on choice of law in cases of physical incapacity. One might argue that such a restrictive view, however, seems neither warranted on principle, nor to be in accord with the decisions of the courts in other matters of formal validity and legal capacity. Although it has been argued that issues of formal validity and legal capacity renders the marriage void, it is very hard to assert with certainty why it should make any difference in principle if the foreign defect renders the marriage voidable, for "there cannot, surely, be any magic in the word 'voidable'".<sup>(191)</sup> It could also be argued that to deny application for the relevant foreign on the sole basis that it is rather different than the law of the forum is unsupported by previous authority, reflects no discernible policy and is inconsistent with the traditional accepted choice of law rules in respect of the validity of marriage. There seem to be no fundamental difference in principle between impotence and wilful refusal since both defects lead to non-consummation of marriage, or between mistaken belief as to the wife's virginity and mistaken belief that she is not pregnant by another man which is ground for nullity in English domestic law. It has been submitted, by way of conclusion, that English and Scottish courts should be prepared fully to accept the principle that matters of essential validity of the marriage are determined by the law of domicile even if the foreign ground is unknown to the law of the forum. The general editor of Cheshire and North's private international law submitted that:

“it matters not whether the English court applies foreign grounds verbally similar to English grounds such as consanguinity or non-age, even though the substance of the rule be different, or a foreign ground which is a variant of the English ground, such as declaring a marriage voidable on the ground that at the time of the marriage another woman is pregnant by the husband, or a foreign ground substantially different from any under English law, such as the incapacity of a person of one religion to marry a member of another or annulment on the ground of a mistake as to the attributes of the other spouse”. (192)

One might therefore conclude that English and Scottish courts should be prepared fully to annul a marriage on a foreign ground which is quite unknown to the law of the forum, irrespective of whether it renders the marriage void or voidable. However, English and Scottish courts should not refuse to apply foreign grounds of invalidity, unless they are contrary to the public policy of the forum. The overriding effect of the *lex fori* public policy would achieve the same result, and thus the existence of the rule suggested by the Scottish Law commission is quite unnecessary.

### Notes Chapter Three

- 1- Anton, A.E., *Private International Law*, 1967, p. 294.
- 2- See, Thomson, J.M., *Family law in Scotland*, 1987, pp. 20, 35; Clive, & Wilson, *Husband and wife*, 1st ed., 1974, p. 142; Law Com.[N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.25.  
For Criticism as to the retrospective effect of the decree annulling a voidable marriage, see Scot. Law Com. [D.P. N° 85], March 1990, paras 3.21-3.22.
- 3- See, The Matrimonial causes Act 1937, Sec. 7 (1)(a); Nullity of Marriage Act 1971, Sec. 5 [re-enacted by Matrimonial Causes Act 1973, Sec. 16]
- 4- It is important to bear in mind that a similar distinction has been drawn, by Algerian and French laws, between absolute and relative nullity of marriage; See, Benmelha, Gh., *Élément du Droit Algerien De la Famille*, T.1, 1985, pp. 95-103; Mestre, J., *Mariage: Droit International Privé*, Fasc. 546-C, 1983, n° 27 *et seq.*; Ponsard, *Le Droit International Privé de la famille en France et en Allemagne*, 1954, n°. 43, 13.
- 5- De Reneville v. De Reneville [1948] P. 100, at p. 111; see also Administrator of Austrian Property v. Von Lorang 1926 S.C. 598, at 615.
- 6- Ross-Smith v. Ross-Smith [1963] A.C. 280, at p. 314.
- 7- This is apparently the position in French law and, probably, Algerian law, See Mestre, J., *op. cit.*, n°. 5 *et seq.*; Bishoff, J.M., *Mariage*, [1969] Rép. Dr. Int. 286, at p. 298, n°. 149; Benmelha, Gh., *op. & loc. cit.*
- 8- Sherwood v. Ray. (1837) 1 Moo. P.C. 353; Faremouth. v. Watson (1811) 1 Phillim. 355; Blair v. Blair (1748) Mor. 6293; Administrator of Austrian Property v. Von Lorang 1926 S.C. 593, at 616-17; Law Com.[N° 48], 1972, para. 50; Scot. Law Com. [N° 25], 1972, para. 15.
- 9- De Reneville v. De Reneville [1948] P. 100, at p. 111.
- 10- Administrator of Austrian Property v. Von Lorang, supra, at 616; See also F. v. F. 1945 S.C. 202, 206, 212.
- 11- See, supra note 9; and also Aldridge v. Aldridge 1954 S.C. 58, at p. 59. If the marriage is void, the wife does not acquire the husband domicile by operation of law, see White v. White [1937] P. 111; Salvesen v. Administrator of Austrian Property {1927} A.C. 641, at 658-60 [*per* Viscount Haldane].
- 12- See North, P.M., *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland*, 1977, p. 133-34.
- 13- Morris, J.H.C., *The Conflict of Laws*, 1971, pp. 162-66; [1970] 19 I.C.L.Q. 424-29. But see now, *Idem*, *The conflict of laws*, 3rd ed., 1984, where this view has been omitted.
- 14- *Ibid*, at p.165, As the necessity of a decree even if the marriage is void, see, supra note 7.
- 15- Corbett v. Corbett [1957] 1 W.L.R. 486, 490 (The case concerns mainly the recognition of foreign nullity decree), See also, supra note 12, at p. 137.
- 16- Morris, J.H.C., [1970] 19 I.C.L.Q. 424, at pp. 427-28.
- 17- Ross-Smith v. Ross-Smith [1963] A.C. 280.
- 18- Cheshire and North, *Private International Law*, 11th ed., 1987, p. 647; and see also North, P.M., supra note 12, at p. 138.
- 19- See, Pugh v. Pugh [1951] P. 482; Planiol, M.F. et Ripert, G., *Traité Pratique du Droit Civil*

- Français, 2nd ed., 1952, p. 247.
- 20- See North, *op. cit.*, p. 137. In this hypothetical example will be declared void in England even if the classification of the defect is decided by the relevant foreign law, since capacity under the *lex loci* is also required if the marriage is celebrated in England, see, *supra* chapter Two.
- 21- Corbett v. Corbett [1957] 1 W.L.R. 486; see also Cheshire and North, *op. cit.*, p. 647; Lysyk, K., [1965] 43 Can. Bar Rev. 107, at p. 121.
- 22- Cheshire and North, *op. & loc. cit.*; See also Clive, E.M., Husband and Wife, 2nd ed., 1982, pp. 157-58; North, P.M., *op. cit.*, 1977, p. 136; De Reneville v. De Reneville [1948] P. 100, at p. 114; Casey v. Casey [1949] P. 420, 429-30; Merker v. Merker [1963] P. 283, 297; Szechter v. Szechter [1971] P. 286, 294; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.50-5.53.
- 23- Cheshire and North, *Ibid*; and see also, Solomon v. Walters (1956) 3 D.L.R. (2d) 78, 80, where the *lex loci celebrationis* was applied to determine whether the formal validity by that law rendered the marriage void or voidable; Lysyk, K., [1965] 43 Can. Bar Rev. 107, 117; Lepre v. Lepre [1965] P. 52, in which there is also a suggestion for referring the preliminary classification to the foreign law.
- 24- [1948] P. 100.
- 25- *Ibid.*, at p. 114.
- 26- See, Morris, J.H.C., [1970] 19 I.C.L.Q. 424.
- 27- Cheshire and North, *op. cit.*, p. 648; see also, North, P.M., *supra* note 12, at p. 135; Clive, E.M., *op. cit.*, p. 158; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.54.
- 28- It is submitted that the parties' common domicile, and even the domicile of either of them, have never been treated as relevant to the jurisdiction of the ecclesiastical courts that mainly based on the parties residence within the particular diocese of the Bishop in whose courts the proceedings were instituted. However, the pre-eminence of domicile in question of status did not clearly emerge until well after 1857. See, Graveson, R.H., Conflict of laws, 1974, p. 327-28.
- 29- Salvesen (Von Lorang) v. Administrator of Austrian Property [1927] P. 641 [H.L. (Sc.)] ; See also Szechter v. Szechter [1971] P. 286; De Reneville v. De Reneville [1948] P. 100; Holden v. Holden [1968] N.I. 7; De Massa v. De Massa [1939] 2 All E.R. 150 n; Galene v. Galene [1939] P. 237; Anton, A.E., *op. cit.*, 1967, p. 295; Bater v. Bater [1906] P. 209, 220 where Gorell Barnes, P., said *obiter*, "It may be also, I think, that the court of the country in which, though the marriage was not celebrated in it, the parties are domiciled at the time when the suit in question is raised between them, has jurisdiction. There is an authority for that proposition in the case of Ruding v. Smith". (1821) 2 Hag. Cons. 371.
- 30- *Ibid*, at p. 670. It is interesting to note that the Lord Philimore's dictum has been interpreted as implying that the court of domicile has exclusive jurisdiction. For argument against and for the conclusive jurisdiction of the court of domicile, see, Morris, J.H.C., Conflict of laws, 1971, pp. 157-58, and see also ALdridge v. Aldridge 1954 S.C. 58, 60 where it has been stated that "There can be little objection to increasing the grounds of jurisdiction for entertaining an action for nullity, provided the court which accepts the jurisdiction is careful to see that the proper law is applied"; Ramsay-Fairfax v. Ramsay-Fairfax [1956] P. 115, 125; Walton, Husband and wife,

- 1951, p. 403.
- 31- See, A.B. v. C.B. (1884) 11 R. 1060, 12 R. (H.L.) 36; A.B. v. C.D. [1900] 38 S.L.R. 559; Anton, *op. cit.*, at p. 295.
- 32- See De Reneville v. De Reneville [1948] P. 100, 109; Cheshire and North, *op. cit.*, 1987, p. 623; Anton, A.E., *supra*, at p. 296.
- 33- Balshaw v. Kelly 1966 S.L.T. 297, De Reneville v. De Reneville *supra*, at p. 113.
- 34- White v. White [1937] P. 111 {as explained in De Reneville v. De Reneville [1948] P.100, at 113, 117 (C.A.)}; and see also Mehta v. Mehta [1945] 2 All E.R. 690; Balshaw v. Balshaw 1967 S.C. 63, 73, 84; Martin v. Buret 1938 S.L.T. 479; Re Capon [1965] 49 D.L.R. (2d) 675; Wolfenden v. Wolfenden [1946] P. 61; Way v. Way [1950] P. 71; Kenward v. Kenward [1951] P. 124; Hussein v. Hussein [1938] P. 159.
- 35- Aldridge v. Aldridge 1954 S.C. 58; see also Balshaw v. Balshaw 1967 S.C. 63, 73, 84; Johnston v. cooke [1898] 2 I.R. 130; A.B. v. C.D. 1957 S.C. 415, 422-23 [*Obiter dictum per Lord Guthrie*]; Ross-Smith v. Ross-Smith [1963] A.C. 280, at p. 323, where Lord Morris said *obiter*: "If a respondent is domiciled or resident in England then there may be a decree of nullity either if the marriage is void or if it is voidable".
- 36- See Law Com. [N° 48], 1972, para. 52, note 75.
- 37- See Inverclyde v. Inverclyde [1931] P. 29, where it was held that the exclusive jurisdiction lay with the court of the parties' domicile; *Contra.* Ramsay-Fairfax v. Ramsay-Fairfax [1956] P. 115.
- 38- Matrimonial Causes Act 1937, s.13, last re-enacted in the Matrimonial Causes Act 1973, s.46 (1)(a), now repealed by the Domicile and Matrimonial Proceedings Act 1973, s.17(2), There is no such a rule in Scotland as far as nullity is concerned, but it has been established judicially in the case of divorce, see North, P.M., *op. cit.*, 1977, pp. 26-27.
- 39- Scot. Law Com. [N° 25], 1972, para. 57, and see also paras.49(d), 53-56.
- 40- Gray v. Formosa [1963] P. 259, 267; and see Adams v. Adams [1971] P. 188, 216.
- 41- See Law Com. [N° 48], 1972, para. 54; Scot Law Com., *supra* note 39; Seventh Report of of the Private International Law Committee, [1963], Cmnd 1955, para. 34(7); Cheshire and North, *op. cit.*, 1987, p. 624, North, P.M., *op. cit.*, 1977, pp. 26 -27, 60.
- 42- See references, *supra* notes 39-41.
- 43- Law Com. [N° 28], paras 40, 44; Scot. Law Com. [N° 25], paras. 53-57.
- 44- The Domicile and Matrimonial Proceedings Act 1973, s. 1.
- 45- *Ibid*, S.5(3) [for England], s.7(3) [for Scotland].
- 46- See Cheshire and North, *op. cit.*, 1987, p. 624; Dicey and Morris, *The Conflict of Laws*, 11th ed., 1987, pp. 724-25; Law Com. [N° 48], 1972, paras. 48, 62, 66; Scot. Law Com. [N° 25], 1972, para. 63
- 47- Algerian Civil Proceedings Act 1966, [N° 66/154], article 8 provides: "... Ansi qu'en toutes matières pour lesquelles une compétence territorial particulière n'est pas prévue, la juridiction compétente est celle du domicile du défendeur, ou si le défendeur n'a pas de domicile connu, celle de sa résidence..."; see also Issaâd, M., *Droit International Privé*, 2nd ed., 1986, pp.19-24.
- 48- Issaâd, M., *ibid*, at p. 20; see also Trib. Constantine, 20 Avril 1972, n° 94/71 [Unpublished].

- 49- Inveclyde v. Inveclyde [1931] P. 29; for critical comments see, Cheshire, G.C., P.I.L., 5th ed., 1957, pp 344-47.
- 50- Ramsay-Fairfax v. Ramsay-Fairfax [1956] P.115; and see also, Szechter v. Szechter [1971] P. 286; Sangha v. Mander [1985] 47 RFL (2d) 212; Mason v. Mason [1944] N.I. 134; Cheshire and North, *op. cit.*, 1987, p. 623; North, P.M., *op. cit.*, 1977, p. 60. The question of whether the residence of both parties was left open in De Reneville v. De Reneville [1948] P. 100 (C.A.), But see at p. 116 (*Per* Lord Greene, M.R.); and in Casey v. Casey [1949] P. 420.
- 51- *Ibid*, at p. 131 (*per* Denning L.J.); See Matrimonial Causes Act 1857, s.22 re-enacted in the Supreme Court of Judicature (Consolidation) Act 1925, s.32; It is worth noting that the same reason was relied on in Easterbrook v. Easterbrook [1944] P. 10; and in Hutter v. Hutter [1944] P. 95, both of which cited with approval in Ramsay-Fairfax case.
- 52- *Ibid*, at p. 133 (*per* Denning L.J.)
- 53- *Ibid*, at p. 125. (*per* Willmer J.)
- 54- Ross-Smith v. Ross-Smith [1963] A.C. 280, at p. 317 (*Obiter dicta per* Lord Morris of Borth-y-Gest)
- 55- *Supra*, note 50, at 132-33; see also Hutter v. Hutter [1944] P. 95, 99 where Pilcher J., pointed out that "It is quite clear that the jurisdiction of each ecclesiastical court to entertain any suit depended in the first place on the residence of the party against whom relief was sought within the territorial jurisdiction of the particular ecclesiastical court before which he was cited to appear".
- 56- Magnier v. Magnier [1968] 112 Sol. Jo. 233; Russ v. Russ (N° 2) [1962] 106 Sol. Jo. 632; Cheshire and North, *op. cit.*, 1987, p. 623; Law Com. [N° 48], para. 52; Westlake, Private International law, 4th ed., stated clearly that "The jurisdiction of the English court in suits for a declaration of nullity of marriage... is sufficiently founded by the defendant's being resident in England, not on a visit or as a traveller, and not having taken up that residence for the purposes of the suit".
- 57- *Supra*, note 54, at p. 303 [*per* Lord Reid], 323 [*per* Lord Morris], 325 [*per* Lord Hodson]; Garthwaite v. Garthwaite [1964] P. 356, 390 [*per* Diplock L.J.].
- 58- Roberts v. Brennan [1902] P. 143 as explained in Graham v. Graham [1923] P. 37. This decision approved in Ogden v. Ogden [1908] P. 46, 80 [*per* Barnes, P.]; Mitford v. Mitford [1923] P. 130 [*per* Duke, P.].
- 59- Robert v. Robert [1947] P.164.
- 60- *Supra*, note 50, at pp. 116-118; Kem v. Kem [1972] 1 W.L.R. 1224; Addison v. Addison [1955] N.I. 1; Shaw v. Shaw [1945] 3 W.W.R. 577 (B.C.C.A.); Gwyn v. Mellan [1979] 6 W.W.R. 385 (B.C.C.A.).
- 61- *Ibid*, and see Garthwaite v. Garthwaite [1964] P. 356, 390-91; Cheshire and North, *op. & loc. cit.*; *Contra*. The Royal Commission on Marriage and Divorce, [1956] Cmd 9678/
- 62- *Ibid*, at p. 118; and see also, Lewis, P.C.S., 11 I.C.L.Q. 665.
- 63- Anton, A.E., Private International Law, 1967, pp. 297-98; and see also Davis, B., Jurisdiction in Actions of Declarator of Nullity of Marriage, [1968] S.L.T. (News) 49, at 51-52; Walton, Husband and wife, 3rd ed., p.408; North, P.M., *op. cit.*, 1977, p. 60.

- 64- Law Reform (Miscellaneous Provisions) Act, s.1 (for England), and s.2 (for Scotland), re-enacted in the Matrimonial Causes Act 1973, s. 46(1)(a), now repealed by the Domicile and Matrimonial Proceedings Act 1973, s. 17(2).
- 65- See, Morris, *The conflict of laws*, 1971, pp.132-33; Schmitthoff, *The English Conflict of Laws*, 3rd ed., 1954, p.341; Anton, *op. cit.*, 1967, p. 318; Graveson, *The conflict of Laws*, 6th ed., 1969, p. 302.
- 66- See, Law Com. [N° 48], para.16; Scot. Law Com. {N° 25}, para. 66; Anton, A.E., *op. cit.*, p. 318; Morris, *op. cit.*, 1971, pp.132-33; 3rd ed., 1984, p. 189.
- 67- Law Com. [N° 48], paras. 38-39; Law Com. [N° 28], paras. 56, 58; Scot. Law Com. {N° 25}, para. 67.
- 68- *Ibid.*, para. 17; Scot. Law Com., *supra*, para. 72.
- 69- The Domicile and Matrimonial Proceedings Act 1973, s.5(3)(b) [England], s.7(3)(b) [Scotland].
- 70- Cheshire and North, *op. cit.*, 1987, p. 625; North, P.M., *op. cit.*, 1977, pp. 30, 61, Morris, J.H.C., *op. cit.*, 1984, p.190; Clive, E.M., *op. cit.*, 1982, p. 160.
- 71- *Supra*, note 69.
- 72- Cf. *Navas v. Navas* [1970] P. 159.
- 73- Clive, E.M., husband and wife, 1982, p. 640; see also references, *supra* note 70.
- 74- Law Com. [N° 48], 1972, paras. 41, 42; As to the International acceptance of that concept see also Scot. Law Com. [N° 25], 1972, para. 72; Hague Convention on Recognition of Divorces and Legal Separations 1968.
- 75- *Kapur v. Kapur* [1984] FLR 920 at 926; see also *Barnet London Borough council v. Shah* [1983] 2 A.C. 309.
- 76- Scot. Law Com. [N° 25], para. 71.
- 77- *Cruse v. Chittum* [1974] 2 All E.R. 940; and See *Broit v. Broit* 1972 S.L.T. (Notes) 32; *Hack v. Hack* [1976] 6 Fam. Law 177.
- 78- See Hall, C., [1975] 24 I.C.L.Q. 1, 11-12; Blom, [1973] 22 I.C.L.Q. 109, 135; Clive, E.M., *op. cit.*, 1982, p. 641.
- 79- See Law Com. [N° 48], para. 42; Scot. Law Com. [N° 25], paras. 72, 73, 83; and also Council of Europe, Committee on legal co-operation, fundamental legal concepts [ C.C.J. (70) 37]; Resolution 72(1) of the Committee of Ministers of the Council of Europe, 18th January 1972.
- 80- *Ibid.* at n.55; and see also, Hall, C., [1975] 24 I.C.L.Q. 1, 22-24; Hague Conference on Private International Law, [1970] 1 Actes et Documents de la Onzième Session, para. 26 at p. 214; *contra.* Blom, [1973] 22 I.C.L.Q. 109, 135.
- 81- See North, P.M., *op. cit.*, 1977, p. 15; De Winter, [1969] III R.C.A.D.I. 357, 428; Cavers, [1972] 21 Am. Univ. L. Rev. 475, 487-88; Law Com. [N° 34]; Scot. Law Com.[N° 16], 1970, p. 15; Council of Europe Resolution 72(1), Rule 11.
- 82- Law Com.[N° 48], para. 42; Scot. Law Com. [N° 25], para. 68.
- 83- *Ibid.*, Law Com. para. 43, Scot. Law Com. para.76, Domicile and Matrimonial Proceedings Act 1973, s.5(3)(b), 7(3)(b).
- 84- Law Com., paras. 44-46; Scot. Law Com., paras. 77-79; North, *op. cit.*, 1977, pp. 30, 31.
- 85- See, *supra* note 47.
- 86- *Ibid.*

- 87- Ibid.
- 88- See, Anton, A.E., *op. cit.*, 1967, p. 298; Walton, Husband and Wife, 3rd ed., pp. 405-07; C.E.C.C., Nullity of Marriage, [1961] S.L.T. (News) 93; Morris J.H.C., Conflict of Laws, 1971, p. 161; Jackson, Formation and Annulment of Marriage, 1951, 288ff; Westlake, Private International Law, 7th ed., p. 95.
- 89- Simonin v. Mallac (1860) 2 Sw & Tr. 67, 75; See also Sottomayor v. De Barros [N° 1] (1877) 3 P.D. 1; Cooper v. Grane (1891) P. 369; Linke v. Van Aerde (1894) 10 T.L.R. 426; Ogden v. Ogden [1908] P.46; Valier v. Valier [1925] 133 L.T. 830; Hussein v. Hussein [1938] P. 159; Srini Vasan v. Srini Vasan [1946] P. 67; Padolechia v. Padolechia [1968] P. 314.
- 90- Ross-Smith v. Ross-Smith [1963] A.C. 280, 295, 297, 303-04 [per Lord Reid], 307, 312 [per Lord Cohen], 319-20, 322 [per Lord Morris], 323-331 [per Lord Hudson], 346 [per Lord Guest].
- 91- Padolechia v. Padolechia [1968] P. 314, 334.
- 92- Ibid; and see Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395, 419.
- 93- See, Anton, A.E., *op. cit.*, 1967, p. 298; Scot. Law Com. [N° 25], paras. 13, 41-42; Davis, B., [1968] S.L.T. (News) 49, 50; C.E.C.C., [1961] S.L.T. 93; Walton; Husband and wife, 3rd ed., p. 407; Miller v. Deakin 1912 1 S.L.T. 253; Lendrum v. Chakravarti 1929 S.L.T. 96; MacDougall v. Chitnavis 1937 S.C. 390; Prawdzcic-Lazarska v. Prawdzcic-Lazarski 1954 S.C. 98; AB v. CD 1957 S.C. 415.
- 94- 1926 S.C. 598, at p. 620.
- 95- Murison v. Murison 1923 S.C. 624 at p. 647.
- 96- Casey v. Casey [1949] P. 420; And see, Cheshire and North, *op. cit.*, 1987, p. 623; North, P.M., *op. cit.*, 1977, p. 60; Morris, J.H.C., *op. cit.*, 1971, p.161, Walton, *op. cit.*, pp. 405-07; Matheson, J.M. & Webb, P.R.H., [1962] Jur. Rev. 21, 28; *Contra. Hill v. Hill* [1960] P. 130; Addison v. Addison [1955] N.I. 1.
- 97- Ibid, at p. 431-32.
- 98- Ross-Smith v. Ross-Smith [1963] A.C. 280.
- 99- Ibid, at pp. 296-303 [per Lord Reid], 314-19 [per Lord Morris].
- 100- Ibid, at p. 295 [per Lord Reid].
- 101- Ibid, at p. 322.
- 102- Ibid.
- 103- Ibid, at p. 306 [per lord Reid].
- 104- Law Com. [N° 48], 1972, para. 60; Scot. Law Com. [N° 25], 1972, paras. 41-42; and see also, Anton, A.E., *op. cit.*, 1967, p. 298; Law Com. [N° 35], paras. 118-120; De Reneville v. De Reneville [1948] P. 100, 122 [per Bucknill L.J.]
- 105- The Domicile and Matrimonial Proceedings Act 1973, sections 5 & 7.
- 106- Ibid, s. 5(3)(c) [for England], s. 7(3)(c) [ for Scotland]; and see Cheshire and North, *op. cit.*, 1987, p. 626; North, P.M., *op. cit.*, 1977, pp. 61-62, 133-34., Law Com.[N° 48], 1972, para. 61; Scot. Law Com. [N° 25], 1972, paras. 15, 62-63.
- 107- See references, Ibid.
- 108- See, Niboyet, *Traité de Droit International Privé Français*, vol. 6, s. 1731; Batiffol & Lagarde, *Droit International Privé*, 1983, vol. 2, pp. 481-84; Issad, M., *Droit International Privé*, vol. 2,

1986, pp. 30-36; Mayer, P., *Droit International Privé, Précis Domat*, 1977, n° 47.

- 109-** Ibid.
- 110-** Issad, M., *op. cit.*, p. 34; and see Algerian Civil Proceedings Code 1966, arts. 10 & 11. Article 10 provides that: "Tout étranger, même non résident en Algérie, pourra être cité devant les juridictions algériennes, pour l'exécution des obligations par lui contractées en Algérie avec un Algérien. Il pourra être traduit devant les juridictions algériennes pour les obligations contractées en pays étranger envers des Algériens." Article 11 states that: "Tout algérien pourra être traduit devant les juridictions algériennes pour des obligations contractées en pays étranger, même avec un étranger."
- 111-** Cour Suprême, Chambre du statut personnel, arrêt du 7 Juin 1976, pourvoi n° 13/531 (Unpublished), and see also Issaad, M., *op. & loc. cit.*
- 112-** Issaad, M., *op. cit.*, p. 34; and see Batiffol & Lagarde, *op. cit.*, p. 494.
- 113-** The Matrimonial Causes Act 1973, S.14(1); and see Marriage (Scotland) Act 1977, S.2(3)(a), a provision concerning only the prohibited degrees of relationships.
- 114-** See, *supra* Chapter 1, section two; See also Dicey and Morris, *op. cit.*, 1987, vol. 2, p. 727; Cheshire and North, *op. cit.*, 1987, p. 637; Morris J.H.C., *op. cit.*, 1984, p. 209; North P.M., *op. cit.*, 1977, pp. 118-25; Law Com. [N°89] & Scots Law Com. [N°64], 1985, para. 5.1; Scot. Law Com. [N°25], 1972, para. 28.
- 115-** See, *supra*, chapter two, section three. See also references, *supra* note 114.
- 116-** It is interesting to note that the other physical grounds laid down in the Matrimonial Causes Act 1973, section 12, are not to be examined here insofar as they are regarded as matters relating to the reality of consent. These are: Mental disorder, venereal diseases and pregnancy per alium. See Cheshire and North, *op. cit.*, 1987, p. 641, North, P.M., *op. cit.*, 1977, pp. 125-26.
- 117-** Matrimonial Causes Act 1973, S. 12(a) & (b). Wilful refusal became a statutory ground of nullity since 1937, See Matrimonial Causes Act 1937, S. 12(b).
- 118-** See Clive, E.M., *op. cit.*, 1982, p. 154; Law Com. [N°89] & Scot. Law Com. [N°64], 1985, para. 5.25; Scot. Law Com. [D.P. N°85], 1990, para. 3.20.
- 119-** See Dicey and Morris, *op. cit.*, 1987, pp. 726-27, Morris J.H.C., *op. cit.*, 1984, p. 171; Jaffey, A.J.E., *op. cit.*, 1988, p. 42.
- 120-** See, Cheshire and North, *op. cit.*, 1987, p. 642; North, P.M., *op. cit.*, 1977, pp. 126-27, Dicey and Morris, *op. cit.*, 1987, pp. 726-29; Garner, Jurisdiction and Choice of law in nullity suits, [1947] 63 L.Q.R. 486, 489-90; Stone, O.M., Jurisdiction to annul a voidable marriage, [1955] 18 M.L.R. 604, 606-07; Webb, P.R.H., Nullity jurisdiction, [1961] 10 I.C.L.Q. 358, 265, *Idem*, Some thoughts on the place of English law as the *lex fori* in English private international law, [1961] 10 I.C.L.Q. 818, 831; Bishop, W.D., Choice of law for impotence and wilful refusal, [1978] 41 M.L.R. 512, 513.
- 121-** Easterbrook v. Easterbrook [1944] P. 10; and see, Hutter v. Hutter [1944] P. 95; Hamilton, [1948] 26 Can. Bar Rev., 875, 879.
- 122-** See Falconbridge, *Essays on the Conflict of Laws*, 2nd. ed., 1954, p. 697.
- 123-** Magnier v. Magnier [1968] 112 S.J. 233; For comment See, Lipstein, [1973] *Clunet* 415.
- 124-** According to English law the wife could not complain of her own refusal. The husband could not complain that the marriage was voidable, for wilful refusal was not a ground of annulment

- according to the law of the Republic of Ireland.
- 125- See, Falconbridge, *op. cit.*, 1954, pp. 695-701; F.H., [1944] 60 L.Q.R. 115, 116; Bishop, W.D., [1978] 41 M.L.R. 512, 513.
- 126- Clive, E.M., *op. cit.*, 1982, pp. 154-55; Anton, A.E., *op. cit.*, pp. 292, 294-99, 300; Law Com. [N° 89] & Scots. Law Com. [N° 64], 1985, para. 5.27; and see the Law Reform (Miscellaneous Provisions) Act 1949, S. 2(4).
- 127- This explanation is mainly acceptable in divorce actions, in so far as the governing law is the existing law at the time of the proceedings.
- 128- Clive, E.M., *Ibid*; and see Scots. Law Com. [N° 25], 1972, paras. 24-30.
- 129- Scots. Law Com. [ Discussion Paper N° 85], Family Law: Preconsolidation Reforms, March 1990, p. 121, note 2.
- 130- Clive, E.M., *op. cit.*, 1992, p. 141.
- 131- *Ibid*, p. 142.
- 132- See, Cheshire and North, *op. cit.*, 1992, p. 649; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.31.
- 133- See, Bishop, W.D., [1978] 41 M.L.R. 512, 513; Cheshire and North, *op. cit.*, 1992, pp. 648-49.
- 134- Cheshire and North, *op. cit.*, 1992, p. 649; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.30; Clive, E.M., *op. cit.*, 1992, pp. 141-42.
- 135- Ponticelli v. Ponticelli [1958] P. 204, at 215 [*emphasis added*]. In line with this view, Lord Reid stated in Ross Smith v. Ross Smith [1963] A.C. 280, 306 that "Suppose a case where the law of the parties' domicile gives no relief on this ground [i.e. wilful refusal]. It seems to quite contrary to principle that the wife should be able to come here and seek relief on that ground".
- 136- Robert v. Robert [1947] P. 164, [1947] 2 All E.R. 22; See Kennedy, Case note, [1947] 25 Can. Bar Rev. 1012.
- 137- *Ibid*, at 167-68; *Cf. Way v. Way* [1950] P. 71 at 80 {English law was applied to nullify a union celebrated in Russia}; Ponticelli v. Ponticelli [1958] P. 204 {a union celebrated in Italy}.
- 138- See Morris J.H.C., *The Conflict of Laws*, 3rd ed., 1984, p. 171 note 53; & p. 174; and see also Garner, *Jurisdiction and the choice of law in nullity Suits*, [1947] 63 L.Q.R. 486, 489-90
- 139- Sottomayor v. De Barros (1877) 3 P.D.1.
- 140- Robert v. Robert [1947] P. 164, at p. 168. It is interesting to note that Robert v. Robert was overruled in De Reneville v. De Reneville [1948] P. 100, 118 (C.A.) as far as the matter of jurisdiction is concerned.
- 141- Addison v. Addison [1955] N.I. 1; For comment see Webb, *The Twilight of the doctrine of Inverclyde v. Inverclyde*, [1955] 4 I.C.L.Q 557-63.
- 142- *Ibid*, at p. 30.
- 143- Bishop, W.D., [1978] 41 M.L.R. 512 at pp. 515-16; See also Cheshire and North, *op. cit.*, 1992, p. 649; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.29; Palsson, *L. Marriage in Comparative Conflict of Laws*, 1981, p. 311; Ponticelli v. Ponticelli [1958] P. 204, at p. 214 where Sachs J. stated that: "Wilful refusal to consummate a marriage, clearly, cannot be said to fall within the categories of form and ceremony...".

- 144- Ponticelli v. Ponticelli [1958] P. 204
- 145- *Ibid*, at 215-16.
- 146- *Ibid*, at 215.
- 147- Domicile and Matrimonial Proceedings Act 1973, Section 1(1) provides that: "Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile". See also North, P.M., *Private International law of Matrimonial Causes...*, 1977, p. 128; Jaffey A.J.E., [1978] 41 M.L.R. 38 at p. 49, *Idem*, *Introduction to The Conflict of Laws*, 1988, pp. 42-43; Collier J.G., *Conflict of Laws*, 1988, p. 273, Cheshire and North, *op. cit.*, 1992, p. 650.
- 148- Matrimonial Causes Act 1973, Section 12 (b).
- 149- North, P.M., *op. cit.*, 1977, pp. 128-29; Cheshire and North, *op. & loc. cit.*, Anton A.E., *op. cit.*, 1992, p. 441; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.34.
- 150- See references, *supra*, footnote 149.
- 151- Ramsay-Faifax v. Ramsay-Faifax [1956] P. 115, 133, a case to which Sachs J. referred to in Ponticelli v. Ponticelli [1958] P. 204, at 215.
- 152- Palsson, L. *Marriage in Comparative Conflict of Laws*, 1981, pp. 312-13.
- 153- Jaffey, A.J.E., [1982] Ox.J.L.S. 368 at 383.
- 154- Cheshire and North, *op. cit.*, 1992, p. 651; Palsson, L., *op. cit.*, 1981, p. 313; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.37; Anton A.E., *op. cit.*, 1992, p. 442; Sangha v. Mander (1985) 47 R.F.L. (2d) 212, where the intended matrimonial domicile of the parties was also considered.
- 155- Bishop, W.D., *Choice of law for impotence and Wilful refusal*, [1978] 41 M.L.R. 512, at 517.
- 156- Bishop, W.D., [1978] 41 M.L.R. 512, at pp. 519-22; Jaffey, A.J.E., [1978] 41 M.L.R. 38, at pp. 47-9; *Idem*, *Introduction to the conflict of laws*, 1988, pp. 42-3.
- 157- Cheshire and North, *op. cit.*, 1992, p. 651; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.38
- 158- Palsson, L., *op. cit.*, (1981), pp. 313-15; See also Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.36 & 5.39.
- 159- Cheshire and North, *op. cit.*, (1992), p. 651; Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.39
- 160- Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.41; see also Cheshire and North, *op. cit.*, (1992), pp. 651-52; Dicey and Morris, *op. cit.*, 4th cumulative suppl., 1991, p. 89.
- 161- Bishop, W.D., [1978] 41 M.L.R. 512, at p. 524.
- 162- *Ibid*.
- 163- Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, para. 5.42.
- 164- Law Com. [N° 89] & Scot. Law Com. [N° 64], 1985, paras. 5.25-5.42.
- 165- Inverclyde v. Inverclyde [1931] P. 29, at p. 41; See also De Reneville v. De Reneville [1948] P. 100, where Lord Green said that it was right to look behind the form and regard the substance of the ground of nullity, as Bateson J. had done in Inverclyde v. Inverclyde. Buknill L.J. clearly

approved of Bateson J.'s equation of the suit for nullity on the ground of impotence with dissolution suits.

- 166- Salveson v. Administrator of Austrian Property 1926 S.C. 598, at p. 616.
- 167- Turner v. Turner (1888) 13 P.D. 37, 40; Inverclyde v. Inverclyde [1931] P. 29, 42.
- 168- See Law Com. [N° 33], Family Law: Report on Nullity of Marriage, 1970, para. 23.
- 169- Morris, J.H.C., The Conflict of Laws, 4th edition, 1993, pp. 165-66.
- 170- Law com. [N° 33], para. 24 (a).
- 171- Clive, E.M., Husband and Wife, 3rd ed., 1992, pp. 141-42, See also Cretney S.M., & Masson, J.M., Principles of Family Law, 5th ed., 1990, p. 72.
- 172- Law com. [N° 33], para. 24 (b).
- 173- Cretney S.M., & Masson, J.M., Principles of Family Law, 5th ed., 1990, p. 73.
- 174- Law com. [N° 33], para. 24 (c).
- 175- Cretney S.M., & Masson, J.M., *Op.Cit. & Loc. Cit.*
- 176- Law com. [N° 33], para. 26 (b).
- 177- Scots Law Com. [N° 85], Family Law- Pre-consolidation reforms, March 1990, para. 3.25.
- 178- Ibid.
- 179- See Brown v. Brown (1828) 1 Hag. Ecc. 523, 524; Napier v. Napier [1915] P. 184, 192-93
- 180- See, Italian Civil Code, Article 123, para.2
- 181- See Mitford v. Mitford [1923] P. 130 [German Law]
- 182- See, Berthiaume v. Dastous [1930] A.C. 79; Kenward v. Kenward [1951] P. 124; Johnstone v. Godet (1813) Fergusson's Reports 8.
- 183- See, Sottomayor v. De Barrose (1877) 3 P.D. 1; Lendrum v. Chakravarti 1929 S.L.T. 96.
- 184- Ibid.
- 185- North, P.M., The Private International Law of Matrimonial Causes in The British Isles And The Republic of Ireland, 1977, p.130; Clive, E.M., Husband And Wife, 3rd ed., 1992, p. 140.
- 186- See, Clive, E.M., The Law of Husband And Wife in Scotland, 3rd ed., 1992, p. 140, 143; McClean, J.D., Morris: The Conflict of Laws, 4th ed., 1993, p. 186; Dicey and Morris, The Conflict of Laws, 12th ed., p. 725 where Vervaeke v. Smith [1983] 1 A.C. 145 is interpreted to that extent; Scots Law Com. [N° 85], Family Law- Pre-consolidation reforms, March 1990, para. 9.13.
- 187- See, Law Com. [N° 89] & Scot. Law Com. [N° 64], Choice of Law Rules in Marriage, 1985, para. 5.47.
- 188- See, Scots Law Comm. [N° 25], Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status, 1972, paras. 24-30; Clive, E.M., *op.cit.*, 1992, p. 141.
- 189- Law Com. [N° 89] & Scot. Law Com. [N° 64], Choice of Law Rules in Marriage, 1985, paras. 5.44-5.49.
- 190- Scots Law Com. [N° 85], Family Law- Pre-consolidation reforms, March 1990, para. 9.13. It has been suggested that reference to impotence should be omitted if it were abolished as a ground on which a marriage is voidable.
- 191- See, Morris, J.H.C., The Conflict of Laws, 1971, p. 167.
- 192- North, P.M. & Fawcett, J.J., Cheshire And North's Private International Law, 12th ed., 1992, p. 652-53.

## GENERAL CONCLUSION

In the doctrine and practice of private international law the story of choice of law rules for marriage has attained prominence and remains one of the most debated subject; its very reputation as an arcane field accounts for the fascination it has exerted on lawyers, scholars as well as the courts. Indeed, the rules relative to the conclusion, the requirements and the nullity of marriage in different legal systems are extremely varied, for they are so closely connected with morality, religion and the fundamental principles prevailing in each society that their application is often regarded as a matter of public policy. It follows that the present conflict of law problems concerned with marriage are mainly caused by the interrelation between different social, religious and legal cultures. Without any value judgement it can hardly be admitted as a principle that European family laws and Islamic family regulations are equivalent and therefore interchangeable.

However, it is not surprising that in spite of all the valiant intellectual efforts lavished on the subject, and the voluminous literature that has been built up over the years, the choice of law rules for marriage remain mired in mystery and confusion. One reason for this state of affairs is the surfeit of new theories that instead of shedding light, obscure the discipline, for their advocates failed fully to examine the implication of such new suggestions and their impact on those who have, outside the court, to apply the law. The very proliferation of ideas based on the policy of *favor matrimonii* distracts attention from the question of choice of law rules to govern the validity of a marriage that is about to be celebrated. The discussion of conflict of law problems of marriage in England and Scotland seems to provide a good example, inasmuch as it is exclusively concerned with judicial decisions which usually involve the validity or the nullity of a marriage already celebrated rather than problems arising at the time when the union is formed. But conflict problems of marriage, whether involving form or substance, may

in principle arise in different situations: on the one hand, at the stage of the formation of a marriage; on the other when a marriage has already been entered into and its validity is being examined *ex post*. However, choice of law rules for marriage must have a twofold function. In the first place, they should serve primarily as directives for the civil or religious officials lending their cooperation to the performance of the marriage. Secondly, they should contain an indirect regulations, laying down the choice of law which must have been observed when the marriage was celebrated in order for it to be held valid by a court of the *forum* which may have to decide the issue of validity. In any event, a conflict approach to the choice of law problems of marriage, which might claim universal acceptability in the subject matter, must offer choice of law rules by virtue of which the registrar may be able to decide the validity or invalidity of a marriage at the time of the ceremony. Therefore, there must be a great deal of merit in choice of law rules which, while retaining a degree of flexibility, may provide a solution without necessitating resort to courts.

It is generally agreed, both in Common and Civil law countries, that there is no choice of law rule more firmly established than the one which attributes the determination of formal validity of marriage to the *lex loci celebrationis*, the law of the place where the ceremony takes place. A marriage celebrated in accordance with the form prescribed, or one of the forms permitted, by the local law of the country of celebration, or complying at least with the mandatory formal requirements of that law, will always be recognised as formally valid almost everywhere. This is because the recognition of such a marriage as valid under the parties' personal laws and in third countries will normally be ensured as a result of the wide acceptance of the *locus regit actum*.

It is evident that the submission of the formal validity of marriage to the *lex loci celebrationis* reflects the importance that countries attach, as an incident of their sovereignty, to regulating just how and by whom marriages may be solemnised within

their territories. It is true that the country of the place of celebration, though it may be a transient place of resort for the would-be spouses, has an interest in prescribing the formalities which must be observed in order to bring about the issue of a marriage licence and the registration of a marriage for purpose of proof. Furthermore, the application of the *lex loci celebrationis* to determine matters relating to formalities of marriage is clearly consistent with the *lex magistratus* principle by virtue of which public authorities in a given country must decide their competence to celebrate marriages on the ground of their domestic law and proceed to do so in accordance with formalities required under the same law. It is therefore apparent that marriage officials in the country of celebration cannot reasonably be expected to celebrate marriages in accordance with the law of other countries.

Indeed, the *lex loci celebrationis* appears to be the most convenient and appropriate law to govern the formal validity of marriage not only because it protect the public interest of the country of celebration, but also because it eliminates the vast majority of practical problems to which the unfortunate concept of referring formal validity to any other law may give rise. It is equally clear that the principle is one of convenience; parties to a marriage must be free to use a form which is required or available to them where they are at the time of the ceremony simply because they have easy access for local legal advice. The suggested rule would seem to have the advantage of achieving legal certainty, predictability, uniformity of decisions, as well as reducing the possible occasions for limping marriages. Furthermore, the policy considerations of upholding the reasonable expectations of the parties, safeguarding the reliability of local records, validation and international uniformity of decisions seem to be in favour of referring formal validity to "the most settled principle of enlightened jurisprudence".

Certainly, the *lex loci celebrationis* rule has the undoubted attraction of simplicity, and

would be a most attractive one if it was interpreted in quite the same sense and applied with entire consistency among legal systems. Although this rule clarified the situation and the insuperable difficulties which existed when the forms of marriage celebration were governed by the law of the husband's domicile; the rule itself is surrounded by enormous problems which may render it an intricate and a difficult rule to apply. In the first place, the varying interpretations to which the *locus regit actum* rule is subjected among legal systems is clearly one of the reasons for the spreading of limping marriages. In many legal systems, including English and Scottish laws, the rule is expressed in a sense that the application of the law of the place of celebration to the formalities of marriage is imperative and compulsory, irrespective of whether the marriage takes place within the *forum* or abroad. According to this approach, which appears to be based on the concepts of sovereignty and convenience, compliance with the local form is not only sufficient but also necessary for the validity of the marriage. No marriage celebrated in any other form, for example, one provided by the parties' personal law, will be recognised as valid; unless the law of the place of celebration regards such a form as sufficient for the validity of the marriage or unless under the "local law impossible" argument. This contrasts with the position in some legal systems, where the *locus regit actum* rule is facultative by virtue of which the parties have a choice to comply either with the form required by the local law or with the form laid down by their personal laws. It is therefore clear that in those systems a marriage is formally valid if it is solemnised according to the formalities prescribed by either the local law or the parties' personal laws. It is also interesting to emphasise that most legal systems adopt a rather startling view based on a combination of both these rules: parties celebrating their marriage within the *forum* must comply with local law formalities; but parties marrying abroad must observe the formalities prescribed either by the law of the place of celebration or by their personal laws. This approach is too much *lex fori*-oriented and therefore inappropriate and unacceptable in the field of conflict of laws, where international comity requires that, on questions of form, each

legal system should recognise the marriage laws of another system. Nevertheless, the main reason is that this view does not recognise the strong and legitimate interest of the foreign country of celebration in the application of its own formal requirements to marriages solemnised within its territory, an interest which the *forum* strongly claims for itself as being the *lex loci celebrationis*.

The difficulties which these different interpretations of the *lex loci celebrationis* cause when the legal systems adopting them interact are very well known. The situation where the marriage is celebrated in a form prescribed by the parties' personal law but not considered as such by the law of the place of celebration would certainly create a limping marriage and would also give rise to certain problems insofar as the recognition of the marriage in third countries is concerned. Suppose that two Scottish subjects domiciled in Scotland celebrated a marriage in France in accordance with Scottish law formalities. The marriage will be declared void in Scotland as the French forms have not been observed. Nevertheless, if an Algerian court has to decide the issue of validity of this marriage it will be declared valid for it is celebrated according to the parties' personal law, i.e. Scottish law. This is because the maxim *locus regit actum*, although recognised in principle, is regarded as a facultative rule in Algerian law under which compliance with the common personal law of the parties is sufficient for the validity of the marriage.

The present writer believes that the seductive simplicity of the *lex loci celebrationis* would neither facilitate the conclusion of marriage, nor promote the prevailing policy considerations as to universal validity of marriage, international uniformity of decisions and extirpation of limping marriages; unless it is understood and applied in quite the same sense among legal systems. It is interesting to emphasise that the imperative approach of the *lex loci celebrationis* seems neither warranted by the historical reasons behind the introduction of the maxim *locus regit actum* as a choice of law rule, nor to

be in accord with the existing divergences between legal systems which regards the marriage as a sacrament, and those considering it as a secular act. The underlying reason is that the exceptions to which the *lex loci celebrationis* rule is subjected to among legal systems strongly assert that the general choice of law rule should not be applied imperatively especially where it would entail hardship to the parties disproportionate to the benefit of the law of the country of celebration. The imperative character of the *lex loci celebrationis* does not work satisfactorily in many cases involving certain religious orders, particularly when the parties' personal law insists on extraterritorial observance of the religious form and the country of celebration demands compliance with its own civil form within its boundaries. In such cases, it would seem that the only acceptable solution in the conflict of laws literature is that the parties must go through both ceremonies in order to affect a universal valid marriage. Although this might not seem an undue hardship -and perhaps not a precaution which would be unreasonable to suggest- a better optional rule can be devised. It could be therefore argued that the imperative approach of the *lex loci celebrationis* is unsupported by early precedents which indicate the principle is in essence flexible, reflects no discernible policy and is inconsistent with the traditionally accepted principle, i.e. international comity. Furthermore, international uniformity of conflict of law rules strongly requires cooperation among legal systems to the extent that they should respect the rules of each other, as far as they do not offend their public policy. One might therefore argue that consideration of the form prescribed by the parties' personal law in the country of celebration does not offend the public policy of that country.

Consequently, there is some reason to believe that the facultative approach is indeed the most appropriate view which supports the maxim *locus regit actum*, the prevailing policy of justice, as well as materializing the interwoven objectives of a conflict solution which is fair to the parties and a result which corresponds to their justified expectations.

Relying on the fact that marriage is an act of such importance and personal character affecting both the parties and the ethical well-being of society, it would be short-sighted to ignore the fact that the parties often desire to avail themselves of the familiar form of their own law even when they have the legal possibility to use the form prescribed by the foreign *lex loci celebrationis*. Apart from this pragmatic assertion, the facultative approach is also consistent with the main reason behind the introduction of the maxim *locus regit actum* as a choice of law rule so as to facilitate celebration of marriages, and more importantly is in favour of promoting the relevance of the above mentioned policy considerations in respect of the validity of marriage. Certainty, predictability, international uniformity of decisions, the policy of upholding the parties' reasonable expectations, *favor matrimonii* principle, and above all the desire to eliminate limping marriages provide therefore an impressive support for this approach. Certainly, the facultative approach of the *lex loci celebrationis* would have the merit to bring about a certain rapprochement between legal systems which regards marriage as a sacrament and those systems under which it is considered as a civil act.

Nevertheless, one might argue that this approach is inconsistent with the traditionally accepted principle of *lex magistratus* by virtue of which the marriage officials in the country of celebration cannot reasonably be expected to be aware of, and comply with, the laws of other jurisdictions. Justified by the practical advantages of its application within the sphere of formal validity of marriage, the facultative approach would not require any local authority of the country of celebration to celebrate marriage within their territory according to foreign laws. The approach can be expressed only in the sense that the parties have the right to avail themselves of the familiar form prescribed under their personal law by celebrating their marriage before the diplomatic or consular representatives of their country in the place of celebration. It is interesting to note that this view has been adopted by new German Act 1986 relative to private international law. Article 13 (3) provides that a marriage in Germany can be solemnised only in the

form prescribed by German law; but nevertheless a marriage of parties neither of whom is German national can always be celebrated before any person duly authorised by the law of the country to which either of the parties belong and in accordance with the form prescribed by that law.

Accordingly, celebration of marriage before diplomatic and consular representatives, or any other persons authorised by the sending state for that matter is the only way through which the facultative approach can be implemented successfully, a way that appears to be generally acceptable among legal systems. Consular marriage can be seen as an option, or an additional service offered by the sending state to its subjects, even though sufficient facilities exist under the local law. It is also important to argue that the English and Scottish view, by virtue of which an authorised diplomatic or consular officer cannot celebrate a marriage if there are sufficient facilities under the local law, is now ripe to be abandoned. The application of the *lex loci celebrationis* facultatively would render the situations, where the use of the local form is impossible, scarce if not non-existent.

The universal adoption of the facultative approach of *lex loci celebrationis* might remove or mitigate the human hardships and legal problems arising out of clashes of different policies. It is reasonable to think that, for avoiding criticism, this approach must be held in check by some restricting conditions, i.e. the parties may use their personal law forms if they belong to a common personal law, or if the forms prescribed by their personal laws coincide. It is clear that the *lex loci celebrationis* applies imperatively in cases where (i) one of the parties is domiciled in, or a national of, the country of celebration, (ii) the personal laws of the parties require different forms.

Secondly, it is obvious that the application of the *lex loci celebrationis* rule in its present form faces certain problems arising from the existing divergences as to the type

of marriage ceremonies among legal systems. In principle, as has already been pointed out, a fundamental difference of attitude concerning forms of marriage exists between legal systems where marriage is regarded as a secular act, and those systems where it is viewed as a sacrament. As regards this issue, one might distinguish three different systems. In most legal systems, including English and Scottish laws, the nature of the ceremony is irrelevant, if the necessary celebration has taken place in accordance with the legal requirements prescribed by their own domestic law. Accordingly, a marriage would be held valid if it is solemnised either in a civil or religious ceremony. This contrasts with the position in certain legal systems where the form of marriage has been secularised, on one hand, and those systems under which marriage remains a purely religious institution on the other. In legal systems where civil ceremony is compulsory, a marriage can only be solemnised before the civil officials who have the authority to celebrate marriages within their territories. It is equally clear that in most of these systems, though the religious marriage is not precluded and not legally binding, the parties to a marriage cannot even go through a religious ceremony before the civil one has taken place. Nevertheless, they recognise as formally valid marriages solemnised by their citizens abroad in accordance with *lex loci celebrationis*, even if the ceremony is a religious one. For instance, if a French person marries in Cyprus where the religious ceremony is compulsory, the marriage will be held valid as to form in France, notwithstanding the fact that French domestic law only countenances the civil ceremony of marriage. The position is different in the legal systems where the religious ceremony is compulsory, for they require extraterritorial application of this principle for marriages taking place abroad. Accordingly, celebration in the proper religious form is not only sufficient but also necessary for the validity of the marriage whenever one of the parties owe allegiance *qua* personal law to one of these countries, regardless of the place of celebration. A matter of notoriety among English and Scottish conflict lawyers after the Maltese marriage cases.

The problems which these imperative rules cause when they interact with the laws of those countries which require a civil ceremony as a matter of strong public policy would certainly render the simplicity and the relevance of the *lex loci celebrationis* as an appropriate choice of law rule exceedingly difficult to be maintained in conflict of laws. This is particularly obvious when a person whose personal law requires extraterritorial observance of the religious ceremony attempts to marry in a country where compliance with the local civil ceremony is essential to the validity of the marriage. In these situations the marriage will certainly be a limping one whether it is celebrated in a religious ceremony or in a civil ceremony. Looking for an escape from the dilemma of an insoluble conflict, most scholars suggest that the only conclusive way to avoid the impasse and thus safeguard the universal validity of marriage is that the parties should go through both the civil ceremony required by the law of the country of celebration and the religious ceremony prescribed by their personal law.

In pursuance of such an unprincipled approach, certain legislators and academic writers on the continent have argued the need to encourage the parties to adopt this course as essential if the solution would stand a chance of achieving its aim. The West German Service Instructions Act 1968 seems to provide a good example of such existing practices which serve as a reminder for the parties of the requirements of their personal law in order to prevent limping marriages. Where the parties' personal law insists on extraterritorial observance of a religious ceremony for the creation of a valid marriage, the 1968 Act provides that the registrar should urge the parties to produce a certificate by virtue of which the minister of the Church to which they belong declares himself prepared to celebrate the marriage in religious form once the local civil ceremony has been performed. This provision does not, however, afford any watertight guarantee against the creation of limping marriage, for the registrar has to celebrate the marriage in civil form even if the parties fail to produce the relevant certificate, notwithstanding that it will not be recognised by the parties' personal law.

A more radical academic approach, which has not been accepted in practice, designed to prevent limping marriages is that the civil form prescribed by the *lex loci celebrationis* should not be available to the parties unless the necessary religious ceremony required by their personal law has been performed. This view can be criticised on the basis that it is difficult to imagine how is the marriage officer of the *lex loci* to know that the personal law has been complied with? It is true these solutions, though they may reduce the number of unnecessary limping marriages, and whether they are framed subjectively or objectively, cannot safeguard the values of certainty, predictability, international uniformity of decisions, as well as the universal validity of marriage. It is also clear that this unprincipled approach can only be seen as a good illustration of the unwillingness of many legal systems to compromise their traditional rules of choice of law, a factor that stands in the way of international cooperation. This approach would be virtually unworkable in the situations where the religious body to which the parties belong does not exist in the country of celebration, as well as where the parties have not received any legal advice to that effect.

If the compulsory systems remains as they stand at present, one might argue that the only realistic option is that the law of the place of celebration would have to admit the exigence of the religious ceremony required by the parties' personal law. Furthermore, the state which requires such form as essential to the validity of marriage would have to restrict the application of its own law to marriages between parties both of whom owe allegiance *qua* personal law to that state. It is therefore clear that where the parties belong to the same faith and are domiciled or nationals of a country which regards religious ceremony as essential, the *lex loci celebrationis* must allow the parties to use the religious form in order to create a universally valid marriage. But the local form becomes imperative if one of the parties is domiciled in, or a national of, the country of celebration, or the parties belong to different countries which require different forms for

the celebration of marriage. In these situations, it is clear that the party's personal law which requires a religious ceremony as essential must recognise the validity of the marriage. This view clearly commends itself on practical and policy grounds, namely, *favor matrimonii* principle and the desire to prevent limping marriages.

Aside from this pragmatic approach, the present writer believes that the compulsory systems are now ripe to be abandoned, insofar as they are historical relics for which there is hardly sufficient justification at the present time. There is no doubt that the present compulsory civil system is based on tradition and a postulate of 'laïcité' dating back to the nineteenth century by virtue of which the civil form of marriage became imperative in the domestic laws of the countries in question where it was thought necessary to fight for the complete secularisation or separation of state and church. It is also equally clear that the present compulsory religious system rests not only on the tradition that the imperative character of religious ceremony has its roots in the concept of marriage as a sacrament, but also on the desire to prevent secularisation from gaining support within the territories of the countries concerned. This can be illustrated by the fact that certain countries where religious ceremony is compulsory, like Egypt and Israel, do not insist on extraterritorial application of this principle for marriages celebrated abroad. Moreover, one might argue that the systematic exclusion of foreign laws requiring religious forms of marriage is too conceptualistic and unacceptable in practice for it often violates the religious convictions of the parties, leads to limping marriages and it stands in the way of international cooperation. Along the same lines, one might point out that the insistence on religious ceremony even for foreigners whose personal law prescribes a civil ceremony, though it does not lead to limping marriages in most cases, is also unacceptable for it is contrary to the demands of international cooperation, and the prevailing policy by virtue of which the celebration of marriage in a purely civil form must be guaranteed. It is interesting to note, however, that the prevalence both of secular and religious matrimonial laws are firmly established to the

extent that they are no longer require the fortifying support of conflict of laws.

One might therefore say that the system of optional civil or religious form of marriage is the most appropriate and the realistic option which would certainly eliminates the vast majority of practical problems to which the unfortunate compulsory systems give rise. This system would not then entail the anomalous and wholly unacceptable consequence that the status of marriage resulting from civil ceremony is something radically different form that produced by a religious ceremony. Clearly the optional system commends itself on practical grounds. The characteristic feature of this system is that both civil and religious ceremony relate to form, and thus they can only be considered as different ways leading to the same result since the status of marriage produced in each case is clearly identical. The underlying reason is that the ceremony of marriage is not an aim in itself [as it is considered in the compulsory systems], but it is only the material support and the external conduct in which the consent of the parties is expressed. It is also clear that the purposes which the formalities serve, such as the publication and the finality of the solemnised act, are common to any kind of marriage ceremony.

Unlike the compulsory systems, the optional approach would certainly achieve legal certainty, predictability, international uniformity of decisions, universal validity of marriage, and above all would render the creation of limping marriages exceedingly difficult if not impossible. The policy of upholding the reasonable expectations of the parties, *favor matrimonii* principle, and the prevailing policy of justice seem to provide support for this approach. Certainly, the optional system would have the merit of a solution which is fair to the parties and support a result which corresponds to their justified expectations. It is interesting to note that this view has been adopted both by the Greek Civil Marriage Act 1982 and the Spanish Marriage Act 1981 which provide that the parties have the option to celebrate their marriage in civil or religious forms. It is therefore clear that the universal adoption of this system would certainly eliminate the

human hardships and legal problems arising out of clashes of the compulsory systems. An optional rule -allowing the celebration of a marriage in either ceremony- should be preferred to an imperative one based on a pre-eminence of either type of ceremony, and the above mentioned Greek and Spanish tendency in this direction is to be welcomed.

Nevertheless, there is some reason to think that the celebration of marriage in a religious form may raise certain practical problems as far as the registration of marriage is concerned. Whatever merits this argument might have, it can hardly justify the rejection of an approach that is appropriate and acceptable to most legal systems in the world. None of these problems, however, seems unsurmountable, as may easily be seen in the countries where the optional system is already in force. The English and Scottish laws seem to provide a good example, inasmuch as the state exercises control over the legal preliminaries to, and subsequent registration of, religious marriages. The Marriage (Scotland) Act 1977, for instance, provides clearly that a religious celebrant cannot solemnise a marriage unless the parties produce to him a marriage schedule which serves as a marriage licence authorising the celebrant to perform the marriage.

The application of the *lex loci celebrationis* rule faces another difficulty which is related to the problem of characterisation arising out of the dichotomy of form and substance. As a practical matter, however, the issue of characterisation has been considered only in the context of parental consent; the selective area where conflict of law problems commonly arise. It has been already indicated that characterisation of parental consent, in English and Scottish laws, as a matter of formality in all cases is subjected to much academic criticism, and it appears to be out of touch with present day social realities. This approach is a historical relic, which is based on the cases decided at a time when both formal and essential validity were governed by the *lex loci celebrationis*, for which there is hardly any logical or policy justification today. The decision in Ogden v.

Ogden, for instance, is a very much discredited authority not only because it contravenes international comity doctrine, but also because it undermines the very basis of the English and Scottish choice of law rules, and promotes limping marriages. A better rule would perhaps have been found if it was not for the misleading habit of English judges and writers in asserting that parental consent is a formality, instead of only stating that it does not invalidate a marriage in English matrimonial law.

Certainly, the law of the *forum* must decide whether the relevant foreign rules relate to the formalities or to the essentials of marriage not only because characterisation is an issue for the *lex fori*, but also because the real issue is one of establishing a choice of law rule. It is submitted that the most rational method by which full and proper effect can be given to the *forum's* choice of law rules is that foreign rules establishing impediments to marriage should be examined in their foreign setting in order to decide whether they relate to the forms or the essence of the marriage. The underlying reason is that it is impracticable and unsatisfactory to characterise all requirements of parental consent, for example, automatically as pertaining to form; a view that would promote rather than prevent limping marriages. It is thus clear that this approach has the merit of being consistent with the relevant policy considerations in respect of the validity of marriage. It is also true that it is consistent with policy consideration behind section 3 (5) of the Marriage (Scotland) Act 1977 which is designed to discourage "runaway" marriages. Finally, the proposed approach would have certainly resulted in a different decision in the case of Bliersbach v. MacEwan and in the much criticised case of Ogden v. Ogden.

The determination of a general choice of law rule to govern the substantive validity of marriage is an even more complicated and confused area in the doctrine and practice of contemporary conflict of laws -not least because the significance of the institution of marriage is so closely connected to the morals and religious attitudes prevailing in each

society. Divergences between conflict approaches within the present subject-matter lies, however, not only in the existing fundamental differences among legal systems as to the nature and the purpose of the essential requirements, but also in the disregard of the importance of the temporal dimension of conflict rules. Moreover, the existence of conflicting theories is clearly a consequence of the unfortunate disagreement among scholars on the nature of the appropriate policy considerations that can best provide a principled basis for a general choice of law rule leading to a just result in the vast majority of normal cases, and setting up a clear guide to be of assistance to the registrars and similar officials who have, outside the courts, to ascertain the validity of marriage at the time of the ceremony.

It has been submitted that the idea of submitting the entire validity of marriage to a single law system, namely, the *lex loci celebrationis*, is the most appropriate and convenient approach leading to a simple and fair solution of the present problems. The underlying reason is that it favours legal certainty and predictability, and it facilitates the role of the marriage officials to the extent that they do not have to investigate and apply foreign law to determine the issue of capacity to marry. Certainly, one might argue that reliance on the law of the place of celebration would be universally acceptable if, and only if, the fundamental requirements for marriage are uniform among legal systems - a uniformity which is beyond reach because of the existence of different social, religious and legal cultures. There is little merit, moreover, in the application of the law of the place of celebration which may only have a fortuitous or fleeting connection with the marriage, for it enables the parties to evade their personal laws, leads to limping marriages and renders the non-universal impediments more or less illusory. The equation of essential with formal validity is no longer appropriate insofar as it is hardly realistic to expect that the country to which the parties belong will be prepared to recognise the validity of the union if it is contrary to its public policy. Therefore, it does seem to be a retrograde step to re-introduce into the field of substantive validity of

marriage an approach, abandoned some 120 years ago, which would achieve neither legal certainty and predictability, nor international uniformity of decisions.

It is interesting to see that the flexible approaches seemingly based on the English judicial opinions voiced in more recent years, suggesting the accommodation of the needs of each individual case, have only succeeded in adding further confusion to an already confused subject. What is most curious, and indeed uncharacteristic, about these approaches is that they are based on the assumption that the purpose of a choice of law rule is the determination of the essential validity at the time of the proceedings, insofar as the validity of marriage is regarded as retrospective concept: the real issue is whether the ceremony which allegedly took place had the legal effect of creating a valid marriage. The advocates of the alternative views have failed, however, to recognise the importance of the role that marriage officials assume among legal systems to prevent illegal and incestuous marriages; a role that is countenanced by the preventive nature of the essential requirements of marriage. Accordingly, the marriage officials have no constructive role at all in the determination of the validity issue for they are required to perform the marriage ceremony anyway and advise the parties to set up a matrimonial home in a country which would validate the marriage. In practice, this would amount to stripping from the marriage officials an essential part of their function -indeed to the extent of reducing their role to little more than a courteous presence, as well as to the disregard of the preventive nature of the substantive requirements of marriage. Hence, it is clearly unacceptable to leave the marriage in limbo until the parties move to an accommodating jurisdiction.

Certainly, it is difficult to imagine any relevant policy considerations, which are far more important at the time of the ceremony, that might provide a sound policy basis for either the real and substantial connection test, alternative reference test, elective dual

domicile test, or even for the intended matrimonial home test. The adoption of any of these flexible tests as a general choice of law rule to determine the essential validity of marriage, however, seems neither warranted on principle, nor to be in accord with the more recent English judicial opinions interpreted by the advocates of these approaches in a manner which is far from being the reasonable and valid interpretation. In fact, there is absolutely no evidence to be found in the decisions in Radwan v. Radwan and Lawrence v. Lawrence, for instance, to support the contention that the judges have identified and discussed the most pertinent issue, namely the appropriate general choice of law rule to govern the essential validity of marriage. With the knowledge of English lawyer's case-minded approach to law it is perhaps not astonishing that the advocates of the alternative views have found it impossible to concede that the above decisions did not establish a general choice of law rule for the solution of the problem. Furthermore, the doctrinal mishmash found in these judicial opinions misleads because the reasoning of the court does not adequately explain the true ground for the decision reached; a matter that lead to different academic interpretations. Nevertheless, one might argue that the only thing that the judges did actually decide in the above cases was that there was no compelling reason for invalidating a long-standing relationship which was valid under the law of the country where the parties have established their actual matrimonial home. While it seems that the policy of upholding the parties' reasonable expectations and the *Favor matrimonii* principle justify the acceptability of the actual outcome in these cases, there is hardly any logical justification for considering these policy issues as fundamental bases for a general conflict rule. This is because the principle of *favor matrimonii* should not be interpreted in a sense that the validity of marriages must be upheld irrespective of other considerations; but it does simply mean that a marriage should not be invalidated without good reason. It is clear that the alternative views can only be seen as vague and perverse ideas, suggesting the determination of the validity of marriage on the basis of elusive concepts such as intention, or real and substantial connection, which furnish little guidance in conflict cases. Consequently, these views

offer no reasonable solution for the problem for they fail to deal with the underlying malaise in the subject-matter, whose root cause is the inappropriate way in which the traditional general choice of law rule is applied at the time of the marriage ceremony.

In any event the new approaches have highlighted the tension between predictability and flexibility -the hallmark of conflict of laws in the second half of this century. It is an overstatement to say that certainty and flexibility are inconsistent because "certainty requires rigid rules, and flexibility is the antithesis of rigidity". The new approaches have abandoned generally accepted notions about nature of legal rules and judicial law-making, insofar as they suggest that the elaboration of rules must be rejected because of their rigidity -their failure to accommodate interests other than certainty. However, the new approaches seem unnecessarily lopsided ways in which to resolve the tension between certainty and flexibility in conflict of laws. Furthermore, the flexibility that has been introduced is so unguided for it would undermine legal security, and certainly would not achieve the uniformity of decisions in the international context. Therefore, the better view seems to be the recognition of the existence of the tension and make continued efforts to achieve an acceptable balance which should be expressed in results from decisional practice rather than through repudiation of rigid rules. There can be no doubt that the English judges in Radwan v. Radwan and Lawrence v. Lawrence have shown initiative and an ability to deal with the occasional outrageous results to which the application of the general choice of law rule in the subject matter may lead.

It is also through concern for realism and flexibility that, not surprisingly, certain English writers have put forward an even more radical approach according to which the insufficient relation between various issues of essential validity embodied in the present broad category of capacity to marry justifies the application of different choice of law rules for different issues. It is argued that this approach cannot be regarded as the

realistic and appropriate way in which the needs for choice of law rules can be reconciled with the demands of justice. It is certainly hard to argue against the desire for justice but, in fact, that is not a sufficient justification for the acceptance of a cumbersome and unwieldy test that creates confusion, uncertainty and inconsistency.

The theoretical bases for this approach are inadequate for they are inferred from yet another unconvincing interpretation of the more recent English judicial opinions which are based, not on general principles but, on the particular factual context of each case. In the first place, it is reasonably clear that Cumming-Bruce J.'s statement (it is an over-simplification for the Common law to assume that the test for purposes of choice of law applies to every kind of incapacity...) in Radwan v. Radwan would have never amounted to anything more than a strong desire to avoid the pitfalls of the traditional choice of law rule, if it is interpreted in the whole context of his judgements. Secondly, the decisions in Radwan v. Radwan and Lawrence v. Lawrence, being based on the considerations of justice, are not authorities for the repudiation of the traditional choice of law rule altogether, let alone authorities for such a new approach which would only produce unnecessary complexity in the structure of the conflict of law rules. It is also clear that the argument that a choice of law rule needs to achieve perfect justice every time it is invoked in order to be an appropriate rule is not easily reconcilable with any generally accepted notions about the nature of legal rules and judicial law-making. It is also difficult to imagine the achievement of perfect justice in every case as a basis for a test which would not achieve such a goal even in the above cases, from which it is seemingly inferred, if the facts were appropriately reversed.

In addition to its wholly inadequate theoretical foundations, the approach's conceptual *instrumentarium* is seriously deficient. If the occasional outrageous results of the traditional choice of law rule are disturbing, so are the consequences that follow from a piecemeal approach which increases the possibility of *dépeçage* -that is to say the

application of substantive rules derived from more than one legal system to determine different aspects of essential validity of the same marriage. Moreover, this test would afford too uncertain a guide to be followed by the marriage officials administering this part of the law, for they are in an unfavourable position to carry out investigations into one foreign legal system, let alone different legal systems at the same time. Therefore, one might argue that the remedy for the occasional outrageous result of the traditional choice of law rule lies in a carefully considered approach, not in an unprincipled test which, though boldly creative, distorts the preventive nature of the essential conditions of marriage and applies principles which, torn from their context, may lead to result different from those which were expected.

In my opinion, any conflict approach dealing with the determination of an appropriate general choice of law rule in the present subject-matter must reflect the basic preventive nature of the essential requirements of marriage which has been completely ignored by all the valiant intellectual efforts lavished on the subject. The underlying reason is that these requirements can be seen as rules of immediate application, non-observance of which should prevent the celebration of marriage altogether, insofar as their purpose is to prevent the creation of relationships which are offensive to the morals and religious principles prevailing in the country concerned. Accordingly, marriage officials must not proceed with the celebration of a marriage unless they are satisfied that there is no impediment to the proposed union under the relevant law. It is also interesting to note that reconciliation of the dichotomy between the selection of the applicable law and the concern for the just substantive result does not certainly require the repudiation of a choice of law rule for its rigidity or inability to achieve perfect justice in the occasional hard cases arising when the marriage validity is examined *ex post*. No one denies that the traditional general choice of law rule may, in certain cases, lead to undesirable or even absurd results the redress of which can easily be achieved, not by the repudiation of the rule but, through the judges' ability to disregard it and find the just substantive

result required by the particular factual context of such cases. Furthermore, if the conflict of laws is concerned only with the questions of the workability of any rule within the court process and what is the proper result instead of what is the proper rationale for the feasibility of any rule outside that process, the danger of parochial decision-making is great.

It is, of course, clear that the general choice of law rule governing substantive validity of marriage, that may claim universal acceptability, should be a rule that can be applied primarily at the time of the formation of the union insofar as the real issue is what legal requirements the parties must satisfy at that time in order to contract a valid marriage. The present writer therefore believes that the existing general choice of law rule, both in Common and Civil law countries, is the most appropriate rule to determine the matter in question simply because the parties' prenuptial personal laws -whether determined by domicile or nationality- can be easily ascertained and applied effectively at the time of the marriage ceremony. The great merit of this approach is that it identifies clearly the necessity of respecting the impeccable nature of the essential requirements of marriage the observance of which must be irrevocably settled at the time of the formation of the union. It is also clear that it provides an immaculate and effective guide for marriage officials to determine with certainty whether the parties have complied with the essential requirements of marriage under their personal laws. If the marriage official proceeds with the solemnisation of a marriage without deciding the issue of whether the parties have capacity to marry, the result will be virtually the denaturation of the substantive requirements or, which is the same, the conclusion that they do not in reality constitute legal impediments which would prevent the creation of illegal and incestuous marriages. In practice, the preventive application of the personal law is therefore far more important than its application within the court process when the validity of a marriage is examined *ex post*. There is no doubt that the protection of the personal law

should not be denied to the parties, nor should the parties be allowed to frustrate the requirements of that law by anticipating a change of domicile or nationality which may occur subsequently, a matter that may not happen in practice at all.

Indeed, the present approach is based on impeccable logic and the level of predictability of result one may expect is very high. With its emphasis on the application of the choice of law rule outside the courtroom process, this approach does in reality foster the conception of normative principles, namely, the preventive nature of the substantive requirements in question, certainty and stability of marriage status which is a matter of public concern. Reliance on the true conflict values and the efficiency of normative criteria clearly demands the adoption of this test as a rule in which all values that affect the choice of law process can be coordinated. The test would necessarily entail a certain respect between legal systems, promote international uniformity, and would help to eliminate limping marriages. It is also consistent with at least the parties' major expectation, i.e. the validity of their marriage, as it enables them to know their legal position without necessitating resort to courts. Accordingly, it would simplify the judicial task inasmuch as its effective application at the time of the ceremony would render the hard cases, where it may lead to outrageous results, rather rare.

It has been argued that the prenuptial personal law approach, however, is not quite the force to simplify the judicial task and to prevent evasion that it is claimed to be. From a theoretical point of view this may be true, but one cannot lay the blame for this on the normative criteria of the general conflict rule. In fact, the fault lies in the inappropriate way in which the general conflict rule is applied at the time of the marriage ceremony. That is the result of the existence of certain antiquated legal rules which obfuscate rather than illuminate the present choice of law problem. The ingenious French bureaucratic legal rule is a perfect example. Although, according to French legal theory, the capacity to marry depends on the parties' prenuptial national laws, the French registrars have

been instructed not to inquire into foreign law *ex officio*. Accordingly, the registrars should solemnise marriages whenever French domestic law requirements are fulfilled, notwithstanding that “le certificat de coutume” produced by the parties reveals the existence of an impediment under the relevant foreign law. It is obvious that this rule diminishes the preventive function of the relevant conflict rule as it substitutes the *lex loci celebrationis* for the parties’ personal law. Furthermore, the discussion of choice of law problems of marriage in England and Scotland, that is exclusively concerned with the judicial decisions, provides another good example. Although English and Scottish registrars are instructed to give effect to any legal impediment brought to their notice, it is not a normal practice for the registrars to establish *ex officio* the content of the relevant foreign law. This can be seen, for instance, through section 3(5) of the Marriage (Scotland) Act 1977 by virtue of which a foreigner who is, not domiciled in the United Kingdom, a party to a marriage intended to be celebrated in Scotland is required to submit a certificate of capacity, issued by a competent authority in the state of his domicile, to the effect that he is not known to be subject to any legal incapacity.

In my opinion, these legal rules are now ripe to be abandoned because they render the structure of the relevant choice of law rule unduly complex, lead to numerous limping marriages and are contrary to the demands of international cooperation. The present practices rest on a postulate of marriage officials’ less favourable position to inquire into foreign law *ex officio* that, given the recent developments of information technology, no longer requires the fortifying support of legal rules. The systematic exclusion of foreign laws at the time of the marriage ceremony amounts only to stripping from the relevant conflict rule an essential part of its function, indeed to the extent of reducing that rule to a little more than a courteous affirmation. The abolition of these rules is needed to eradicate uncertainty and complexity, and to ensure that the general conflict rule can be applied effectively so as to accomplish its modest goal of preventing the existence of illegal and incestuous relationships.

Certainly, the realization of an effective application of the general conflict rule lies in the fact that marriage officials must play an active role in determining the issue of capacity to marry, indeed to the extent of establishing the content of the relevant foreign law *ex officio*. This is because invalidation of a marriage *ex post* has undesirable effects as the validity of most issues of status and of property depends upon whether the parties are validly married or not. But the usual sanction for failure to meet the requirements of marriage at the time of the ceremony is limited to the denial of celebration. Being aware of the marriage officials' unfavourable position for carrying out investigations into foreign laws, certain devices such as "certificate of custom" and certificate of capacity to marry have been adopted in some legal systems -enabling them to apply the relevant foreign law without misinterpretations. The French tradition with the "certificat de coutume" is not a reliable way for providing precise knowledge of the relevant foreign law as it involves greater risks that that law will be misinterpreted or mis-applied. The main reason is that such a certificate is not delivered by an official authority of the relevant foreign country, but it is issued by a lawyer of that country or even by a lawyer or an authority of the county of celebration. Moreover, it concerns only the reproduction of the relevant foreign legal rules, and it does not actually offer a minute examination of the pertinent questions -namely the ascertainment of the exact facts of the proposed union, the interpretation and application of the foreign provisions in issue-that appear to be left to the ill-equipped local marriage officials.

Indeed it has been argued that the most important device, which can assure the correct application of the foreign law and thus prevent the creation of limping marriages, is the certificate of capacity to marry if it is issued by the competent authorities of the foreign country concerned. However, apart from the fact that this certificate relieves the marriage officials from the necessity of ascertaining capacity *motu proprio*, it is my opinion that, given its status and non-universal character in the present legislations, it

might fail to secure the correct application of the relevant foreign law, nor achieve international uniformity and decisional harmony. There is little merit in a certificate which relates only to the party's general capacity to marry and does not cover the exact facts of the proposed marriage, such as whether the parties are within the prohibited degrees of consanguinity and affinity. Furthermore, the practical importance of this certificate is now much reduced, for it is delivered without any serious investigation, and it does only prove that the party concerned has capacity to marry without specifying whether he or she is already married. Accordingly, the certificate of capacity to marry would not achieve even the very goal anticipated by its western promoters, namely, the protection of the institution of monogamy in western legal systems.

The fact that the parties are exempted, in certain cases, from producing the certificate of capacity to marry is another practical reason which suggests its inability to assure the correct application of the relevant foreign law. According to English and Scottish laws, for instance, a foreigner is exempted from complying with this requirement if he has resided in the U.K. for two years preceding the marriage. This seems to be based on the fact that it is socially unacceptable for a person to leave his partner for such a long period of time. But reality shows that this factual situation goes even further than two years as far as immigrants from the third world countries, where polygamy is the norm, are concerned. In my opinion, the waiver of this certificate on the ground of two years residence in the United Kingdom should be abolished altogether as it goes against the very modest purpose of the certificate itself.

It is my argument that creation of a coherent and completely satisfactory solution is only possible if each legal system is prepared to compromise its traditional rules of choice of law, to respect foreign laws, and to provide assistance for foreign marriage officials in order to ensure the correct application of its legal rules. There is no doubt that a uniform system of international mutual assistance would facilitate the task of marriage

officials to determine capacity to marry *ex officio*, relieve the parties concerned from the burden of substantiating foreign law and, above all, would contribute to the attainment of international uniformity of decisions. In practice, I believe, this system can be only achieved through the establishment of a marriage bureau in each country so as to deal with requests of foreign marriage officials, indeed to the extent of providing authentic and detailed information with regard to the issue of whether the parties have capacity to marry under the law of the country concerned. The formulation of an exact and precise reply does, of course, presuppose that the marriage official's request should not only state the necessary facts for its proper understanding, but also should be accompanied by copies of any official documents which may clarify its scope and, most importantly, should specify in exact terms the questions with which the marriage bureau should be concerned. This is because reliance on questions begging only the determination of the party's general capacity to marry does not establish precisely whether there is no legal impediment altogether to the proposed marriage. An English or a Scottish registrar, for instance, would be unable to find out whether the Algerian party is already married or not, if his request is based on the question whether the party concerned has capacity to marry. In this case, the marriage bureau in Algeria where polygamy is permitted would have no other alternative than replying in the affirmative even though that person is already married.

The receiving marriage bureau must provide detailed information in an objective and impartial manner that would permit the foreign marriage official concerned to determine with certainty the issue of capacity, and thus apply the relevant foreign law without any misinterpretations. In practical terms, the relevant legal texts and judicial decisions must be enclosed simply because they are essential for the appropriate understanding of the reply. It is also logical that additional documents, such as explanatory notes and extracts from doctrinal works, must be attached where deemed necessary to clarify the

content of the reply. It is interesting to note that the preparation of such a conclusive reply requires the extension of the marriage notice period. For instance, it is obvious that the two weeks' marriage notice in England and Scotland is hardly sufficient for the formulation of the reply, let alone for the necessary investigations to be carried out. Although it might be argued that this minimum period should be retained as a general rule, marriage officials should not proceed with the celebration of a marriage involving a foreign element before they receive a reply from the marriage bureau of the country concerned.

However, it might be argued that this system of international mutual assistance impedes the swift and inexpensive administration of law and justice, as well as being contrary to the prevailing policies of facilitating the solemnisation of marriages and upholding the reasonable expectations of the parties. In my opinion, this is hardly a valid argument. In the first place, it is obvious that the swift and inexpensive administration of law and justice is a futile and an unsound concept in areas such as conflict of laws marriage questions, where it is inappropriate. This is because considerations of justice outweigh the factor of time and cost, involved in the appropriate application of legal rules, that can only be seen as an acceptable price for the attainment of more rational and satisfactory solutions. Above all, the alignment of the proper application of the general choice of law rule to the particular necessities of the principle of universal validity of marriage demands that the true and faithful administration of the designated foreign law is not to be avoided on this precarious concept which is unworthy of a place in conflict of laws. It is therefore clear that the proposed system of international mutual assistance provides a suitable corrective mechanism.

Secondly, it is hard to justify the principle of facilitating the solemnisation of marriages as a ground for rejecting the true and faithful administration of foreign law, insofar as the judicial authorities of the *lex loci celebrationis qua lex fori* will be obliged to annul

the marriage afterwards through the application of its general conflict rule. This is because the main purpose of the reference to foreign law is to ensure that the marriage is universally valid. Accordingly, the proposed system is rational inasmuch as this aim can only be achieved if the relevant foreign rules are effectively applied at the time of the marriage ceremony. It is equally true that a wise application of this system would promote the idea of a standard of international due process which includes special concern for the parties' reasonable expectations, mainly because the proper application of the general conflict rule at the time of the ceremony would foster certainty and predictability -the important values that are greatly needed for the endorsement of those expectations. It is therefore my opinion that this system is consistent with the reasonable expectations of the parties for the "plain man's view" that the marriage is valid once it has been celebrated should be upheld.

It might further be argued that this system is unacceptable as it requires the extension of marriage notice period; a requirement which is enacted in the first place to be applied in domestic cases. From a theoretical point of view this may be true, but the present writer believes that the length of the marriage notice period, even in domestic cases, is not very important especially in the Western societies where people may live together for years before even they consider marriage. Furthermore, a layman would be prepared to wait for an extended period if that is what it takes to establish his reasonable expectation as to the universal validity of the marriage.

In any event, the universal adoption of the idea of a marriage bureau as an efficient means of creating a system of international mutual assistance would certainly mitigate the human hardships and legal problems arising out of the consideration of the true and faithful administration of foreign laws as an onerous task, among legal systems, at the present time. It is submitted that the proposed solution provides a practical device leading to the proper application of the general choice of law rule at the time of the

ceremony, inasmuch as it offers the country to which the parties belong a chance to direct the ill-equipped foreign marriage officials to the right interpretation of its legal rules. It is thus a matter of principle that the country to which the parties belong at the time of the marriage ceremony should not be able to refuse recognition of the marriage on the ground of any incapacity if, and only if, there are no fraudulent circumstances or undisclosed facts affecting capacity to marry. But if the parties have not disclosed certain necessary facts that would have effect on the outcome, the marriage would be held void both in the country of celebration and the country of the personal laws. It is also clear that if the marriage officials failed to ask the right questions in a very concise and precise manner, the marriage once it has been celebrated should be held valid if it is regarded as such by the parties' personal laws, even though its celebration would not have been permitted in the first place for reasons of public policy.

The proposed solution has the merit of achieving legal certainty, predictability, universal validity of marriage, international uniformity of decisions, the prevailing policies as to the extirpation of limping marriages and upholding the parties' reasonable expectations. Quite evidently, this solution would also render the hard cases, where the application of the general choice of law rule *ex post* would lead to undesirable results, rather rare in practice. This is because a marriage official should only celebrate a marriage if the essential requirements under the relevant law have been complied with, or if the only incapacity existing by that law is one which falls to be disregarded by the *lex loci* for reasons of public policy.

Certainly, the arguments in favour of the parties' pre-marital personal laws as a general choice of law rule are so convincing that this principle ought to be the starting-point in the courtroom process when the *forum's* judicial authorities examine the validity of the marriage *ex post*. This, however, does not in itself rule out the possibility of departure

from this principle when its application leads to the outrageous result of invalidating a long-standing relationship which no longer has any connection with the country of the parties' prenuptial domicile or nationality. It is therefore a matter of principle that this judicial deviation should depend entirely on the circumstances of the case in question and especially the law of the country with which it has its present connection, for the marriage has in fact come into existence and the parties lived in the reasonable belief that they are husband and wife. The underlying reason, as already indicated, lies in the fact that whatever flexibility is required to cover any special circumstances of the parties' marital relationship should be a part of choice of law decision for the validity of the marriage at the time of the proceedings.

Quite evidently, this practice provides courts with the most appropriate mechanism to avoid the absurd result to which the general choice of law rule may give rise, and the ability to achieve justice, in many hard cases. Furthermore, this view is also well justified on policy grounds, namely, the prevailing policy of upholding the parties' reasonable expectations, and the principle of *favor matrimonii* which comes into consideration once the marriage has come into existence. Above all, it is my opinion that this view is ultimately prescribed by the fact that most atypical cases have been created mainly because marriage officials have disregarded the only impediment existing under one of the parties' pre-marital personal laws as being fundamentally contrary to the *lex loci* public policy. Accordingly, it is difficult to justify the invalidation of a marriage in a truly objective way in such cases insofar as it will discredit the very essence of public policy in conflict of laws, especially if the parties have severed all connections with that country after the marriage ceremony.

Nevertheless, the need to accommodate the competing policy considerations relevant in the field of marriage does not actually justify the change of the existing general conflict rule in question to a flexible one based on the principles of *favor matrimonii*, and

justice in the individual atypical case -policy issues that should not contribute to the elaboration of legal rules, particularly in private international law. This is because the absurd result which the application of the general conflict rule produces in hard cases is clearly not a special weakness of that rule as the application of any flexible approach mentioned above might equally result in the invalidation of a marriage that is initially valid under the parties' prenuptial personal laws. The application of a real and substantial connection test, for instance in normal cases, would not achieve even the very objective that it is designed to pursue, i.e. the validity of marriage. It is therefore clear that this flexible approach may exact a cost entirely out of proportion to whatever benefits they promise in atypical cases.

Indeed, it is my opinion that considerations of policy and justice demand that the attainment of more rational solutions in atypical cases should be left to the initiative and the ability of judicial authorities to make adjustments for the general conflict rule. This is because justice in atypical cases is an aim that should be pursued outside the legal rules. However, the *forum's* judicial authorities should proceed with caution as they are bound to the law. Accordingly, they must use this discretion in a truly objective way and must not for the sake of convenience fall back to the *lex fori* which may have nothing to do with the parties and the facts of the case in question. This is because the accommodation of the competing policy considerations requires the application of the law of the country with which the marriage in issue has its present connection once it has been performed.

Quite rightly the *forum's* judicial authorities should never hold as void a marriage that is initially valid under the parties' prenuptial domiciliary [or national] law designated by the *forum's* general conflict rule. This is because the invalidation of marriage in such normal cases would result in the virtual negation of the general conflict rule. Reliance on the law of, the matrimonial domicile or, the nationality of the parties at the time of

the proceedings to invalidate a marriage in a normal case would only reflect a parochial concept that every marriage is potentially and conditionally invalid -a concept that is neither warranted on principle, nor reconcilable to any policy considerations which are important once the marriage has come into existence.

Hence, it is certainly true that the *forum's* judicial authorities can only disregard the general conflict rule if its application leads to the invalidity of a union which, according to Common and Civil law systems, is valid under the law of, the matrimonial domicile or, the nationality of the parties at the time of proceedings, respectively -i.e any variation in the rules must be to positive effect. In fact, the courts in such hard cases should only rely on actual changes of domicile or nationality, notwithstanding the presumed intentions of the parties. The proposed solution seems to be consistent with the policy of validation. In Radwan v. Radwan, for instance, Cumming-Bruce J. was of opinion that it was difficult to imagine what useful purpose would have been served by applying the wife's prenuptial domiciliary law to invalidate a long-standing relationship which is valid under Egyptian law, the law of the matrimonial domicile where the marriage has existed nearly for 20 years. The *Lex loci celebrationis* and the parties' prenuptial personal laws should recognise this decision in order to prevent conflicts between the relevant laws, unless there is some overwhelming policy reason which prevent this.

It is, however, my opinion that the learned judge would have never considered the marriage as valid in this case if the parties had established their matrimonial home after the marriage ceremony in England, the country of the wife's pre-marital domicile, under the law of which the marriage was initially void from its inception as being an actually polygamous union. Accordingly, the *forum's* judicial authorities should only declare a marriage void if, and only if, it is void by both the parties' antenuptial

personal laws, and the law of the country where the union has existed after the marriage ceremony as the law to govern [in the eye of the *forum*] the effects of the parties' marital relationship, notwithstanding its validity under the *lex fori*. The reason is that it is hard to find any conceivable justification why the *forum's* courts should declare the marriage as nevertheless valid in these cases. In Lawrence v. Lawrence, for instance, English law was primarily applied, not in its capacity as the law of the *forum* but, as being the law of the matrimonial domicile. The only thing the judge can do in such cases is to base his decision on the fact that the marriage, though is valid by the *lex fori*, is regarded as void under both parties' antenuptial personal laws, and the law of the country where the union has existed once it is performed. This may not be a solace for the parties but at least will give them an understandable ground for the judicial decision.

Indeed, the effectiveness of the proposed rules would be difficult to achieve in practice because of the existing parochial and nationalistic focus in choice of law leading to the formulation of subsidiary rules that, almost invariably, give preference to the *lex fori* or the *lex loci celebrationis*, as the case may be, in the present matter. The underlying reason lies in the existing lenient practice among legal systems as to the enforcement of foreign laws that tends not only to erode the general rule determining capacity to marry by the parties' prenuptial personal laws, but also aborts any practical proposition seeking to bridge the distance between different choice of law tendencies -a matter that is countenanced by the importance of coordinating the competing policy considerations relevant in the field of marriage. In practical terms, this unprincipled focus in choice of law tends actually to restore the kind of territorialism that, in the past, characterised certain doctrines of statisticians, as well as the antiquated notion of *lex fori* predominance in conflict of laws. Although one cannot ignore the fact that the growing concern to avoid an inadequate and unjust result revolves around the special circumstances of each individual case, there is no justification for imposing even the *forum's* minimum

standards of essentials of marriage in a case where there are no policy reasons requiring the exclusive application of the law of the *forum*.

In Sottomayor v. De Barros [N° 2], for instance, the English court rejected the relevant foreign law designated by the English general conflict rule simply because one of the parties was domiciled, and the marriage was celebrated, in England -a rule under which the foreign element provides little additional dimension. The application of the *lex fori qua lex domicilii* of either party seems to be based here on the desire to protect English domiciliaries from the injustice alleged to result if the prohibitions imposed by the foreign party's domiciliary law were to be applied. This rule is surely excessive insofar as it reduces the application of the relevant foreign law to pure lip-service, and it perpetuates the existence of a limping marriage which is socially undesirable and unjust to the parties. Furthermore, this unprincipled rule would not achieve even the very goal of justice upon which it is based, particularly if the relevant foreign prohibition is not contrary to the *forum's* public policy. The problematic nature of this rule becomes apparent in the case where the foreign party obtains a nullity decree in the foreign country concerned and remarries there. In such a case, this rule would inflict injustice on the local party rather than achieving justice, insofar as the *forum's* subject would be deprived of his right to remarry, and thus would be forced into celibacy, unless he obtains a divorce in the *forum*. Quite evidently, the illogical nature of this rule and the complexity that it introduces into the structure of choice of law rules strongly justify its condemnation as "unworthy of a place in a respectable system of conflict of laws". It is therefore my opinion that the attainment of an effective application of the proposed rules highly requires the abolition of this kind of rules, for it is an unprincipled inductive process necessarily leading to *ad hoc* decisions. The English and Scottish Law Commissions has recommend, in their 1985 joint report, has recommended its removal from English and Scottish conflict of laws -a view that can be seen as a positive step

towards modernisation of conflict of laws.

Another and, from the present writer's perspective, perhaps even more damaging rule in the present subject-matter is that by which the parties are also required to comply with the essentials of marriage under the *lex loci celebrationis qua lex fori*. As is apparent, English and Scottish courts would hold a marriage void if the parties lacked capacity by English and Scottish laws *qua lex loci celebrationis*, irrespective of its validity under the parties' prenuptial domiciliary laws and the law of the matrimonial domicile. The application of the *lex loci qua lex fori* is certainly undesirable as being of illogical and discriminatory nature which may create rather than prevent limping marriages. It is certainly true that the application of this rule even in its generalised form -as suggested by English and Scots Law Commissions- has little to recommend it, as it is in direct opposition to the policy of validation. Furthermore, it is also hard to justify the maintenance of this rule at the present time as the judicial and academic authorities are in favour of the validity of a marriage once it has come into existence, irrespective of its invalidity even under the parties' prenuptial personal laws. Therefore, it is very difficult to see what useful purpose would have been served by invalidating a marriage that is celebrated, and performed in good faith, according to the general choice of law rule governing essential validity. The reason is that the policy of validation seems to demand this if the marriage is valid under both the parties' prenuptial personal laws and the law of the country where the parties have established their matrimonial home.

Certainly, it is evident that no country would allow a marriage to take place within its territory in defiance of its prohibitory rules, on the basis that it is fundamentally against public policy. It is therefore my opinion that this rule is only acceptable to prevent celebration of marriages, and not to invalidate marriages that had already taken place in contravention of the law of the *forum qua lex loci celebrationis*. The reason is very

clear that the country of celebration may only have a fortuitous or fleeting connection with the marriage, particularly if the parties have returned to their home country where the union is valid. While it may be in accordance with the principle for the *lex loci celebrationis* to prevent the celebration of a marriage which offends the policy of the *lex loci*, or which appears to the officials of the *lex loci* to flout the parties' personal laws, a *favor matrimonii* approach may yet be appropriate in cases where marriages have been celebrated, parties have acted on the faith of its, and its validity is examined *ex post*. Accordingly, there is no need for a rule that would render the choice of law rules' structure unduly complex -especially if one of the parties has decided to remarry in the *forum*- since public policy ground is sufficient to cover the cases where marriage officials cannot celebrate marriages in defiance of the *lex loci's* prohibitory rules. The better view seems indeed to be that an existing marriage should be sustained if it is valid by the parties' prenuptial personal laws and the parties lived in the reasonable belief that they are husband and wife, even though it is invalid by the *lex loci celebrationis*. It is therefore to be hoped that sections 1(2) and 2(1)(a) of the Marriage (Scotland) Act, and section 21(1)(a) of the Family Law (Scotland) Bill 1992, will be reconsidered in the near future, indeed to the extent that the Scottish prohibitory rules *qua lex loci celebrationis* should only be invoked at the time of the celebration.

Finally, the most stringent stumbling block in the way of the proposed rules is the rule enacted by section 50 of the Family Law Act 1986, as a result of piecemeal reforms suggested by English and Scottish Law Commissions without any consideration of the wider ripples that it causes in the capacity and nullity pools. This provision expressly provides that where a divorce has been granted, or recognised, in England or Scotland, the fact that it is not recognised elsewhere shall not preclude either party to the marriage from remarrying, or cause the remarriage, wherever it takes place, to be treated as void, in England or Scotland. This rule certainly disregards the parties' personal laws designated by the *forum* itself in order to be substituted by the recognition rules of *lex*

*fori*, producing a rule which, it is submitted, has neither been accepted as a general conflict rule in the present subject, nor can be seen as a subsidiary rule that may achieve justice in the hard cases referred to above. The main reason is that the adoption of *lex fori qua lex fori* in this case renders the structure of choice of law unduly complex, and it is inconsistent with the prevailing policies of legal certainty, predictability and international uniformity of decisions that are relevant in the field of marriage. It is also evident that English or Scottish *forum* may have no real connection with the second marriage, particularly where jurisdiction has been assumed on the ground of one year's habitual residence, or the *forum* is only a convenient place of celebration. As is apparent, there is no policy judgement indicating that capacity to remarry after divorce or nullity decrees ought to be governed exclusively by *lex fori*, insofar as it raises the same questions as general capacity to marry. In fact, this rule can only be justified as the necessary effect of the United Kingdom ratification of 1970 Hague Convention on the Recognition of Divorces and Legal separations. Nevertheless, it must be admitted that the United Kingdom recognition rules are reasonable and of many years standing.

It is my opinion that the application of this rule, especially at the time of the ceremony, exacts a cost entirely disproportionate to whatever benefits it promises in atypical cases where the second marriage has actually its present connection with the *forum* country. To allow a remarriage to take place on the sole ground that a prior divorce is recognised as valid in the *forum qua lex loci* -even though it is invalid under the parties' prenuptial personal laws- would certainly achieve national uniformity of decisions in the *forum* for the greater and unacceptable price of creating a limping marriage and endangering the remarrying party's life if he returns to his home country, where he can be prosecuted and convicted for bigamy. The main reason is that the chances of that person returning to his home country are considerably higher than his chances of settling down in the *forum* or in a third country where the remarriage might be

recognised as valid, insofar as the establishment of a domicile in, or the acquisition of the nationality of, a given country is subject to its restrictive regulations of immigration. The point is not, as the adherents of the *lex fori* approach in regard to incidental question seem to suggest, that internal consistency should be maintained simply because the right to remarry is a legal consequence inherent in the divorce decree. The question is rather whether the attainment of internal uniformity of decisions within the *forum* is worth taking the risk of creating a limping union, and above all endangering the remarrying party's life who might be found guilty of bigamy in his home country. Furthermore, it is unlikely that the parties' prenuptial personal laws would be prepared to recognise the remarriage simply because it has been celebrated, to achieve internal uniformity of decisions in the *forum qua lex loci*. In Russell v. Russell, for instance, the House of Lords declared the second marriage void *ab initio* and found the husband -whose divorce had not been recognised by English law as being the law of domicile- guilty of bigamy. The present writer therefore believes that a divorcee should not be allowed to remarry in England or Scotland if the divorce has not been recognised by his domiciliary law. The attainment of internal consistency is certainly not a sufficient ground for the *forum* to permit the celebration of a second marriage on the authority of a locally, or recognised foreign, valid divorce.

The position is certainly different where the remarriage has already entered into in contravention of the relevant foreign law. Here it is also true that *lex fori qua forum* should not be applied on the sole ground that the divorce is recognised as valid there, for the *favor matrimonii* principle -that comes into consideration once the marriage has been created- requires the validation of a marriage where, and only where, it is valid in the country with which it has its present connection. It is very clear that English and Scottish courts, when examining the validity of a marriage *ex post*, should consider the position of the country where the parties have established their actual matrimonial home. In Lawrence v. Lawrence, for instance, English court upheld the validity of the

marriage on the basis that it was valid under the law of the matrimonial home, namely, England, the country which has the most enduring interest in the parties' marital status in this particular case. But if the parties have established their matrimonial home in a country where the remarrying party's divorce was not recognised as valid, it is hard to find any conceivable reason why an English or a Scottish court should declare the marriage as nevertheless valid. It is therefore to be hoped that section 50 of the 1986 Act will be amended so as to provide that the remarriage of a divorcee, that has been celebrated nevertheless in contravention of the relevant foreign law governing capacity, will be held valid in the United Kingdom if, and only if, the parties have established their actual matrimonial home in a country where it is regarded as a valid union.

As regards the converse situation where the prior marriage is valid from the outset, or the foreign divorce or nullity decree is not entitled to recognition, in the *forum*, the application of the *lex fori qua lex loci* so as to prevent the celebration of a second union is well founded on the sole ground of public policy. This is because the celebration of the second marriage would be so offensive to the morals and religious concepts a monogamy-insisting *lex fori* and would create a legal bigamy in that country. To this extent, it has been established in England and Scotland that a marriage registrar should not issue the necessary licence or the marriage schedule if the existence of any lawful impediment has been shown to his satisfaction. It is therefore clear that this would be a case where the certificate of capacity from the foreign marriage bureau, if asked for, would be disregarded simply because the remarrying party has no capacity under the *lex loci celebrationis*.

Accordingly, it is my opinion that an incapacity due to a prior subsisting marriage under the *lex fori qua lex loci* can hardly require the invalidation of a subsequent marriage once it has been celebrated if it is valid under the parties' personal laws. Quite rightly, there is no policy justification for the application of the *lex fori qua lex loci* in such

cases insofar as it is in direct opposition to the policy of validation, as well as leading to limping marriages, particularly if the second marriage has no connection with the *forum's* country. The Canadian decision in Schwebel v. Ungar, for example, appears to be in favour of applying the view suggested here which seems to be consonant with the *favor matrimonii* principle and, the best way in which the *forum* can further international uniformity of decisions. It is therefore to be hoped that English and Scots courts, when given an opportunity to rule on this question, would adopt the rule here advanced.

From an objective view, it is very clear that the argument of internal consistency rests on misunderstanding. When an English or a Scottish court determines the validity of a divorce as an incidental question in a case of remarriage, which is governed for instance by French law, the court should not decide whether the divorce is valid in England or Scotland, but whether the divorcee has capacity to remarry under French law and thus whether the remarriage is valid. The decision that a divorcee has no capacity to remarry under French law, i.e. the law of the country to which the party belongs by domicile or nationality, does not actually frustrate a previous decision that the divorce is recognised as valid by English or Scottish law. It is therefore submitted that this decision does not lead to any internal inconsistency, insofar as the court is concerned in such cases with the examination of the validity of the second marriage in relation to two different legal systems.

Indeed, it is fair to say that comprehensive legal reforms, either at the domestic or international level, must concentrate on the eradication of conflict of laws' encrustations and their root cause, i.e. the parochial and nationalistic focus in the present field, rather than on finding the "lowest common denominator" that is inadequate and satisfies no one. The English and Scottish Law Commissions have, in their 1985 joint report, put

forward certain recommendations that seem to be a modest step in the right direction to introduce some rationality and certainty into the field of marriage. The Law Commissions have actually identified some of the antiquated barriers which stand in the way of the efficient application of the general choice of law rules in the present subject-matter, namely, the parochial and nationalistic rule of Sottomayor v. De Barros the abolition of which has been strongly recommended. But it is unfortunate that the Law Commissions have failed to realise the undesirable effect of the application of the *lex loci* rule as to capacity, especially when the validity of the marriage is examined *ex post*.

It is essential to note that in 1987 the Law Commissions also declined to propose any comprehensive legislative intervention on the choice of law rules in marriage, as they believe this might be harmful. The main reason is that there is no major area where, in practice, the present law seems to lead to absurd results, and the clarification of certain undeveloped choice of law rules in marriage would be best left to judicial authorities. One might think that these reasons are not very convincing insofar as some at least of the most recent innovative judicial developments have achieved nothing more than adding confusion to the most confused subject of conflict of laws. As regards the judicial experience of the last hundred years, it is very unlikely that the judicial authorities will in fact provide the necessary clarification needed in choice of law rules of marriage. However, the Scottish Law Commission has finally realised, as indicated in its 1992 report on family law, that the haphazard nature of the most recent judicial developments and the fact that the choice of law rules of marriage require application outside the court primarily at the time of celebration point to comprehensive legislation as the answer for providing clarity, stability and certainty in law. The Commission has thus proposed the inclusion of choice of law rules on marriage in the new Scottish family law code. It is to be hoped that the English Law Commission would follow the Scots Commission's step in order to conform English law to the most appropriate

standards through which the coordination of the policy considerations relevant in marriage can be achieved.

It is also regrettable that the 1976 Hague convention, the main international initiative to harmonise the choice of law rules of marriage has ultimately failed to achieve the very objective that it was designed to pursue, for it provides an inadequate and incomplete set of choice of law rules that do not actually form a sound basis for law reform. The underlying reason is that the convention is mainly concerned with the identification of compromises of the “lowest common denominator” that might bring about a certain rapprochement between legal systems insisting on the exclusive application of the *lex loci celebrationis* and those systems which favour the traditional dichotomy between formal and essential validity. In its effort to achieve such compromises, the convention has laid down certain choice of law rules for celebration and recognition of marriages that are far from being adequate rules, without taking into consideration that the conflict problems are inherent in the stringency of the marriage laws of the countries concerned, as well as in the parochial and nationalistic focus in choice of law.

Quite evidently, the convention has failed to recognise the relevance of coordinating the policy considerations relevant in the field of marriage. It only promotes the principle of *favor matrimonii*, and the unfortunate general tendency to facilitate the celebration of marriages. It is certainly true that chapter one of the convention promotes the creation of limping marriages insofar as it obliges the authorities of the country of celebration to celebrate a marriage if the future spouses have complied with the essential requirements of the *lex loci celebrationis* and one of them is a national or a habitual resident of that country. Accordingly, chapter one appears to preserve the very essence of the English rule in *Sottomayor v. De Barros* by virtue of which a foreign incapacity must be ignored if one of the parties is domiciled in England, a perpetuation that is rather

unfortunate in the light of the rule's stigmatisation as "unworthy of a place in a respectable system of conflict of laws". Furthermore, the authorities of the country of celebration are also bound to celebrate a marriage if their conflict rules are satisfied, irrespective of the fact that the celebration is fundamentally contrary to the *lex loci* public policy. However, this conventional rule is undesirable as it is very unlikely that many countries would be prepared to reject their practice of requiring marriages in their own territories to comply with their law, particularly at the time of the celebration. It is thus clear that this unprincipled compromise undercuts decisional harmony, and defeats the objective of uniformity of approach that is sought in an international convention; a criticism that is evidenced by the optional nature of chapter one of the convention.

It is also interesting to emphasise that chapter two, the core of the convention falls well short of harmonisation of choice of law rules to govern essential validity, inasmuch as the primacy it gives to the *lex loci celebrationis* in the matter of recognition is far from being self-evidently justified. It is in essence a compromise between Common law systems which apply the law of domicile and Civil law systems which prefer the national law -a compromise that certainly suffers the fate of satisfying no one. The renunciation of the personal law concept in favour of the excessive "Yankeeism" of the reliance on the *lex loci celebrationis* is unfortunate in the light of the present condemnation of this rule even in the U.S.A. as is evidenced by the lukewarm reception that the Hague convention has received there. Finally, it is clear that the convention does not really achieve very much, because it attempts to solve the very complicated conflict problems in marriage by the use of an over simple formula: something which has been tried only too often, in an upsurge of cosmopolitan enthusiasm and in disregard of reality.

In conclusion, it is to be hoped that any future legal reforms, either at the domestic or international level, should give particular attention to the coordination of the competing

policy considerations relevant in marriage, and the attainment of the proper application of the general choice of law rules in the present subject. The efficient solution to the conflict problems of marriage, in general, would be a complete reconsideration of English, Scottish and Algerian conflict rules in marriage in a more straight forward fashion. It is a difficult task to achieve but the problems cannot be left to the piecemeal effect of statutory changes to existing rules or occasional judicial innovations. The best conflict system would therefore remain pure theory as long as legal systems are unwilling to compromise their traditional rules, and the courts are not prepared to apply such a system as part of their law.

**Appendix I**  
**ALGERIAN CIVIL CODE**  
**[Ordonnance n° 75-58 du 26 September 1975]**

**CHAPITRE I**  
**DES CONFLITS DE LOIS DANS LE TEMPS**

Art. 6: Les lois relatives à la capacité s'appliquent à toutes les personnes qui remplissent les conditions prévues.

Lorsqu'une personne ayant la capacité juridique aux termes de l'ancienne loi, devient incapable d'après la loi nouvelle, cette incapacité n'affecte pas les actes antérieurement accomplis par elle.

Art. 7: Les nouvelles dispositions touchant la procédure s'appliquent immédiatement.

Toutefois, en matière de prescription, les règles concernant le point de départ, la suspension et l'interruption, sont celles déterminées par l'ancienne loi pour toutes la période antérieure à l'entrée en vigueur des nouvelles dispositions.

Il en est de même en ce qui concerne les délais de procédure.

Art. 8: Les preuves préconstituées sont soumises à la loi en vigueur, au moment où la preuve est établie ou au moment où elle aurait dû être établie.

**CHAPITRE II**  
**DES CONFLITS DE LOIS DANS L'ESPACE**

Art. 9: En cas de conflit de lois, la loi algérienne est compétente pour qualifier la catégorie à laquelle appartient le rapport de droit, objet de litige, en vue de déterminer la loi applicable.

Art. 10: Les lois concernant l'état et la capacité des personnes, régissent les Algériens même résidant en pays étranger. Toutefois, si l'une des parties, dans une transaction d'ordre pécuniaire conclue en Algérie et devant y produire ses effets, se trouve être un étranger incapable et que cette incapacité soit le fait

d'une cause obscure qui ne peut être facilement décelée, cette cause n'a pas d'effet sur sa capacité et la validité de la transaction. Les personnes morales étrangères, sociétés, associations, fondations ou autres qui exercent une activité en Algérie, sont soumises à la loi algérienne.

Art. 11: Les conditions relatives à la validité du mariage sont régies par la loi nationale de chacun des deux conjoints.

Art. 12: Les effets du mariage, y compris ceux qui concernent le patrimoine, sont soumis à la loi nationale du mari, au moment de la conclusion du mariage.

La dissolution est soumise à la loi nationale de l'époux, au moment de l'acte introductif d'instance.

Art. 13: Dans les cas prévus par les articles 11 et 12, si l'un des deux conjoints est Algérien, au moment de la conclusion du mariage, la loi algérienne est seule applicable, sauf en ce qui concerne la capacité de se marier.

Art. 14: L'obligation alimentaire entre parents est régie par la loi nationale du débiteur.

Art. 15: Les règles de fonds en matière d'administration légale, de curatelle et autres institutions de protection des incapables et des absent, sont déterminées par la loi nationale de la personne à protéger.

Art. 16: Les successions, testaments et autres dispositions a cause de mort, sont régis par la loi nationale du de cujus, du testateur ou du disposant au moment du décès.

Toutefois, la forme du testament est r'gie par la loi nationale du testateur, au moment du testament ou par la loi du lieu où le testament a été établi. Il en est de même de la forme des autres dispositions à cause de mort.

Art. 17: La possession, la propriété et les autres droits réels sont soumis, pour ce qui est des immeubles, à la loi de la situation de l'immeuble et pour ce qui est des meubles, à la loi de lieu où se trouvait le meuble, au moment où s'est produit la cause qui a fait acquérir ou perdre la possession, la propriété ou les autres droits réels.

Art. 18: Les obligations contractuelles sont régies par la loi du lieu où le contrat a été conclu, à moins que les parties ne conviennent qu'une autre loi sera appliquée.

Toutefois, les contrats relatifs à des immeubles sont soumis à la loi de la situation de l'immeuble.

Art. 19: Les actes entre vifs sont soumis, quant à leur forme, à la loi du lieu où ils ont été accomplis. Ils peuvent être également soumis à la loi nationale commune aux parties.

Art. 20: Les obligations non contractuelles sont soumises à la loi de l'Etat sur le territoire duquel se produit le fait générateur de l'obligation.

Toutefois, lorsqu'il s'agit d'une obligation née d'un fait dommageable, la disposition de l'alinéa précédent n'est pas appliquée aux faits qui se sont produits à l'étranger et qui, quoique illicites d'après la loi étrangère, sont considérés comme licites par la loi algérienne.

Art. 21: Les dispositions qui précèdent ne s'appliquent que lorsqu'il n'en est pas autrement disposé par une loi spéciale ou par une convention internationale en vigueur en Algérie.

Art. 22: En cas de pluralité de nationalités, le juge applique la nationalité effective.

Toutefois, la loi algérienne est appliquée si la personne présente, en même temps, la nationalité algérienne, au regard de l'Algérie et, une autre nationalité, au regard d'un ou de plusieurs Etats étrangers.

En cas d'apatridie, la loi à appliquer est déterminée par le juge.

Art. 23: Lorsque les dispositions qui précèdent renvoient au droit d'un Etat dans lequel existent plusieurs systèmes juridiques, le système à appliquer est déterminé par le droit interne de cet Etat.

Art. 24: L'application de la loi étrangère, en vertu des articles précédents, est exclue si elle est contraire à l'ordre public ou aux bonnes mœurs en Algérie.

**Appendix II**  
**CODE DE L'ÉTAT CIVIL**  
**[Ordonnance n° 70-20 du 19 Février 1970]**

**TITRE IV**  
**L'ÉTAT CIVIL EN DROIT INTERNATIONAL**

**CHAPITRE UNIQUE**  
**ÉTAT CIVIL DES ALGÉRIENS ET ÉTRANGERS**  
**A L'ÉTRANGER**

**Section I**  
**État civil local**

- Art. 95 Tout acte de l'état civil des Algériens et des étrangers établi en pays étranger, fait foi, s'il a été rédigé dans les formes usitées dans ledit pays.
- Art. 96 Tout acte de l'état civil des Algériens en pays étranger, est valable, s'il a été reçu, conformément aux lois algériennes par les agents diplomatiques ou par les consuls.
- Art. 97 Le mariage contracté en pays étranger entre Algériens ou entre Algérien et étrangère, est valable, s'il a été célébré dans les formes usitées dans le pays, pourvu que l'Algérien n'ait point contrevenu aux conditions de fond requises par sa loi nationale pour pouvoir contracter mariage.

Il en sera de même du mariage contracté en pays étranger entre un Algérien et un étrangère, s'il a été célébré par les agents diplomatiques pourvu d'une circonscription consulaire ou par les consuls d'Algérie, conformément aux lois Algériennes.

Toutefois, lorsque le conjoint étranger n'a pas la nationalité du pays d'accueil, ce mariage ne peut être célébré que dans les pays qui seront déterminés par décret.

Art.98 Lorsque l'acte a été omis, en raison de l'inexistence dans le pays étranger, d'actes instrumentaires constatant l'état civil, il est procédé à l'inscription de l'acte sur les registres consulaires, par ordonnance de président du tribunal d'Alger.

Art. 99 Lorsque l'acte a été omis en raison d'un défaut de déclaration, il y a lieu soit de faire établir l'inscription de l'acte si la loi locale admet les déclarations tardives, soit de provoquer une ordonnance du président du tribunal d'Alger prescrivant son inscription sur les registres consulaires.

Art. 100 Le président du tribunal d'Alger est compétent pour ordonner la rectification des actes de l'état civil instrumentaires dressés à l'étranger dans les formes locales et concernant les Algériens.

L'acte ainsi rectifié est transcrit d'office, à la requête du ministère public, sur les registres consulaires.

Art. 101 Lorsque l'acte a été perdu ou détruit et que la loi étrangère ne contient aucune disposition relative à sa reconstitution, l'Algérien peut saisir le président du tribunal d'Alger.

Art. 102 L'ordonnance rendue par le président du tribunal d'Alger est immédiatement adressée par le procureur de la République, pour transcription de ces actes sur les registres déposés au ministère des affaires étrangères qui détient le second original des registres consulaires.

Art. 103 Les actes de l'état civil dressés en pays étranger, qui concernent des Algériens, sont transcrits soit d'office, soit sur la demande des intéressés, sur les registres de l'état civil de l'année courante, tenus par les agents diplomatiques pourvus d'une circonscription consulaire ou les consuls territorialement compétents.

Seules sont transcrites les indications qui doivent être portées dans les actes de l'état civil algérien correspondant.

Lorsque, du fait de l'absence des relations diplomatiques ou de la fermeture du poste diplomatique ou consulaire territorialement compétent, la transcription

ne peut être faite dans les conditions prévues aux alinéas précédents, l'acte est déposé au ministère des affaires étrangères qui peut en délivrer expédition. Dès que les circonstances le permettent, le ministère fait procéder à la transcription de l'acte dans les conditions précitées.

Les expéditions et extraits des actes transcrits sont délivrés par les consuls, les agents diplomatiques pourvus d'une circonscription consulaire ou par le ministère des affaires étrangères.

## **Section II**

### **Etat civil consulaire**

Art. 104 Les vice-consuls peuvent être autorisés à suppléer, d'une manière permanente, le chef de poste consulaire, par décision du ministre des affaires étrangères.

Les agents consulaires peuvent être autorisés, par arrêté du ministre des affaires étrangères, soit à recevoir les déclarations de naissance et de décès, soit à exercer les pouvoirs complets d'officier de l'état civil.

En cas d'empêchement momentané de l'agent exerçant les fonctions d'officier de l'état civil, ses pouvoirs passent à l'agent désigné à cet effet, par le ministre des affaires étrangères, sous réserve qu'il s'agisse d'un agent de carrière.

Art. 105 Les agents mentionnés aux articles 1 et 2 dressent, conformément aux dispositions de la présente ordonnance, les actes de l'état civil concernant les ressortissants algériens sur des registres tenus en double.

Ils transcrivent, également sur les mêmes registres les actes concernant ces ressortissants qui ont été reçus par les autorités locales dans les formes usitées dans le pays.

Art. 106 Les registres de l'état civil sont cotés par première et dernière et paraphés, sur chaque feuille, par le chef de poste.

En fin d'année, ils sont clos et arrêtés par lui; l'un des exemplaires est

adressé au ministère des affaires étrangères qui en assure la garde; l'autre est conservé dans les archives du poste. A se dernier registre qui peut contenir les actes de plusieurs années, restent annexées les pièces produites par les intéressés, telles qu'expéditions et traductions des actes étrangers transcrit et procurations.

Lorsqu'au cours d'une année, aucun acte n'a été dressé ou transcrit, le chef de poste adresse au ministre des affaires étrangères, un certificat pour néant.

Les formalités de clôture et de réouverture des registres sont, en outre, obligatoires à chaque changement de chef de poste.

Art. 107 En cas de perte ou de destruction des registres, le chef de poste en dresse procès-verbal et l'envoie au ministère des affaires étrangères.

La reconstitution est faite par une commission interministérielle.

Un décret déterminera les modalités d'application du présent article ainsi que la composition et le fonctionnement de ladite commission.

Art. 108 Aucun acte de l'état civil reçu dans un poste diplomatique ou consulaire ne peut, pour motif d'erreurs ou d'omissions, être rectifié, si ce n'est par ordonnance du président du tribunal d'Alger. Si un acte transcrit sur les registres de l'état civil, est rectifié par une décision judiciaire étrangère, celle-ci doit recevoir l'exéquatur du tribunal d'Alger.

Art. 109 De même, lorsque, pour une cause autre que celles prévues à l'article 99, les actes n'ont pas été dressés, il ne peut être suppléé que par ordonnance du président du tribunal d'Alger.

Art. 110 Les agents exerçant les fonctions d'officier de l'état civil auront soin de recueillir et de transmettre au ministre des affaires étrangères, soit au moyen d'actes de notoriété, soit de toute autre manière, les renseignements qui pourraient être utiles pour ratifier les actes qu'ils ont dressés ou transcrits ou pour y suppléer.

Ses actes de notoriété seront dressés sur les registres des actes divers et des expéditions pourront en être délivrées aux intéressés.

Art. 111 Des copies conforme des actes de naissance ne peuvent être délivrées à des personnes autres que celles prévues à l'article 65, que sur demande écrite adressée à l'agent qui a dressé l'acte. En cas de refus, la demande peut être portée par le requérant devant le ministère des affaires étrangères.

**Appendix III**  
**ALGERIAN FAMILY LAW CODE**  
**[Loi n° 84-11 du 9 Juin 1984]**

**CHAPITRE I**  
**DU MARIAGE ET DES FIANÇAILLES**

Art. 4 Le mariage est un contrat passé entre un homme et une femme dans les formes légales. Il a entre autres buts de fonder une famille basée sur l'affection, la mansuétude et l'entraide, de protéger moralement les deux conjoints et de préserver les liens de famille.

Art. 5 Les fiançailles constituent une promesse de mariage; chacune des deux parties peut y renoncer.

S'il résulte de cette renonciation un dommage matériel ou moral pour l'une des deux parties, la réparation peut être prononcée.

Si la renonciation est du fait du prétendant, il ne peut réclamer la restitution d'aucun présent.

Si la renonciation est du fait de la fiancée, elle doit restituer ce qui n'a pas été consommé.

Art. 6 Les fiançailles peuvent être concomitantes à la fatiha ou la précéder d'une durée indéterminée.

Les fiançailles et la fatiha sont régies par les dispositions de l'article 5 ci-dessus.

Art. 7 La capacité de mariage est réputée valide à vingt et un (21) ans révolus pour l'homme et à dix huit (18) ans révolus pour la femme.

Toutefois le juge peut accorder un dispense d'âge pour une raison d'intérêt ou dans un cas de nécessité.

Art. 8 Il est permis de contracter mariage avec plus d'une épouse dans les limites de

la Chari'a si le motif est justifié, les conditions et l'intention d'équité réunies et après information préalable des précédente et future épouses. L'une et l'autre peuvent intenter une action judiciaire contre le conjoint en cas de dol ou demander le divorce en cas d'absence de consentement.

### DES ELEMENTS CONSTITUTIFS DU MARIAGE

Art. 9 Le mariage est contracté par le consentement des futurs conjoints, la présence du tuteur matrimonial et de deux témoins ainsi que la constitution d'une dot.

Art. 10 Le consentement découle de la demande de l'une des deux parties et de l'acceptation de l'autre exprimée en toute terme signifiant le mariage légal.

Sont validés la demande et le consentement de l'handicapé exprimés sous toutes formes écrites ou gestuelles signifiant le mariage dans le langage ou l'usage.

Art. 11 La conclusion du mariage pour la femme incombe à son tuteur matrimonial qui est soit son père, soit l'un de ses proches parents.

Le juge est le tuteur matrimonial de la personne qui n'en a pas.

Art. 12 Le tuteur matrimonial [WALI] ne peut empêcher la personne placée sous sa tutelle, de contracter mariage si elle le désire et si celui-ci lui est profitable. En cas d'opposition, le juge peut autoriser le mariage, sous réserve des dispositions de l'article 9 de la présente loi.

Toutefois, le père peut s'opposer au mariage de sa fille vierge si tel est l'intérêt de la fille.

Art. 13 Il est interdit au wali [tuteur matrimonial] qu'il soit le père ou autre, de contraindre au mariage la personne placée sous sa tutelle de même qu'il ne peut la marier sans consentement.

Art. 14 La dot est ce qui est versé à la future épouse en numéraire ou toute autre bien qui soit légalement licite. Cette dot lui revient en toute propriété et elle en dispose librement.

Art. 15 La dot doit être déterminée dans le contrat de mariage que son versement soit immédiat ou à terme.

Art. 16 La consommation du mariage ou le décès du conjoint ouvrent droit à l'épouse à l'intégralité de sa dot.

Elle a droit à la moitié de la dot en cas de divorce avant la consommation.

Art. 17 Si avant la consommation du mariage, la dot donne lieu à un litige entre les conjoints ou leurs héritiers et qu'aucun ne fournit une preuve, il est statué, sous serment, en faveur de l'épouse ou de ses héritiers. Si ce litige intervient après consommation il est statué sous serment, en faveur de l'époux ou de ses héritiers.

#### **DE L'ACTE ET DE LA PREUVE DE MARIAGE**

Art. 18 L'acte de mariage est conclu devant un notaire ou un fonctionnaire légalement habilité, sous réserve des dispositions de l'article 9 de la présente loi.

Art. 19 Les deux conjoints peuvent stipuler dans le contrat du mariage toute clause qu'ils jugent utiles à moins qu'elle ne soit contraire aux dispositions de la présente loi.

Art. 20 Le futur conjoint peut se faire valablement représenter par un mandataire investi d'une procuration pour ce faire, dans la conclusion de l'acte de mariage.

Art. 21 Les dispositions du code de l'état civil sont applicables en matière de procédure d'enregistrement de l'acte de mariage.

Art. 22 Le mariage est prouvé par la délivrance d'un extrait du registre de l'état civil. A défaut d'inscription, il est rendu valide par jugement si, toutefois, les éléments constitutifs du mariage sont réunis conformément aux dispositions de la présente loi. Cette formalité accomplie, il est inscrit à l'état civil.

## CHAPITRE II DES EMÊCHEMENTS AU MARIAGE

Art. 23 Les deux conjoint doivent être exempts des empêchements absolus ou temporaires au mariage légal.

Art. 24 Les empêchements absolus au mariage légal sont:

- 1- La parenté,
- 2- L'alliance,
- 3- L'allaitement.

Art. 25 Les femmes prohibées par la parenté sont les mères, les filles, les soeurs, les tantes paternelles et maternelles, les fille du frère et de la soeur.

Art. 26 Les femmes prohibées par alliance sont:

- 1)- Les ascendantes de l'épouse dès la conclusion de l'acte de mariage.
- 2)- Les descendantes de l'épouse après consommation du mariage.
- 3)- Les femmes veuves ou divorcées des ascendants de l'époux à l'infini.
- 4)- Les femmes veuves ou divorcées des descendats de l'époux à l'infini.

Art. 27 L'allaitement vaut prohibition par parenté pour toutes les femmes.

Art. 28 Le nourrisson, à l'exclusion de ses frères et soeurs, est réputé affilié à sa nourrice et son conjoint et frère de l'ensemble de leurs enfants.

La prohibition s'applique à lui ainsi qu'à ses descendants.

Art. 29 La prohibition par l'allaitement n'a d'effet que si ce dernier a lieu avant le sevrage ou durant les deux premières années du nourrisson indépendamment de la quantité de lait tété.

Art. 30 Les femmes prohibées temporairement sont:

- 1- La femme déjà mariée,
- 2- La femme en période de retraite légale à la suite d'un divorce ou du décès de son conjoint,
- 3- La femme divorcée par trois fois par le même conjoint pour le même

conjoint,

4- La femme qui vient en sus du nombre légalement permis.

Il est également interdit d'avoir pour épouse deux soeurs simultanément, ou d'avoir pour épouses en même temps une femme et sa tante paternelle ou maternelle, que les soeur soient germaines, consanguines, utérines ou soeurs par allaitement.

Art. 31 La musulmane ne peut épouser un non musulman.

Le mariage des algériens et algériennes avec des étrangers des deux sexes obéit à des dispositions règlementaires.

### **CHAPITRE III MARIAGE VICIÉ ET MARIAGE NUL**

Art. 32 Le mariage est déclaré nul si l'un de ses éléments constitutifs est vicié ou s'il comporte un empêchement, une clause contraire à l'objet du contrat ou si l'apostasie du conjoint est établie.

Art. 33 Contracté sans la présence du tuteur matrimonial, les deux témoins ou la dot, le mariage est déclaré entaché de nullité avant consommation et n'ouvre pas droit à la dot. Après consommation, il est confirmé moyennant la dot de parité [Sadaq el Mithl] si l'un des éléments constitutifs est vicié. Il est déclaré nul si plusieurs de ses éléments sont viciés.

Art. 34 Tout mariage contracté avec l'une des femmes prohibées est déclaré nul avant et après sa consommation. Toutefois, la filiation qui en découle est confirmée et la femme est astreinte à une retraite légale.

Art. 35 Si l'acte de mariage comporte une clause contraire à son objet, celle-ci est déclaré nulle mais l'acte reste valide.

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