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**Recognition of Foreign Divorces and Related Issues in English,
Scots and Iraqi Conflict of Laws**

**A Thesis Submitted for the Degree of Doctor of Philosophy in Law
to The School of Law,
Faculty of Law and Financial Studies
University of Glasgow**

by

Raad Yaseen Abbas (LL.M., Baghdad University)

March 1994


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In memory of my father and my brother Abbas

Acknowledgements

I owe a great debt of gratitude to my supervisor Dr. Elizabeth. B. Crawford, lecturer in the Department of Private Law at the University of Glasgow, for encouraging me to complete this work. The thesis would not have come to this level without her invaluable guidance, suggestions and critical comments.

I would like to thank Professor G Maher for his assistance at the beginning of this work. Thanks are also due to the staff of the Libraries of Glasgow and Strathclyde universities for their assistance.

Many thanks to all those who in one way or another contributed to the fruition of this work. Special thanks should go to my family in Iraq, and to my wife, Rezan and children, Shahad, Yaseen and Zeinab who have been waiting a long time to see this work come into existence.

Summary

This thesis is intended to deal with the conflict problems of recognition of foreign divorces and related issues in the English, Scots and Iraqi conflict of laws. The structure of this thesis is as follows. Chapter 1 outlines the general questions which have a connection with the present thesis subject. Chapters 2 and 3 will examine the jurisdictional and choice of law aspects in divorce cases. Chapters 4 and 5 will deal with the questions of recognition and non-recognition of foreign divorces. Chapters 6 and 7 will consider the effect of recognition of foreign divorces on capacity to marry and financial relief. A review of findings, and recommendations for change, are contained in the conclusion.

The main purposes of this thesis are: (1)- A study of divorce conflicts rules in different legal systems, serving to identify the problems and defects (particularly 'limping marriages') which justify the making of change. (2)- To provide a work of reference for the Iraqi lawyer, since it is believed this thesis is the first work of this kind dealing with divorce conflict of laws in Iraq.

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Shaw v. Gould (1868) L. R. 3 H. L. 55.

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Shields v. Shields (1852) 15 D. 142.

Show v. Show (1851) 13 D. 819.

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Spenoer-Churchill v. Spenoer-Churchill [1970] 114 Sol. Jo. 806.

St. Pierr v. South American Stores Ltd [1936] 1 K. B. 382.

Starkowski v. A. G. [1954] A. C. 155.

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Stavert v. Stavert (1882) 9 R. 519.

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- Tee v. Tee [1974] 1 W. L. R. 213 (A. C.).
- Tew Bon Tew v. Kendrean Basmara [1982] 3 ALL. E. R. 833.
- The Abidin Daver [1984] A. C. 398.
- The Atlantic Star [1974] A. C. 436.
- Thyssen-Bornemisza v. Thyssen-Bornemisza [1985] 2 F. L. R. 670.
- Tijanic v. Tijanic [1968] P. 181.
- Tollemach v. Tollemach (1859) 1 Sw. & Tr. 557.
- Torok v. Torok [1973] 3 ALL. E. R. 1001; [1973] 1 W. L. R. 1066.
- Tovey v. Lindsay (1813) 1 Dow. 643.
- Toylor v. Toylor (1883) 21 S. L. R. 18.
- Travers v. Holley [1953] P. 246.
- Tulloh v. Tulloh (1861) 23 D. 639.
- Turczak v. Turczak [1969] 3 ALL. E. R. 317; [1970] P. 198.
- Turnbull v. Inland Revenue [1904] 7 F. 1.
- Tursi v. Tursi [1958] P. 54.
- Udny v. Udny (1869) L. R. 1 Sc. & Div. 441.
- Uttorton v. Tewsh (1811) Ferg. Rep. 55.
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- Vervaeke v. Smith [1983] 1 A. C. 145.
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- Whicker v. Hume (1858) 7 H. L. C. 124.
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- Yousef v. Yousef [1957] The Times, 1 August. 1957.

Zaal v. Zaal [1983] 4 F. L. R. 284.

Zanelli v. Zanelli [1948] 64 T. L. R. 556. (C.A.).

Abbreviations

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|-------------------|--|
| AC | Appeal Cases English Law Reports |
| ALL.E.R. | All England Law Reports |
| App.cas | Appeal Cases |
| B.Y.B.I.L. | British Yearbook of International Law |
| Can.Bar.Rev. | Canadian Bar Review |
| C.L.J | Cambridge Law Journal |
| Ch. | Chancery Division, English Law Report |
| Ch.D | Law Report, Chancery Division |
| C.J.Q | Civil Justice Quarterly |
| Fam | Law Report: Family Division |
| F.L | Family Law |
| Har.L.Rev. | Harvard Law Review |
| I.C.L.Q | International and Comparative Law Quarterly |
| Int'l &.L.Q | International Law Quarterly |
| J.L.S.S | Journal of the Law Society of Scotland |
| J.S.L.W | Journal of Social Welfare Law |
| Jur.Rev | Juridical Review |
| L.Q.Rev. | Law Quarterly Review |
| L.A | Legal Action |
| L.S | Legal Studies |
| M.L.Rev. | Modern Law Review |
| N.L.J | New Law Journal |
| N.I.L.Q | Northern Ireland Legal Quarterly |
| P. | Law Reports Probate, Divorce & Admiralty Division |
| Q.B. | Queen's Bench Division |
| Recueil des Cours | Recueil des Cours de l'Académie du Droit International |
| S.C. | Session Cases (Scotland) |
| S.L.T | Scots Law Times |
| T.L.R. | Times Law Reports |
| W.L.R. | Weekly Law Reports |

Introduction

I- Scope of the Thesis

It is generally agreed that marriage and divorce are at the core of personal status. Since these matters come very largely within the orbit of personal law, which is not the same in all legal systems, it follows that marriage and divorce questions will be treated differently according to which policy the legal system concerned has adopted. The countries whose laws are examined in this thesis are very illustrative of this, and it is shown that the aim of international uniformity in determination of personal status is still rather distant.

Although earlier attempts were made to create an international body of rules to govern conflict problems in matters of divorce, it is unfortunate these have failed. Apart from the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, whose application is now confined to certain states and its scope limited only to the question of recognition, every state has now the power to determine by itself all of its divorce policy.

Accordingly, conflict problems are bound to arise. The countries which are subject to this study have responded by introducing rules dealing with divorce matters. The English and Scots rules may initially be traced to the decision of *Le Mesurier v. Le Mesurier*,⁽¹⁾ which was for many years the basic judicial approach in matrimonial causes. The doctrine enacted in that case made the law simple by applying one legal system, but at a significant cost in terms of international concerns and hardship for many people. They were deprived of remedies on the ground that they did not satisfy Lord Watson's principle that "the domicile for the time being of the married pair afford the only true test of jurisdiction to dissolve their marriage".⁽²⁾ The narrow rules and hardship were also characteristic of the Iraqi law. Until 1951 residence of either party was the only basis of jurisdiction and the choice of law rule was subject to an unclear test.

1- (1895) A.C.517.

2- Ibid, at 540.

The desire to provide a just system and to promote international concerns produced pressure to expand both the bases of jurisdiction and the grounds of recognition. This development is not without a price. It creates new problems of increased litigation with the possibility of forum-shopping, the dispute of deciding whether to stay proceedings, limping marriages, the ability to provide financial relief and the dispute over capacity of divorced persons to remarry. Although the existing rules have made significant changes and have removed the major problems facing the parties in the past, they are still in certain cases unsatisfactory. They leave much to be desired in promoting certainty of status and providing a system of justice.

Although England and Scotland have each their own legal system, it is worth noting that in recent times both countries have set up a joint team which aims to reform the rules of private international law including those relating to divorce in order to diminish their differences almost to the vanishing point. The outcome of this work is that most aspects of divorce conflict rules have now been placed in statutory provisions by virtue of which the courts' administration in both countries is determined.⁽³⁾ It would be therefore unrealistic to discuss both legal systems separately but any differences between them will be mentioned. The study will also cover the common law rules since they are still of great value or authority to fill the gaps in the present statutory provisions. The Iraqi law, on the other hand, is not directly concerned to any great extent with this subject of conflict rules concerning consistorial cases and there is no legal study or judicial opinion in which a serious effort has been made to give an objective picture of it. However, in this work we try to refer to the general rules of Iraqi conflict of laws and domestic laws to assert the solution of the problems arising within the sphere of divorce.

The object of chapter One is to give a brief outline of the general questions which have

3- A notable exception, where the same end is pursued by slightly different means in the two jurisdictions is contained in the Matrimonial and Family Proceedings Act 1984, part III for England and part IV for Scotland.

a connection with the present thesis subject. The questions addressed in this chapter will be the nature of marriage, and methods and causes of divorce. It is also the purpose of this chapter to examine the main reasons and appropriateness for using domicile and nationality as connecting factors to determine the personal law of the parties. ‘

Jurisdiction, as being logically the first matter for consideration in any divorce action, will be examined in chapter Two with reference to the Iraqi Civil Code 1951, and to the Domicile and Matrimonial Proceedings Act 1973. The issue of jurisdiction is a vital one imposing itself here in order to assert in what circumstances a court can assume jurisdiction to grant a decree of divorce and whether the existing bases of jurisdiction are capable of avoiding 'forum shopping'⁽⁴⁾ and of avoiding anomalies and hardship as well as securing so far as reasonably possible divorce recognition abroad.

The widening of the rules of jurisdiction increased litigations of divorce with the risk of conflicts of jurisdiction between the courts of different countries, which fact led to the introduction of a system of staying or sisting proceedings in the sphere of English and Scots law. This new problem in this area of jurisdiction needs consideration to find out how the courts acted to resolve such conflicts and whether there is any dispute between the existing statutory provisions and the general power of the courts to stay or sist proceedings.

Chapter Three will deal with the second fundamental question in cases presenting a foreign element, namely, the question of choice of law rule applicable to a given case. This has been treated as a purely jurisdictional question in English and Scots law. The courts have disregarded whatever grounds of divorce might be available to the parties in their own country and have applied their own laws in cases properly heard by them. In Iraq the two

4- 'Forum-shopping' has been defined as a "plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in the natural forum". *Boys v. Chaplin*[1971] A.C.356 at 401 *Per* Lord Pearson.

questions of jurisdiction and choice of law are distinguished and the courts do not automatically apply Iraqi law. Although the principle is to apply the national law of the husband, this has been restricted in favour of the application of Iraqi law in several cases. It will be necessary to place emphasis on the arguments for and against the two choices of law rules in order to assess which of the existing rules would provide a system of justice and avoid the problems of "forum-shopping" and of securing recognition of divorce abroad.

The issue of whether a divorce obtained in one country will be recognised in another country is the third main concern of conflict of laws rules which will be discussed in chapter Four. The practical importance of this question is too obvious to need extensive elaboration. Until 1972 the recognition of foreign divorces in English and Scots law was generally governed by common law rules. The Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973, was enacted to give effect to the 1970 Hague Convention. The mischief which the Convention was designed to cure was that of "limping marriage".⁽⁵⁾ The Act in this point went much further than was required under the Convention and laid down rules for recognition which are simpler and more generous than the Convention required. It also retained certain common law rules. The Act was replaced with certain changes by part II of the Family Law Act 1986 which now governs the recognition of foreign divorces. The

5- A 'limping marriage' is defined as "a phrase which has come to usage to describe a marriage which is recognised in one country but not recognised in another with unhappy results that may flow therefrom, namely bigamous remarriage, illegitimate children and uncertainty or confusion over status and property rights." *Quazi v. Quazi* [1980] A.C.744 at 766 *per* Wood J. In *Indyka v. Indyka*, [1967] 2 All.E.R.689 at 798-9, Lord Pearce, commenting on this problem, observed that "each country may recognise all or none or take some intermediate position. In this it will be largely influenced by public policy... but insofar as it confines its recognition more narrowly than its jurisdiction, it is adding to the sum of unilateral marriages. Thus the definition of jurisdiction should be closely related to that of recognition". It could be said that the current United Kingdom recognition rules are much wider than its jurisdictional rules and this would have a positive effect on 'limping marriages'. Nevertheless, one must also say that 'limping marriages' will continue to be created so long as the existing rules as whole are not completely designed to cure this problem as we shall see throughout this thesis.

1986 Act has made significant changes in this field of law, but not to the point of removing all the uncertainties created by previous laws. The Act expressly draws a distinction between divorces obtained by proceedings and divorces obtained otherwise than by means of proceedings and provides narrow recognition rules for the latter. This issue will be given more attention to consider whether such an approach would satisfy the aim of the Act to cure "limping marriages".

The discussion also includes a number of questions which have been subject to a strong arguments both judicially and academically, most notably questions bearing on the meaning of 'proceedings', whether 'bare' *talaq* can be summed under 'proceedings', where an extra-judicial divorce is obtained, and whether English and Scottish courts would recognise transnational divorce.

In contrast, the Iraqi law contains no specific statutory provisions dealing with recognition of foreign divorces. Academic opinions have expressed different speculative views as to whether the general rules concerning enforcement of civil and commercial judgments should be applied to the recognition of divorces. The discussion and evaluation of these views is strongly required in order to find out whether the Iraqi courts can apply the general rules to recognise a foreign divorce.

Chapter Five will consider the grounds for non-recognition of foreign divorces. Even if a foreign divorce satisfies the jurisdictional condition a court may refuse to recognise the divorce on any of the grounds listed in section 51 of the Family Law Act 1986, or under general rules in the case of Iraqi law. Although various discretionary grounds are available to English and Scottish courts, the reported law indicates that only in limited cases were these discretionary grounds used to refuse recognition to a divorce granted by a court of law. On the other hand, the courts have shown a greater willingness to allow divorces not obtained by a court to be attacked. This chapter will discuss these grounds to find out to what extent the court can use its power to refuse recognition to foreign divorces and

whether the existing grounds are necessary to justify the denial of recognition over the creation of 'limping marriages'.

The issue of the effect of recognition of foreign divorces on capacity to marry will be examined in chapter Six. Since the rules governing capacity to marry are different from those governing recognition of foreign divorces, conflicts are likely to arise where the laws concerned take different views as to whether the divorced person has capacity to marry. The problem particularly arises where the previous marriage was dissolved according to one law but not according to another or where the foreign divorce imposes prohibitions or restrictions on the capacity of a divorced person to marry. The purpose of this chapter is to analyze and evaluate the different views and to assess the underlying reasons for the existing rules.

Chapter Seven will consider the issue of the effect of recognition of foreign divorces on financial relief. In many cases of divorce, the parties are not only concerned with the determination of their status, but are also concerned with the powers of the court to make orders as to financial relief. Until 1984 a party to a recognised foreign divorce was unable to seek financial relief in England or Scotland. The law led to unjustifiably harsh results in certain cases and served to encourage the parties to challenge foreign divorces. The Matrimonial and Family Proceedings Act 1984 contains separate provisions for England and Scotland enabling the courts in those countries to make financial relief to a party to a foreign divorce provided certain conditions are met. The Iraqi courts at present have no such power. The main concern of this chapter is to discuss in which circumstances the courts have power to make financial relief and whether the present law has removed all the hardship existing before 1984. It will also examine the differences between English and Scots provisions and the form of order which the courts can make.

II- Legal System of Iraq

The next few pages will give a brief discussion of the Iraqi legal system to enable readers to obtain some understanding of Iraqi law.

A- Judiciary

The Constitution guarantees the independence of the judiciary. It provides that in the administration of justice, a Judge is subject to no authority and that in no circumstances shall any one interfere with the course of justice.⁽⁶⁾ The present judicial structure of the country is based on the law no.26 of 1963.⁽⁷⁾ The Courts are of three tiers, at the top of which is the Court of Cassation. At the base of the pyramid, are the Courts of first instance. These Courts are composed of one Judge. In the second tier are the Courts of Appeal which are composed of three Judges. The jurisdiction of these courts is limited to appeal against the decision of the Courts of first instance where the value exceeds 1000 *dinars* (£2000 approximately). At the top of the pyramid is the Court of Cassation. In civil matters, it has power to reverse final judgment made by the Court of first instance in cases where the value does not exceed 1000 *dinars*. the Courts of Appeal and the Courts of Muslim personal status.

The Court of Cassation is composed of three Chambers and the General Assembly. The three Chambers are the Civil and Commercial Chamber, the Chamber on matters of personal status and the Criminal Chamber. Each of these Chambers is composed of at least three Judges, while the General Assembly is composed of at least ten Judges.

Beside the Courts of first instance, there are the Courts of personal status of Muslims with jurisdiction in question of marriage, divorce, maintenance, custody, etc. For non-Muslims the Civil Courts of first instance have jurisdiction to hear such cases.

6- Art.60 of the Provisional Constitution.

7- Courts Organization Code.No.26 of 1963.

B- Sources of law

Iraq's main sources of law are its constitution, legislation, custom and principles of Muslim law and rules of equity. In the absence of any legislative provision and custom to be applied the courts have to resort to the principles of Muslim law. Here the spirit of Muslim law viewed in its entirety has to be taken into account and not any single text. If the sources above do not provide a solution the courts have to apply the rules of equity.⁽⁸⁾ If, however, the matter before the courts is one of personal status, the courts must apply the provisions of the 1959 Personal Status Code. In the absence of any legislative provision to be applied, judgment shall be given under the principles of Islamic law most suitable to the provision of the Code.⁽⁹⁾

C- Persons

Legal personality starts at the birth of the living child.⁽¹⁰⁾ The age of majority at which capacity commences is fixed at 18 years.⁽¹¹⁾ The capacity to enter into marriage is also fixed at 18 years.⁽¹²⁾ A minor of 15 years may be granted permission by the court, subject to his (her) proving physical ability and to his (her) guardian's consent, which can be waived by the court if it is unreasonably withheld.⁽¹³⁾

D- Property

Article 16 (2) of the Provisional Constitution describes property as a social function which has to be exercised within the limits set by the objectives of society and the state programmers in conformity with the law. On the other hand, Article 7 of the 1951 Civil Code provides that anyone who exercises his right in an unlawful way will have to make

8- Art.1 of the 1951 Civil Code.

9- Art.1 of the 1959 Personal Status Code.

10- Art.34(1) of the 1951 Civil Code.

11- Ibid, Art.106.

12- Art.7(1) of the 1959 Personal Status Code as amended by Art.1 of the Act No.21 of 1978.

13- Art.8 of the 1959 Personal Status Code as amended by Art.2 of the Act No.21 of 1978. Recently, the age for girls has been reduced to 14.

good the resultant damage. The exercising of a right will be unlawful if its sole aim is to injure another; if it is designed to satisfy an interest whose importance is negligible compared to the injury done to another; or if it is designed to satisfy an unlawful interest. Every legal transaction relating to immovable property has to be concluded before the competent civil servant and entered in the land registry. A legal transaction disregarding legally prescribed formalities will be held null and void.⁽¹⁴⁾

Customarily, property which the parties to a valid marriage owned at the time of the marriage or might subsequently acquire is administered by the husband. Legally, any property obtained during the marriage shall be regarded as owned by the party who obtained it. As regards the matrimonial home, it is a duty of the husband to provide his wife with a home containing all the necessary means according to his financial position. If either spouse dies after a valid marriage the other shall inherit.⁽¹⁵⁾ On the dissolution of marriage by divorce, the wife is only entitled to certain financial rights for a limited time and after that she has to rely on her means or her family support.⁽¹⁶⁾ This fact is perhaps significant for other countries in their deliberations upon recognition of Iraqi divorce, or at least its incidents, and upon the subject of competing jurisdiction

E- Personal Status Law

This law covers generally the subject of marriage, divorce, parentage and degrees of kinship, custody and fostering, maintenance, guardianship, will, inheritance and status, including being alive, dead, missing or absent. Until 1917, the principles of Islamic law were applied to all cases without any distinction between the personal status cases and civil cases. The *Sharia* Procedures Code 1917 set up for the first time *Sharia* Courts to deal only with personal status cases according to the principles of Islamic law, while the civil cases remained subject to the jurisdiction of Civil Courts, to be decided according to *Mejelle*, the Civil Code. In 1921, when Iraq was under the British occupation, the British

14- Arts. 1126(2) and 1268(2) of the 1951 Civil Code.

15- Arts. 88 and 91 of the 1959 Personal Status Code.

16- *Infra*, p. 332.

High Commissioner, without any reasonable justification, established Civil Courts for personal status concerning *Shiati* Muslim, applying the *Shia* law, while retaining the personal status cases for other Muslims subject to *Sharia* Courts, applying the *Hanafi* law.

This state of discrimination and confusion was abandoned by the 1959 Personal Status Code, now in force, which provides that its provisions apply to all Iraqis,⁽¹⁷⁾ except those for whom special legislation was made, i.e. Christians and Jews. The provisions of this Code, on the whole, are of Islamic inspiration.⁽¹⁸⁾

F- Private International Law

Iraqi's private international law is essentially a system whose main principles are derived from French law. The 1951 Civil Code now deals with problems of private international law in a chapter dedicated to the conflict of laws in space and falling under two headings:

- (1) - International conflicts in matters of jurisdiction.
- (2) - International conflicts in matters of legislative jurisdiction.

These rules do not extend to cases that are governed either by a special law or an international Convention in force in Iraq.⁽¹⁹⁾ The Code could not be said to be comprehensive in its conflict of laws treatment of the area.

G- Personal Status in Private International Law

Iraqi private international law in the field of personal status has been largely neglected. There are at least three reasons behind this negative development:

- (1) - Matters of personal status are mainly based on Islamic law, a law which has limited the cases of conflict of laws by providing prohibitions or restrictions on non-

17- Art.2(1) of the 1959 Personal Status Code.

18- Religious Courts for the Christian and Mosaic Denominations Code No.32 of 1947.

19- Art.29 of the 1951 Civil Code.

Muslim marriages. Moreover, although in theory, the Iraqi court is more open to choice of law discussion in divorce cases than is the British court, yet the Iraqi court will apply Iraqi law if the case in its view in any way justifies it.

(2)- The background, culture and tradition of the Iraqi society indicates that the Iraqi family is unwilling to tie with a foreign relation.

(3)- The number of immigrant communities compared with that , for instance, in England or Scotland is very limited

Nevertheless, there are a few rules dealing with personal status matters in the conflict of laws.⁽²⁰⁾ These rules are rather rudimentary, leaving many gaps and suffering from lack of clarity. They are now the basic source of Iraqi law

²⁰- Arts.19-24 of the 1951 Civil Code.

CHAPTER ONE

Preliminary Matters

I- The Nature of Marriage

Before a court exercises its jurisdiction to dissolve a foreign marriage, it must be satisfied that there is a lawful marriage according to the law governing the marriage and that it is also valid and subsisting and is not contrary to public policy.⁽¹⁾ If the court is satisfied that said conditions are present, it will then exercise its jurisdiction to grant a decree of divorce to the parties of marriage, provided that the other requirements exist. It is submitted that "not all the various kinds of marriages existing in different parts of the world are recognized as marriage".⁽²⁾ Before 1972 English and Scots law, for instance, declined to grant matrimonial relief to the parties of a polygamous union.⁽³⁾ Also concubinage has never been recognised as a marriage for granting relief under Iraqi law. The question may arise of what the nature of marriage is in these laws, and whether Iraqi marriage is recognised by English and Scots law in order to grant a decree of divorce or other relief

A marriage in Iraqi law may be defined as "a contract between a man and a woman who is lawfully eligible to be his wife with the objective of life and procreation"⁽⁴⁾ This definition is derived from the Classical Islamic law, which permits to a Muslim man four wives at the same time without the permission of the Judge.⁽⁵⁾ However, in Iraqi law,

1- See, *Infra*, 261.

2- See, Wolff, *Private International Law*: 2nd ed, Oxford Clarendon Press (1950) P.316.

3- *Hyde v. Hyde* (1866) L.R.1.P & D.130 at 138; *Ohochuku v. Ohochuku* [1960] 1W.L.R.183; *Sowa v. Sowa* [1961] P.70; *Muhammed v. Suna*, 1956 S.C.366. Discussed by Anton, *The 'Christian Marriage' Heresy* 1956.S.L.T (News)201. See, Cheshire & North, *Cheshire and North's Private International Law*, by North, P.M and Fawcett, J.J., 12th ed, London, Butterworths, (1992) P.628; North, *Private International Law in Common Law Jurisdiction*, London, (1993) pp.46-53; Anton, *Private International Law: A Treatise From the Standpoint of Scots Law*, 2nd ed Edinburgh, W. Green & Son Ltd, (1990), p.444.

4- Art.3(1) of The 1959 Personal Status Code

marriage to more than one wife is allowed only by permission of the judge, a permission that cannot be granted unless the required conditions are satisfied, namely (i) that the husband is financially capable of supporting more than one wife; (ii) that there is a legitimate interest⁽⁶⁾ e.g. that he had no children from the first wife. Moreover, the court has a discretion not to permit polygamy if it thinks that the wives will not be treated equitably and fairly.⁽⁷⁾

Despite the conditions above restricting actually polygamous marriage, it is submitted that a marriage is described as potentially polygamous even though the husband has not taken an additional wife. The nature of marriage as polygamous or monogamous is governed by the Islamic law for Muslims and by personal law for Non-Muslims.⁽⁸⁾ Muslim marriage is always potentially polygamous according to Iraqi law regardless of the personal law of the parties or where the marriage was celebrated.⁽⁹⁾ It follows from this view that if a Muslim domiciled in England marries there, the marriage will be potentially polygamous even if the nature of such a marriage is monogamous according to the law of domicile and the *Lex Loci Celebrationis*. Whereas if a Non-Muslim domiciled in Scotland marries in Iraq, the marriage will be determined by the Scots law not by Iraqi law.

Thus, the nature of a marriage celebrated in Britain in Muslim religious form between Iraqi nationals domiciled in England or Scotland will be viewed differently by Iraqi law and by English and Scots law since the marriage will be regarded as potentially polygamous in

- 5- Fitzgerald, *Muhammadan Law and Abridgement: According to its Various School*, Oxford, (1931) P.26; Abbas, R.Y., *Divorce for Injury*. Baghdad, 1987, p.219 (In Arabic).
- 6- Art.3(4) of The 1959 Personal Status Code; Abbas, M, *Personal Status Law*, Baghdad, Higher Education Ministry, (1980), p.49.(In Arabic).
- 7- Art 3(5); Abbas, M., op.cit., p. 49; Anderson, *Law Reform in The Muslim World*: London Athlone, (1976), p. 111; Under The Tunisia Code, polygamy is forbidden and constitutes a criminal offence; Personal Status Code of 1956, Art.18.
- 8- See, Kassab, *Conflict of Laws in Formation and Dissolution of Marriage*, Egypt, (1944), p.212.(In Arabic).
- 9- Unlike Scots and English law, Iraqi law does not entertain change in the nature of marriage after celebration; contrast with *Ali v. Ali* [1965] P. 564.

Iraq but monogamous by English and Scots law, because the parties by their personal law of domicile do not have the capacity to enter into a potentially polygamous marriage in Britain. In addition English and Scots law tend to classify the nature of marriage in the first instance by the *Lex Loci Celebrationis*. All marriages celebrated in Britain are classified by English and Scots law as monogamous, no matter the religious ceremony used. It is clear that in Iraqi law, as opposed to Scots and English law, religion is the sole and pre-eminent factor in classifying marriages as to nature.

What is the nature of marriage between parties of different religion? Before examining this question, it is necessary to say that in Iraqi law (i) a marriage between a Muslim woman and a Non-Muslim man is null and void regardless of the personal law of the parties, and (ii) a Muslim man cannot contract a valid marriage with a Non-Muslim woman who is not a Christian or a Jewess.⁽¹⁰⁾ To consider the question which has already been mentioned, the answer becomes easy, in the former point (i) above, no problem arises so long as Iraqi law declines to recognise the relationship between a Muslim woman and Non-Muslim man as a marriage. With regard to point (ii) above, the marriage is always potentially polygamous so long as the husband is Muslim. If both parties are Non-Muslim and they have different personal law, the nature of the marriage will be decided by the personal law of the husband. It seems here there is room for disagreement between the legal systems which are the subject of this thesis because Scots and English law do not recognise penal incapacities, i.e., restriction on marriage for reason of religion or cast.⁽¹¹⁾

The case in England and Scotland is different. In the famous English case *Hyde v. Hyde*,⁽¹²⁾ Lord Penzance defined marriage "as the voluntary union for life of one man and one woman to the exclusion of all others."⁽¹³⁾ This definition indicates that the

10- Abbas, M., op.cit., p.81; Nasir, *The Islamic Law of Personal Status*: London, Graham & Trotman, (1986), p.63.

11- *MacDougall v Chishavisi*, 1937 S.C. 390; *Chetti v Chetti* [1909] P.67; See, *Infra*, 267.

12- (1866) L.R.1 P & D.130; *Warrenderv.Warrender*(1835) 2 Sh. & Macl.154.

character of marriage is monogamous.⁽¹⁴⁾ A person domiciled in England or Scotland lacks capacity to contract a polygamous marriage anywhere even if only a potentially polygamous one.⁽¹⁵⁾ Section 11(d) of the Matrimonial Causes Act 1973 provides that such a marriage is void, viz., a polygamous marriage entered into outside England if either party was at the time of the marriage domiciled in England. For these purposes a marriage may be polygamous although at its inception neither party has an additional spouse.⁽¹⁶⁾

The Law Commissions,⁽¹⁷⁾ after the decision of the Court of Appeal in *Hussain v. Hussain*,⁽¹⁸⁾ have recommended that a person domiciled in England or Scotland should have capacity to enter a marriage outside the United Kingdom which, though polygamous in form, is monogamous in fact, i.e. a potentially polygamous marriage.⁽¹⁹⁾

13- Ibid, 133 .

14- Anton, 2nd-ed., p.445; Clive & Wilson, *The Law of Husband and Wife in Scotland*, Edinburgh, (1974), p.149; Cheshire & North, 12th-ed.p.608; Collier, *Conflict of Laws*:Cambridge Uni Press, (1987) P.276; Graveson, *The Conflict of Laws: Private International Law*, 7th ed, London, Sweet & Maxwell, (1974), p. 242 .

15- *Lendrum v. Chakravarti*, 1929 S.L.T.96,99. In *Radwan v Radwan*(No.2) [1973] Fam. 35.Cumming-Bruce J. Held that a woman domiciled in England had capacity to contract an actually polygamous marriage with a man domiciled in Egypt at the Egyptian Consulate General in Paris. He based his decision on the ground that capacity to contract a polygamous marriage is governed by the law of the intended matrimonial home, which, in that case, was Egypt. Criticised in Dickey & Morris, *Dickey and Morris on the Conflict of Laws*, by Lawrence Collins and others, 11th-ed, London, Stevens & Sons Ltd, (1987),.p.664; and See, 12th-ed, London, Sweet & Maxwell, (1993), p. 700; David Pearl, *Capacity For Polygamy*, (1973) C.L.J. 43; Karsten, *Capacity to Contract A Polygamous Marriage* (1973) 36 M.L.Rev. 291; James, *Polygamy and Capacity to Marry* (1979) 42 M.L.Rev. 533.

16- There is no equivalent in Scotland of section 11(d).

17- Law Com.No.146& Scots Law Com No.96 (1985), *Polygamous Marriage-Capacity to Contract A Polygamous Marriage and Related Issues*, paras. 2.21, 4.2-4.8.

18- [1983] Fam.26 In this case, the husband and wife were Muslim by religion. They were married in Pakistan in accordance with the Pakistani law. At the time of the ceremony the husband was domiciled in England and the wife in Pakistan. The parties came to England and the wife petitioned for a decree of judicial separation. The husband contended that the marriage was void under section 11(d) of the Matrimonial Causes Act 1973. The Court of Appeal held that the marriage was monogamous. Their view was that a marriage can only be potentially polygamous for the purpose of section 11(d) if one of the parties has the capacity to marry a second spouse. Since the husband by English law has no such capacity and the wife by Pakistani law has also no such capacity, the marriage was monogamous and valid.

The law which determines whether the marriage is monogamous or polygamous has not yet been settled beyond all doubt. It has sometimes been suggested that the law of domicile should determine the nature of marriage.⁽²⁰⁾ On the other hand, another view appears to be in favour of the *Lex Loci Celebrationis*⁽²¹⁾ and academic opinion seems to support this.⁽²²⁾ It follows from this view that, if a Muslim domiciled in Iraq, marries in England or Scotland, in accordance with English or Scottish formalities, the marriage will be monogamous, whereas according to Iraqi law his marriage is potentially polygamous.

Another issue may arise which needs to be briefly considered, and that is the case of recognition of polygamous marriage in order to grant divorce or other relief. It has been seen, that until 1972, the parties to actually and potentially polygamous marriages were unable to obtain decrees of divorce in England, this is not because it is contrary to public policy to recognise polygamous marriage but because "the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy".⁽²³⁾

This view was followed in Scotland and the Court of Session refused to grant matrimonial relief to parties to a polygamous marriage.⁽²⁴⁾ This rule was abolished by

19- Cheshire & North, 12th ed., p. 621; Anton, 2nd ed., p.449.

20- *Warrender v. Warrender* (1835) 2 Cl & Fin, 488, 535; *Harvey v. Farnie* (1882) 8 A.C 43; *De Reneville v De Reneville* (1948) P. 100, Lord Greene M.R.; *Ali v .Ali* [1960] P 564 at 567, 577; *Russ v. Russ* [1964] P.351 at 326; *Hussain v .Hussain* [1983] Fam 26; See, Cheshire & North, 12th ed., p. 610; Dicey & Morris, 11th ed., p.651; 12th ed., p.689; Collier, *op.cit.*, p.277.

21- *Risk v. Risk* [1951] P.50; *MacDougall v .Chitnavis*, 1937, S.C. 390; *Lee v .Lau* [1969] P 14 Per Cairns J. at P.20 ; *Qureshi v. Qureshi* [1977] Fam 173; *Chetti v. Chetti* [1909] P. 67; *Ohochuku v. Ohochuku* [1960] 1 W.L.R.183; *Lendrum v.Chakravarti*, 1929, S.L.T. 96. See, James, (1979) 42 M.L.Rev. 533 at 537; David Pearl, *Polygamy for English domiciliaries* (1983) C.L.J. 270; Morris, *The Conflict of Laws*, 3rd ed, London, Stevens & Sons, (1984), p. 177; Morris, *Morris: The Conflict of Laws*, by McClean, 4th-ed, London, Sweet & Maxwell, (1993), p.170.

22- Cheshire & North, 12th ed., p. 612; Dicey & Morris, 11th ed., p. 651; 12th ed., p. 989; Cliv & Wilson, *op.cit.*, p.184; Wolff, *op.cit.*, pp. 318, 319; Morris, *The Recognition of Polygamous Marriages in English Law*, (1953) 66 Har.L.R. 961 at 976; Anton, (1967), p. 267 at 273; North, *The Private International Law of Matrimonial Causes in The British Isles and The Republic of Ireland*, Amsterdam, (1977), p. 108; Beckett, *The Recognition of Polygamous Marriage under English Law*, (1932) 48 L.Q.Rev. 341 at 356.

23- *Hyde v .Hyde* (1866) L.R.1 P & D 130 at 135; North, *op.cit.*, (1977), p.107.

the Matrimonial Proceedings [Polygamous Marriages] Act 1972. A polygamous marriage will be recognised in England and Scotland as a valid marriage for most purposes unless there is strong reason to the contrary,⁽²⁵⁾ and the courts shall not be precluded from granting a decree of divorce or other relief by reason only that the marriage to which the proceeding relates was entered into under a law which permits polygamy.⁽²⁶⁾

II- The Methods and Causes of Divorce

A- Iraq

Under the Iraqi law marriage may be dissolved, during the lifetime of the parties thereto:⁽²⁷⁾ (1)- by the act of parties, i.e. by the husband, or by the wife duly authorized by her husband, (2)- by mutual consent, (3)- by Judicial decree.

1 - Divorce by the act of Parties

In Classical Islamic law, the dissolution of marriage by the act of parties is called *talaq*. It may be defined as "the dissolution of a valid marriage contract forthwith or at a later day by the husband or his wife duly authorized by him to do so, using the word *talaq*, a derivative or a synonym thereof".⁽²⁸⁾ Generally speaking, any husband of sound mind has the right at any time to terminate the marital relationship without assigning any cause, by pronouncing *talaq* "I divorce you". This formula used by the husband for the pronouncement of *talaq* includes the medium of expression, e.g. by word of mouth, in

24- *Muhammad v Suna*, 1956, S.C. 366; Clive & Wilson, op.cit., p.146; Anton, op.ict, (1967), p. 269.

25- Collier, op.cit., p. 280; Jaffey, *Introduction to The Conflict of Laws*, London, Butterworths (1988), p. 57.

26- Matrimonial Causes Act 1973, S.47 (1) (2), re-enacting Matrimonial Proceedings [Polygamous Marriages] Act 1972; for Scotland; See, Matrimonial Proceedings (polygamous Marriages) Act 1972, S.2 as amended by Family Law (Scotland) Act 1985, Sched.1; *Onobrauche v. Onobrauche* [1978] 8 Fam.107; *Resehota v. Resehota* [1978] 3 All.E.R. 385 at 389; Morris, 3rd ed p. 181; 4th ed., p. 180; Clive & Wilson, op.cit., p. 147; North, op.cit., (1977), p. 108; Dickey & Morris, 11th ed., p.677; 12th ed., p. 703; Cheshire & North, 12th ed., p. 628; Collier, op.cit., p.280; Anton, 2nd ed., p. 447.

27- Abbas, M., op.cit P.127.

28- This definition has been adopted by Iraqi Law, Sec. Art.34(1) of the 1959 Personal Status Code.

writing, gesture for him who is incapable of either of them or by the grammatical construction, e.g. if you commit adultery you shall be divorced".(29)

In *Hanafi* law,(30) intention is unnecessary and the mere use by the husband of a formula of *talaq*, in drunkenness or under compulsion, is valid.(31) The wife need not be present, nor be given notice of the intention to *talaq* her. The *talaq* can be performed in *Hanafi* law without any reference to any court or other authority. The triple pronouncement of *talaq* is lawful, although sinful.(32) However, in *Shia* law(33) the pronouncement of *talaq* by the husband in drunkenness or compulsion is invalid. The requirement of witnesses is necessary and the triple pronouncement of *talaq* is not permissible.(34)

The pronouncement of *talaq* may be either revocable or irrevocable.(35) The revocable *talaq* does not dissolve marriage until the *period of Idda* is completed.(36) The husband can at any time revoke the sentence either by express words or by conduct, without the necessity of a new contract or a new dower and even without the wife's consent.(37)

29- Abbas, M., op.cit., p.132; Nasir, op.cit., p. 106; Blagay, *Family Law*, Egypt, (1986), v.1, p. 349.(In Arabic).

30- A School of Islamic Law.

31- See, Mustapha, Z, *Divorce*, V.2 Baghdad,(1984)P.7(In Arabic); Fyzee, *Outline of Muhammadan Law*, 2nd ed, London, 1955. P.127; Fitzgerald, op.cit. P.73.

32- See, Fyzee, op.cit.p.130.

33- A School of Islamic law.

34- Abbas, M. op.cit.p.134.

35- Art.38 of The 1959 Personal Status Code; Abbas, M., op.cit., pp. 137, 138; Fyzee, op. cit., pp.128, 129; Blagay, op.cit., p. 413.

36- The word *Idda* means to count; in this case, it is the counting of days and months. By definition it is a waiting period of abstinence, or a specified term during which the wife shall remain unmarried after the dissolution of marriage by divorce, death or any other form of separation under certain condition. The period of *Idda*, generally is three months from the date of declaration or if the woman is pregnant, until delivery. See, Nasir, op.cit., p. 132; Art. 48 of the 1959 Personal Status Code.

37- Art.38(1).

The irrevocable *talaq* dissolves the marriage immediately without any waiting period. This form of *talaq* is made either when no intercourse has taken place or when the *period of Idda* has expired in the revocable *talaq* without resumption of conjugal relations.⁽³⁸⁾ The irrevocable *talaq* is subdivided into minor, *Bain bainoon sughra*, and major, *Bain bainoon kubra*.⁽³⁹⁾ The effect of the minor *talaq* is that the husband's rights over the wife cease at once and cannot be resumed without remarriage under a new contract for a new dower and subject to her consent.⁽⁴⁰⁾ The effect of the major *talaq* is that the husband can only remarry her [previous wife] after she has been duly married to another and her marriage has been duly dissolved or the second husband has died and she has finished her *idda*.⁽⁴¹⁾

As we have mentioned above, the act of *talaq* may be either by the husband or by the wife. In the case of the wife, the husband has the power to delegate his own right of pronouncing *talaq* to the wife herself in the marriage contract or thereafter. The Iraqi law has adopted these general principles in Islamic law but with some modification. Article 35(1) provides that "A formula of *talaq* pronounced by one who is drunk, insane, acting under compulsion, or oblivious of what he is doing by reason of anger, old age or illness, shall not be of any legal effect".⁽⁴²⁾ Article 39(1) provides that "He who desires to *talaq* his wife must commence proceeding in the court to demand that this be effected, and must seek a judgment accordingly". The effect of this provision is, however, considerably softened by the *proviso* that if he cannot take the matter to the court, then he must register the *talaq* during the course of the *Idda period*. Article 39(2) provides that "the marriage certificate will remain valid in law until it is annulled by the court".⁽⁴³⁾

38- Art.38(2).

39- Art.38(2); See, Abbas, M., op.cit., pp. 138,139; Fyzee, op.cit., pp. 130, 131, Fitzgerald, op.cit., p. 74.

40- Art.38(2)(1) See, Bltagy, op.cit., p. 413; Abbas, M., op.cit., p. 138.

41- Art.38 (2) (2); See, Bltagy, op.cit., p. 414; Abbas, M., op.cit., pp. 139,140 .

42- See, Mustapha, Z, op.cit., 15, 24, 31, 55 ; Abbas, M., op.cit., p. 135.

43- Abbas, M., op.cit., p. 143.

It is submitted that article 39 is enacted for procedural and statistical purposes and therefore it does not change the fact that *talaq* shall take effect from the time of the pronouncement even if it takes place outside the courts and the husband does not commence proceedings to register the *talaq*, because under Iraqi law the right of *talaq* belongs only to the husband and the courts cannot prevent him from doing so if he wishes. It is the duty of the courts to recognise and register the *talaq*.⁽⁴⁴⁾

2- Divorce by Mutual Consent

The dissolution of marriage by the mutual consent of the parties is called *Khula*. It means the wife gives the husband something for her redemption. For the *khula* to be valid, the husband must have legal capacity to pronounce *talaq* and the woman must be a lawful object thereof.⁽⁴⁵⁾ The three essential conditions of *khula* are: (1) Mutual consent of the parties. (2) *Awad* dower [return] passing from the wife to the husband for her redemption. (3) Must take place before the court.

3- Divorce by Judicial Decree

Here, we shall deal with the actual intervention by the court to effect dissolution of marriage. This is called *tafriq*.⁽⁴⁶⁾ In Classical Islamic law, *tafriq* can be brought as a demand of each of the spouses when reason for divorce is available.⁽⁴⁷⁾ With the exception of *Al-Dhahiria*,⁽⁴⁸⁾ Islamic doctrines are generally agreed on *tafriq* though they differ on the justification for *tafriq*.⁽⁴⁹⁾ The right of *tafriq* is not confined to the wife. Certain Islamic doctrines have given this right to the husband too when the wife has been the cause of the deterioration of the marriage life.⁽⁵⁰⁾ This has been done to save the

44- Ibid, 130.

45- Art.46, of The 1959 Persnal Status Code; Mustapha, Z, op.cit., p. 138; Nasir, op.cit., p. 111.

46- For more details, See, Abbas, R.Y., op.cit.

47- Abbas, M., op.cit., p. 145; Mustapha, Z, op.cit., p. 181; Nasir, op.cit., p. 114; Bltagy, op.cit., p. 276.

48- A School of Islamic Law, See, Abbas, R.Y., op.cit., p. 10; Mustapha, Z, op.cit., p. 185; Bltagy , op.cit., P.277.

49- See, Abbas, R.Y., op.cit., P.9.

husband any financial burden he might incur if he unilaterally caused the *talaq*.^(5 1) Iraqi law has followed, with certain differences the Islamic law in enumerating the reasons for *tafriq* as follows:

a- Reasons Entitling Both Spouses to Obtain *Tafriq*

Iraqi law gives the right to either spouse to apply to the court for *tafriq* for the following reasons:

(1) That the respondent has committed adultery.^(5 2)

(2) Marriage contract being solemnized without the courts' permission before either spouse completes 18 years of age.^(5 3)

(3) Marriage being contracted outside the court through coercion, and consummation having occurred.^(5 4)

(4) Under article 41, both spouses have the right to ask the court for *tafriq* in the event of any dispute between them. The article provides, that the court, before passing the decree of divorce must attempt to reconcile the spouses by constituting a council for two or if necessary three arbitrators. Thereafter, if the court is convinced of the continuation of the dissension and fails to reconcile the spouses and the husband refuses to pronounce *talaq*, then the court shall grant *tafriq*.^(5 5)

b- Reasons Entitling a Wife Only to Obtain *Tafriq*

A wife under article 43 shall be entitled to obtain a decree of divorce on any one or more of the following reasons:

(1) That the husband has been sentenced to imprisonment for a period of three years or upwards.^(5 6)

50- Ibid, P.185.

51- Abbas, R.Y., op.cit., p. 20.

52- Art.40(2) of The 1959 Personal Status Code .

53- Art.40(3).

54- Art.40 (4).

55- See, Abbas, R.Y., op.cit., p. 154 .

56- Art.43(1)(1).

(2) That the husband has deserted her for two years upwards without lawful reason even if his address is known.(57)

(3) That the husband was impotent at the time of marriage and continues to be so.(58)

(4) That the husband was suffering from disease of body or mind as would make married life dangerous for life.(59)

(5) That the husband has failed to pay her maintenance without a lawful reason for a period of 60 days upwards.(60)

B- England

Until 1857 the ecclesiastical courts, in accordance with canon law, had no power to grant a decree of divorce *a vinculo matrimonii* for any cause arising after the marriage.(61) They had power to grant a decree of *a separation a mensa et thoro* on the grounds of adultery, cruelty and unnatural offences. The only way of obtaining divorce *a vinculo* was by private Act of Parliament by petition to the House of Lords following a divorce *a mensa et thoro* in the ecclesiastical courts.(62)

The Matrimonial Causes Act 1857, set up for the first time a civil court for divorce and matrimonial causes and gave it power to grant a decree of divorce *a vinculo* to the husband on the ground of adultery by his wife and to the wife on the grounds that her husband has been guilty of incestuous adultery, or of bigamy, or of rape, or of sodomy, or bestiality or adultery coupled either with desertion for two years or upwards or with cruelty.(63) A

57- Art.43(1)(2).

58- Art.43(1)(4).

59- Art.43(1)(6).

60- Art.43(1)(7).

61- See, Cretney, *Principle of Family Law*; 4th ed, London, Sweet & Maxwell(1984) P.99; Tolstoy & Kenworthy, *Tolstoy on Divorce*, London, 7th ed, (1971), p. 3.

62- See, Rayden, *Rayden's Law and Practice in Divorce and Family Matters in all Courts*, 12th ed, London, Butterworths, (1974), pp. 3-4; Passingham, *Law and Principle in Matrimonial Causes*, 2nd ed., London, Butterworth, (1974), p. 1; Halsbury, *Halsbury's Laws of England*, 4th ed, V.13, London, Butterworths, (1975), p. 244.

63- S.27, of the Matrimonial Causes Act 1857; Rayden, op.cit., p. 7; Halsbury, op.cit., p. 272; Lee, *Divorce Law Reform in England*, London, Owen, (1974), p. 14.

change of much greater substance was made by the Matrimonial Causes Act 1923,⁽⁶⁴⁾ which abolished the distinction between the grounds on which a husband and wife respectively could petition for divorce and enabled a wife to seek a decree of divorce on the ground of her husband's adultery.⁽⁶⁵⁾ The next important change came with the Matrimonial Causes Act 1937 which introduced new grounds for divorce.⁽⁶⁶⁾

The Divorce Reform Act 1969 abolished the grounds of divorce laid down in the Matrimonial Causes Act 1965,⁽⁶⁷⁾ and enacted that the sole ground on which a petition for divorce might be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.⁽⁶⁸⁾ The 1969 Act was subsequently consolidated in the Matrimonial Causes Act 1973 which made no substantial change in the law.⁽⁶⁹⁾

Section 1(2) of the Matrimonial Causes Act 1973⁽⁷⁰⁾ provides that the court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is, to say-

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent

64- S.(1).

65- Passingham, *op.cit.*, p. 2.

66- See, S.(2); Lee, *op.cit.*, p. 17; Radyen, *op.cit.*, p. 9; Passingham; *op.cit.*, p. 3.

67- See, S.(1).

68- S.(1); See, now 1(1) of the Matrimonial Causes Act 1973.

69- See, Cretney, *Elements of Family Law*, London, 1987, p. 26.

70- *Ibid*, p. 30.

consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of petition.

Section 3(1) of the Matrimonial and Family Proceedings Act 1984 provides that "no petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage."^(7 1) Even if one or more of the facts in section 1(2) of the Matrimonial Causes Act 1973 are proved the court may nevertheless refuse to dissolve the marriage: (i) if it is satisfied that the marriage has not broken down irretrievably;^(7 2) (ii) if a decree *nisi* has been made on the basis of two years separation, it may be rescinded if the petitioner misled the respondent about any matter which the respondent took into account in deciding to consent to divorce;^(7 3) (iii) the court shall not make absolute a decree of divorce unless it has satisfied itself about the arrangement for any children of the family.^(7 4)

In 1990, the Law Commission published a report on Reform of the Ground for Divorce. They recommended

"(i) that irretrievable breakdown of the marriage should remain the sole ground for divorce;(ii) that such breakdown should be established by the expiry of a minimum period of one year for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable".^(7 5)

In December 1993, the Lord Chancellor published a consultation paper, [Looking to the

7 1- This period was three years in Matrimonial Causes Act 1973, S.3(1); See, Cretney, op.cit., p. 28.

7 2- S.1(4) Matrimonial Causes Act 1973. It should be noted that the court has power to adjourn proceedings to enable attempts to be made effect a reconciliation, S.6(2) Matrimonial Causes Act 1973, See, Cretney, op.cit, p. 126.

7 3- S.10 (1) Matrimonial Causes Act 1973.

7 4- S.41 Ibid.

7 5- Law Com. Rep. N° 192, *Family Law: The Ground for Divorce*, 1990, para. 3.48; See also, Law Com.Discussion Paper' *Facing the Future*' 1988.

Future],⁽⁷⁶⁾ which was concerned not only with the reform of the grounds for divorce and the procedures for dissolving a marriage but also with possible arrangements for extending the use of family mediation. The paper agreed that the present law of divorce is not working well and that it fails to meet the objective of a good divorce system. The paper is of the view that change should be considered. Accordingly, it sets out options for reform of the present divorce law. Mediation and opportunities for reconciliation and responsibilities of parties themselves in the making of suitable arrangements are keynotes.

C- Scotland

Since the sixteenth century, the Scottish courts have granted divorce *a vinculo*⁽⁷⁷⁾ but the only grounds of divorce until 1938 were adultery and desertion. The Divorce (Scotland) Act 1938 added new grounds for divorce, i.e. incurable insanity,⁽⁷⁸⁾ cruelty,⁽⁷⁹⁾ sodomy and bestiality.⁽⁸⁰⁾ By the Divorce (Scotland) Act 1976, the court may grant decree of divorce only if it is established that the marriage has broken down irretrievably.⁽⁸¹⁾ The Act of 1976 enumerates the grounds for divorce as follows:⁽⁸²⁾

(a) since the date of the marriage the defender has committed adultery; or

(b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or

(c) the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion-

(i) there has been no cohabitation between the parties, and

76- Lord Chancellor's Department, A Consultation Paper, 'Looking to the Future' Mediation and the Ground for Divorce, December, 1993.

77- For more details, See, Fraser, *Treatise on the Law of Husband and Wife According to Scottish Law*, 2nd ed, V 2, Edinburgh, (1878), p. 1129.

78- S 1(1) (b).

79- S.1(1)(c).

80- S.1(1)(d), See, also, Divorce Act 1958; Divorce (Scotland) Act 1964; Clive, *The divorce Scotland Act 1976*, Edinburgh, W.Green, (1976), p. 1.

81- S.1(1).

82- S.1(2).

(ii) the pursuer has not refused a genuine and reasonable offer by the defender to adhere, or

(d) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce, or

(e) there has no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the action.

In 1989, the Scottish Law Commission produced a report on Reform of the Ground for Divorce based on its view of the workings of the present divorce law. They recommended that

“the ground for divorce should continue to be the irretrievable breakdown of the marriage but that the periods of separation which can be used to establish breakdown should be reduced from 2 years to 1 year (where the defender consents to the divorce) and from 5 years to 2 years (where the defender does not consent)”.(83)

Provisions to implement this recommendation are included in the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament.

Finally, it has been seen in English law that no petition for divorce shall be presented to the court before the expiration of the period of one year from the date of marriage. There is no such bar in Scotland.(84)

83- Scots Law. Com. Rep 1989, *Reform of the Ground for Divorce*; See also, Scots Law Com. Discussion Paper N°85, 1990, *Family Law Pre-Consolidation Reform*.para. 8.1.

84- Clive, op. cit., p. 4.

III- The Personal Law

Questions affecting status are governed by the personal law, which differ from one legal system to another.⁽⁸⁵⁾ England and Scotland have adhered to the ancient regime of domicile,⁽⁸⁶⁾ while Iraq has adopted nationality as the test of personal law in all the laws which deal with private international law matters, particularly the law of the Personal Status of Foreigners 1931 and the Civil Code 1951.⁽⁸⁷⁾ Both domicile and nationality are major connecting factors in matrimonial matters in the context of jurisdiction, choice of law and recognition. It becomes necessary to consider briefly the legal concept of domicile and nationality.

A- Domicile

It is not easy to give a satisfactory definition of domicile.⁽⁸⁸⁾ It is easier to describe than define; it is regarded as the equivalent of a person's permanent home.⁽⁸⁹⁾ In *Whicker v. Hume*,⁽⁹⁰⁾ Lord Cranworth has said: "By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."⁽⁹¹⁾ A person can have only one domicile at any time and no person can be without a domicile.⁽⁹²⁾

85- See, Rabel, *The Conflict of Laws: A Comparative Study*, 2nd ed, Uni. of Michigan, (1958), p. 109; Kahn-Freund, *General Problems of Private International Law*, (1974) III Hague Recueil 139, 334-391, 392; Kenneth McK Norrie, *Personal Law: Concept and Development*, (1983) S.L.T.(News) 53; Anton, 2nd ed., p. 121.

86- Cheshire & North, 12th ed., p. 139 et seq.

87- Raith Ali-Kassi, *Nationality and Domicile as Connecting Factor in Iraqi and English Private International Laws, with particular Reference to the Laws of Marriage*, Uni of London, "Ph.D Thesis" (1961), p. 8.

88- Dicey, *The Conflict of Laws*: 6th ed, London, Stevens (1947), p. 27; Graveson, 7th ed, p. 195.

89- Cheshire, *Private International Law*, 6th ed, Oxford, (1961), p. 165; Anton, 2nd ed, p. 161; Maher, *International Private Law: Cases and Statutes*, Edinburgh, W.Green & Son, (1985), p. 45.

90- (1858) 7.H.L.C., p. 124.

91- Ibid, at p. 160, Criticised by Graveson, op.cit, p. 185.

92- *Udny v. Udny* (1869) L.R.1 Sc. & Div. 441 at 457; *McLelland v. McLelland* 1942 S.C. 502 at 508; *I.R.C v. Bullock* [1976] 1W.L.R. 1178 at 1184; *Lawrence v. Lawrence* [1985] Fam 106 at 132. See

1- Domicile of Origin

The English and Scots law ascribe to every person a domicile of origin from the moment of his birth. His domicile depends on the domicile of one of his parents at the time of his birth, irrespective of where he was born or where his parents are residing.⁽⁹³⁾ In the case of a legitimate child, this is his father's domicile at the date of the child's birth. In the case of an illegitimate child or a legitimate child born after the father's death, it is the mother's domicile at the date of the child's birth.⁽⁹⁴⁾ In the case of a foundling,⁽⁹⁵⁾ his domicile of origin must be the country where he is found, and an adopted child's domicile of origin is determined as if he were the legitimate child of his adoptive parents.⁽⁹⁶⁾ This is the only case in which domicile of origin is ascribed at a date later than birth.

2- Domicile of Choice

This kind of domicile requires two elements: an intention to reside indefinitely in a new country and residence in that country.⁽⁹⁷⁾ Presence of one only of these elements is insufficient for acquiring a domicile of choice. Residence for the purpose of domicile was defined by Nourse in *I.R.C v. Duchess of Portland*⁽⁹⁸⁾ as "physical presence in the country as an inhabitant of it." Long residence suggests acquisition of domicile but is not conclusive.⁽⁹⁹⁾ A domicile of choice can only be acquired if residence is legal.⁽¹⁰⁰⁾

also, Dicey, op.cit. p. 84; Cheshire & North, 12th ed., p. 140; Anton, 2nd ed., p. 128, Wolff, op.cit., p. 107; Graveson, op.cit., pp. 190, 191; Walker, *Principle of Scottish Private Law*, 4th ed, V.1, Oxford, (1988), p. 135; Inglis, *Conflict of Laws*, Wellington, (1959), p. 75.

93- *Udny v Udny* (1869) L.R.I Sc. & Div 441 at 457; Dicey, op.cit, p. 88; Anton, op.cit., 1st ed., p. 167.

94- *Udny v. Udny* (1869) L.R.I SC & Div 441 at 457.

95- Ibid. Cheshire & North, 12th ed, p. 140; Walker, op.cit., p. 136; Wastlake, *A Treatise on Private International Law*, 7th ed London, (1925), p. 248; Dicey & Morris, 11th ed, p. 126.

96- S.39 of the Adoption (Scotland) Act of 1978; for England, S.39 of the Adoption Act, 1976; See, Law, Com.Nº.88; Scots Law Com.Nº.63, 1985, for criticism of the proposals See, Fawcett, *Law Commission Working Paper No.88: the Law of Domicile*, (1986) 49 M.L.Rev .225.

97- Dicey, op.cit, p .89; Anton, 2nd ed ,p.138; Cheshire & North, 12th ed., p. 142; Wolff, op.cit. p. 101.

98- [1982] Ch 314 at 319.

99- *Liverpool Royal Infirmary v. Ramsay*, 1930 S.C.(H.L.) 83; *Henderson v. Henderson* [1967], P.77 at

Those whose residence is precarious, and subject to Government order, may yet acquire a domicile, in England or Scotland, their intention (to stay as long as the Home Secretary permits) being sufficient for domicile purposes.⁽¹⁰¹⁾

The degree of intention required to establish a domicile of choice was considered by Scarman J. in the *Re Fuld's Estate* (No.3)⁽¹⁰²⁾

"if a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune, or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact".

Both residence and intention must coincide at the relevant time.⁽¹⁰³⁾ As a result of the rule that no person can have more than one domicile at the same time, a domicile of origin may become displaced by acquisition of a domicile of choice, and according to the rule that every person must have one domicile at all times, a domicile of origin automatically revives, where a person abandons his domicile of choice by leaving the country and having no intention to go back to the country.⁽¹⁰⁴⁾ The unsatisfactory nature of the present rules of domicile has long been recognised⁽¹⁰⁵⁾ e.g. the retention of the concept of the domicile

79; *I.R.C. v. Bullock* [1976], 1 W.L.R. 1178 (C.A.).

100- *Cruikshanks v. Cruikshanks* (1957), 1 W.L.R. 564; *Puttick v. AG* [1980] Fam. 1; Pilkington, *Illegal Residence and the Acquisition of A domicile of Choice*, (1984) 33 I.C.L.Q. 885.

101- *May v. May* [1943] 2 ALL.E.R. 146; *Cruch v. Cruch* [1945] 2 ALL.E.R. 545.

102- [1968] P. 675 at 684-685; Cf. *Cramer v. Cramer* [1987] 1 F.L.R. 116 (C.A.); *Brown v. Brown* [1982] 3 F.L.R. 213 (C.A.).

103- *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307 at 320.

104- *Udny v. Udny* (1869) L.R. 1 Sc. & Div. at 457; *Tee v. Tee* [1974] 1 W.L.R. 213 (C.A.); Anton, 2nd ed., p. 132; Morris, 3rd ed., p. 16; 4th ed., p. 14; Graveson, 7th ed., p. 197; Cheshire & North, 12th ed., p. 157.

105- See, *The First Report of the Private International Law Committee*, (1954). Discussed Graveson, *Reform of the Law of Domicile*, (1954) 70 L.Q. Rev. 492; Stone, *The English Concept of Domicile*, (1954) 17 M.L. Rev. 244 at 246; Domicile Bill, No. 1, (1958); Domicile Bill, No. 2, (1959). Discussed, Mann, (1959) 8 I.C.L.Q. 457; *The Seventh Report of the Private International Law Committee on Domicile*, (1963) Discussed, Mann, (1963) 12 I.C.L.Q. 1326; Law Com. W.P. No. 88

of origin has led to the doctrine of the revival of that domicile, with the result that a person may die domiciled in a country which he has never visited.

The Law Commissions have recently reviewed the present rules of domicile and recommended that domicile should continue to be used as a connecting factor in the law of England and Scotland,⁽¹⁰⁶⁾ but that it should be reformed since the present rules lead to artificiality and uncertainty. The main recommendations are: the domicile of a person under the age of 16 should be determined as follows: (a) where he has his home with both his parents, his domicile should be the same as and change with the domicile of: (i) his parents where their domiciles are the same or (ii) his mother if the domicile of his parents are different; (b) where he has his home with one parent only his domicile should be the same as and change with the domicile of that parent; and (c) in any other case he should be domiciled in the country with which he is for the time being most closely connected.⁽¹⁰⁷⁾ The domicile of a child at birth should be determined in the same way as his domicile at any other time before he reaches the age of 16.⁽¹⁰⁸⁾ The domicile of origin should be abolished. The doctrine of the revival of the domicile received at birth should be abolished and replaced by a rule to the effect that an adult's domicile should continue until he obtains another domicile.⁽¹⁰⁹⁾ The latest unofficial information, however, is that this attempt to reform domicile rules, as earlier attempts before the Domicile and Matrimonial Proceedings Act 1973, is set to fail because of the tax implications of changing domicile law in such a way that it will be easier to establish that an individual is domiciled in the United Kingdom.

& Scots Law Com C.m N°.63 (1985); Law Com N°.168 & Scots Law Com N°.107, *Private International Law: The Law of Domicile*, (1987); North, *Reform, But not Revolution: General Course on Private International Law*, (1990) IHague Recueil 13, 26 et seq; North, (1993) p.5

106- Law Com.N°.168 & Scot Law Com. No.107, para.3, 12.

107- Paras.4, 13-4, 16.

108- Para.4, 24.

109- Para.5, 25.

3- Domicile of Married Women

At the common law the domicile of a married woman was the same as the domicile of her husband and if the husband changed his domicile she shared the new one.⁽¹¹⁰⁾ She continued to take her husband's domicile until the marriage was dissolved by divorce or by death and she could not acquire a new domicile or resume her domicile even if the husband had committed a matrimonial offence⁽¹¹¹⁾ or they were judicially separated⁽¹¹²⁾ or even if the marriage was voidable.⁽¹¹³⁾ Under the old law if the marriage was void there was no change *ex lege* in the domicile of woman. If the marriage was voidable the wife took the husband's domicile until decree of nullity was pronounced and retained until she took steps to change it. This rule is strangely anachronistic and was criticised as "the last barbarous relic of a wife's servitude."⁽¹¹⁴⁾

Prior to 1974, several attempts were made to reform the domicile of a married woman. The Private International Law Committee⁽¹¹⁵⁾ had recommended that "the domicile of a married woman shall be that of her husband: provided that a married woman who has been separated from her husband by the order of a court of competent jurisdiction shall be treated as a single woman". The matter was also considered by the Royal Commission on Marriage and Divorce which recommended that a wife who is living separate and apart from her husband should be entitled to acquire a separate domicile for the purpose of establishing jurisdiction in divorce.⁽¹¹⁶⁾

110- Wolff, op.cit.p. 121; Dickey, op.cit.p. 107; Stone, (1954) 17 M.L.Rev. pp.246, 247; Anton, 2nd ed.p.173.

111- *Lord Advocate v. Jaffrey* [1921] 1A.C 146.

112- *Mackinnon's Trustees v. Inland Revenue*, 1920S.C (H.L.) 171, 174, 175; *Low v. Low* (1891) 19R.115; *Att.Gen. for Alberta v Cook* [1926] A.C.444; *Lord Advocate v. Jaffrey* [1921] 1A.C 146; Graveson, 7th ed P.217; Wolff, op.,cit.p. 121.

113- *De Reneville v. De Reneville* [1948] P.100; Graveson, op.cit.p. 215.

114- *Gray v. Formosa* [1963] P.259, per Lord Denning M.R at 267; *Adams v. Adams* [1971] P.118 at 216.

115- Comd (9068)1954. Draft Code of the Law of Domicile. Art.3; See, also *The Seventh Report of the Private International Law*. Comd.1955 (1963). Cf, Graveson, (1954) 70 L.Q.Rev 500; Stone, (1954) 17 M.L.Rev. 236; Mann, *The Domicile Bills*, (1963) 12 I.C.L.Q. 1326.

In 1972, the Law Commissions⁽¹¹⁷⁾ stressed vigorously support for a separate domicile of a married woman, although its recommendation was only in relation to jurisdictional purposes. "We are in danger of being the last country to cling to an obviously anachronistic and unjust rule."⁽¹¹⁸⁾

The outcome of all these efforts was the Domicile and Matrimonial Proceedings Act 1973. This provided that from 1 January 1974 a married woman should have her own independent domicile.⁽¹¹⁹⁾ The Act is not retrospective. This means the common law rule applies to the domicile of women married before 1974. If, immediately before 1974, a woman was married and then had her husband's domicile by dependence, she is to be regarded as retaining that domicile as her domicile of choice, unless and until she acquires another domicile of choice or her domicile of origin revives on or after 1 January 1974.⁽¹²⁰⁾ However, this rule will disappear if the recommendations of the Law Commissions are implemented by legislation.⁽¹²¹⁾

The question where a person is domiciled is determined according to English law, if the question arises in England, and according to Scottish law, if the question arises in Scotland.⁽¹²²⁾ All matters pertaining to domicile as a connecting factor are the province of the forum⁽¹²³⁾

116- Comd 9678 (1954) para. 825.

117- Law Com W.P.Nº.28 *Family Law: Jurisdiction in Matrimonial Causes (other than nullity)* (1970) paras.39-44; Law Com. Rep.Nº.48, *Family Law:Jurisdiction in Matrimonial Causes*,(1972) paras. 27-32; Scots Law Com. Memorandum.Nº.13, para.35; Scots Law Com. Nº.25, *Family Law: Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status*,(1972) paras. 53-58.

118- Law Com W.P. Nº.28, para.40.

119- S.1(1); For Commentary, See, Hartly.& Karsten, *The Domicile and Matrimonial Proceedings Act 1973*:(1974) 37 M.L.Rev. 179; Thompson, *Domicile of Dependence:The Last Remnant of A Relic?*, (1983) 32 I.C.L.Q. 237.

120- S.1(2); See, *I.R.C.v. Duchess of Portland* [1982] Ch.314. Criticised by Wade, *Domicile:A Re-examination of Certain Rules*, (1983) 32 I.C.L.Q. 1. and See, Carter, (1982) 53 B.Y.B.I.L. 295 at 296; Thompson (1983) 32 I.C.L.Q. 237; Cheshire & North, 12th ed., pp. 163,164.

121- Law Com. Nº 168 & Scots Law Com. No.107, para. 8-7.

122- See, North, op.cit., (1977), p.8.

An exception has been established to this rule in relation to the law of matrimonial causes.⁽¹²⁴⁾ The Family Law Act 1986⁽¹²⁵⁾ provides that a foreign divorce, annulment or legal separation must be recognised if obtained in a country in which either spouse was domiciled either according to the law of that country in family matters or according to the law of the part of the United Kingdom in which the question of recognition arises. This means that the courts in England and Scotland must examine the private international law domicile rules of the foreign country to determine the domicile of the spouses.⁽¹²⁶⁾

B- Nationality

Under Iraqi law, nationality may be defined as a legal and political concept which links a person to a particular state.⁽¹²⁷⁾ It is either of origin or of choice. Nationality of origin may be defined as the nationality acquired by a person at the moment of birth either by the *Jus sanguinis* or by the *Jus soli*. Nationality of choice, on the other hand, is every nationality which is usually acquired by a person during his life,⁽¹²⁸⁾ either by his own free will as in the case of naturalization or automatically as a consequence of some legal act as in the case of marriage.⁽¹²⁹⁾

1- Nationality of Origin

Iraqi law ascribes Iraqi nationality of origin to every person as following:

(a) if his father, at the time of his birth, was an Iraqi national⁽¹³⁰⁾

(b) if he was born of Iraqi mother and, at the time of his birth, his father was unknown

¹²³⁻ *Annesley, Re, Davidson v. Annesley*[1926] Ch. 692

¹²⁴⁻ See, also Civil Jurisdiction and Judgments Acts 1982 and 1991.S.41, See, *Infra*, 311.

¹²⁵⁻ S.46(1)(b)(ii) and (2)(b) and 5; See also, Recognition of Divorces and Legal Separations Act 1971, SS.3(2) and 6; See, *Infra*, 173.

¹²⁶⁻ See, North, *op.cit.*, (1977), p. 8.

¹²⁷⁻ Hammed Mustapha, *Principle of Private International Law*: 2nd ed., Baghdad (1970), p. 170 (In Arabic)

¹²⁸⁻ All-Kassi, *op.cit.*, p. 51.

¹²⁹⁻ *Ibid.*

¹³⁰⁻ Art.4(1) of the Iraqi Nationality Code, N° 43 of 1963; All- Dawody, *Private International Law*, Baghdad, (1970), p. 266.

or stateless.(131)

(c) if he was born in Iraq and at the time of his birth his parents were unknown.(132)

2- Nationality of Choice

Nationality of choice of Iraq may be acquired by,

(a) any person who was born outside the Iraqi territory of Iraqi mother, and at the date of his birth, his father was unknown.(133)

(b) a foreign wife has the right to acquire her Iraqi husband's nationality on condition that her request should be brought after the expiration of the period of three years from the date of marriage and that she is residing in Iraq and that the Minister of the Internal must approve her request.(134)

(c) the third case of nationality of choice of Iraq is naturalization. The requirements for naturalization are: (i) the applicant must be of full age and capacity; (ii) he must be resident in Iraq; (iii) he must be of good behaviour and intend to live in Iraq.(135)

The status and capacities of Iraqi nationals are governed by Iraqi law, irrespective of their domicile or residence and in the case of foreigners their status and capacities are governed by their personal law so long as they do not become Iraqi nationals.(136)

It is well established that each state has the right to determine under its own law who are its nationals and any question as to whether a person possesses the nationality of a particular state must be determined in accordance with the law of that state and no state is entitled to determine the conditions on which a person becomes a national of a foreign state

131- Art.4(2).

132- Art.4 (3).

133- Art.5.

134- Art 12(4); All-Dawody, op.cit., p.19; All-Kassi, op.cit., p. 57.

135- Art.10, 11, 12; See, Law N° 206 of 1964; 147 of 1968; 131 of 1972; All- Dawody, op.cit., p. 333; All -Kassi, op.cit., p. 58.

136- Art.18 of the 1959 Civil Code; Art.1 of the Law of 1931; Abdul whahed K, *Personal Status in Iraqi Private International Law*, (1977) Uni of Baghdad, p. 6 (In Arabic); All-Hadawy, *Conflict of Laws in Iraqi Private Internatinal Law*, Baghdad, 2nd-ed, Uni of Baghdad (1972), p. 158 (In Arabic); Azzedeen Abdallah, *Private Internatinal Lawt*, 6th ed., Egypt, (1969), p. 211 (In Arabic).

or withdraw nationality from foreigners belonging to a foreign state.⁽¹³⁷⁾ Thus, no other law than that of Iraqi law determines whether or not a certain individual is an Iraqi national.⁽¹³⁸⁾ These principles, which gave each state the right to determine the acquisition and loss of nationality may lead to difficulties in cases of stateless persons and dual nationality.

3- Stateless Persons

A person who lacks nationality under the law of any state is called stateless.⁽¹³⁹⁾ Such a situation may arise either from birth or as a result of marriage or from a political event such as the position of refugees.⁽¹⁴⁰⁾ Despite the fact that many steps have been taken to eliminate or reduce this problem, it is still common.⁽¹⁴¹⁾ So long as nationality cannot be applied for those persons, it becomes necessary that the nationality be supplemented by another connecting factor. Some countries have adopted the domicile or habitual residence or in the absence of domicile or habitual residence, have provided that the temporary residence should be decisive.⁽¹⁴²⁾

¹³⁷⁻ Art.1(2) of the *United Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws* (1930) L.N.D.oc, 24; Weis, *Nationality and Statelessness in International Law*, 2nd ed, (1979), pp. 65-94; *Oppenheimer v. Cattermole* [1976] A.C. 249.

¹³⁸⁻ Iraqi Nationality Code No.43 of 1963; All-Dwady, op.cit., p. 67; Hammed Mustapha, op.cit., p. 182; *Lex Patriæ* pre-eminent in these matters is also accepted and adopted in England and Scotland.

¹³⁹⁻ Weis, op.cit., p. 161; Palsson, *Marriage and Divorce in Comparative Conflict of Laws*, Netherland, (1974), p. 90; All-Hadway, op.cit., p. 154; All-Dwady, op.cit., p. 72; Hammed Mustapha, op.cit., p. 194.

¹⁴⁰⁻ Article 1 of the *Geneva Convention Relating to the Status of Refugees* (1951) defines Refugees as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it".

¹⁴¹⁻ See, e.g. *United Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws* (1930); Article.7; *Protocol Relating to Certain Cases of Statelessness* [The Hague, 1930] *United Nations Convention on the Reduction of Statelessness* (1951).U.N.T.S., Vol.139, p. 137 Art. 12 (2)(3)(4) of the Iraqi Nationality Code No.43 of 1963.

¹⁴²⁻ See, Art.12(1) of the *New York Convention Relating to the Status of Stateless Persons* (1954); Art.12(1) of the *Geneva Convention Relating to the Status of Refugees* (1951).

Article 33(1) of the Iraqi Civil Code provides that "in the case of a person of unknown nationality the law to be applied will be decided by the court". However, there is general agreement in Iraq to substitute domicile (habitual residence) as the relevant connecting factor for stateless persons.⁽¹⁴³⁾ There is no doubt that this solution is sound in principle since it is in accordance with the interests both of the person concerned and of the country in which he is actually living and normally has the centre of his material interests.

4- Dual Nationality

The second issue in conflict of nationality is dual or plural nationality: "a person holds two or more nationalities."⁽¹⁴⁴⁾ Such a situation may arise either from birth or as a result of marriage or naturalization. Many steps also have been taken to eliminate or to reduce this problem, but it is still common.⁽¹⁴⁵⁾ In dealing with dual nationality a distinction between the cases must be considered, viz whether one of the nationalities involved is that of the forum state or all nationalities are foreign.

In the case of one of the nationalities being that of the forum state, the most accepted view is that the nationality of the forum should be considered.⁽¹⁴⁶⁾ Article 33(2) of the Iraqi Civil Code provides that "Iraqi law shall apply, however, if a person is deemed in Iraq to be of Iraqi nationality and is at the same time deemed by one or more foreign states to be a national of that or those states".

In the case where all nationalities are foreign, one view has advocated the law of the country of which the person is not only national, but where he also has his domicile or

¹⁴³⁻ All-Hadway, op.cit., p. 154.

¹⁴⁴⁻ See, Weis, op.cit., p. 169; Palsson, op.cit., (1974), p. 82; All-Dawady, op.cit., p. 88; All-Hadway, op.cit., p. 153.

¹⁴⁵⁻ See, *United Nations Convention on Reduction of Cases of Multiple Nationality and Military Obligation in Cases of Multiple Nationality*.(1950) U.N. Vol. 624, p. 221; *United Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws* (1930); Articles 11 and 35 of the Iraqi Nationality Code No.43 of 1963.

¹⁴⁶⁻ Art. 3 of the *United Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws*.(1930)

habitual residence.⁽¹⁴⁷⁾ Another view favours the nationality of the country with which in the circumstances the person concerned is in fact most closely connected. In other words, this view selects from several nationalities, the effective nationality. The court must take into account many factors in order to select the effective nationality, e.g the domicile or habitual residence of the person concerned, where he conducted his business and where he exercised his political rights, his language, the last nationality etc.⁽¹⁴⁸⁾

Article 33(1) of the Iraqi Civil Code provides that "in the case of a person of plural nationality the law to be applied will be decided by the court". However, there is general agreement in Iraq to select the effective nationality.⁽¹⁴⁹⁾

5- Nationality of a Married Woman

Under the 1924 Nationality Code a foreign woman by marriage automatically acquires the nationality of her Iraqi husband and an Iraqi woman would lose her nationality by marrying a foreigner.⁽¹⁵⁰⁾ This rule was abolished to effect that the nationality of a married woman remains unaffected if she marries an Iraqi national,⁽¹⁵¹⁾ but in this case she has the right to acquire Iraqi nationality on condition that her request shall be brought after the expiration of the period of three years from the date of marriage and that she is residing in Iraq and that the Minister of the Interior must approve her request.⁽¹⁵²⁾ On the other hand, an Iraqi woman will not lose her nationality by marrying unless she acquires her husband's nationality.⁽¹⁵³⁾

147- Art.5 of the *United Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws*.(1930)

148- Weis, op.cit., p. 169.

149- All-Hadway, op.cit., p. 154; Hammed Moustapha, op. cit., p. 193

150- Art. 17.

151- Art. 12 of the Iraqi Nationality Code of 1963.

152- Ibid, Art.12(4)(b) .

153- Ibid, Art.12(2).

C- The Merits and Demerits of Nationality and Domicile

Various reasons have been invoked to justify the doctrine of nationality as a connecting factor in Iraqi law, namely that the system of nationality is based on the idea that every individual is more deeply rooted in his nation than his home.⁽¹⁵⁴⁾ The courts should in the first place offer protection to the interests of its own nationals.⁽¹⁵⁵⁾ Nationality is more stable and easier to ascertain than domicile because a change of nationality involves a public act.⁽¹⁵⁶⁾

Having regard to the nature of Iraqi matrimonial law, it is thought that nationality is a proper connecting factor and should not be replaced generally by domicile. The law of personal status depends mainly on the Islamic religious principles, and it is therefore beyond any doubt that acceptance of domicile would lead to the application of Islamic religious rule to persons belonging to another religious denomination. It is also difficult to accept the application of the law of domicile in cases of an Iraqi businessman domiciled in a country whose law does not permit e.g. divorce or polygamy. Nationality provides the most realistic connecting factor in such cases.

There are clearly many cases in which the principle of nationality provides no solution. The extreme, and unfortunately still common, examples of this are the cases of dual nationality and of stateless persons, whereas under the British law of domicile every person has one and only one domicile.⁽¹⁵⁷⁾ Although the Iraqi law does not establish clear rules to deal with such cases, one must not place too much emphasis on this point to devoid the merits of nationality at least in the context of Iraqi law.

¹⁵⁴- All-kassi, op.cit., p. 55.

¹⁵⁵- All-Hadawy, op.cit., p. 152.

¹⁵⁶- Ibid, pp. 152-153.

¹⁵⁷- Weis, *The United Nations Convention on the Reduction of Statelessness*, (1962) 11.I.C.L.Q. 1073; Cheshire & North, 12th ed., p. 167; Graveson, 7th ed., p. 190.

Nationality has been rejected by England and Scotland as a connecting factor.⁽¹⁵⁸⁾ It is only adopted by the Family Law Act 1986⁽¹⁵⁹⁾ in the case of recognition of divorces, annulments and legal separations. As we shall discuss later, the nationality as a connecting factor in this area is inapplicable if the divorce is obtained where there are no proceedings, such as divorce by *Khula*⁽¹⁶⁰⁾ or by bare *Talaq*.⁽¹⁶¹⁾ This divorce could only be recognised on the basis of domicile.⁽¹⁶²⁾

Academic opinion in Britain appears to be against the doctrine of nationality. Professor Anton has said "nationality may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life."⁽¹⁶³⁾ The main arguments advanced to support the principle of domicile as a test of personal law are that 'domicile' generally means that country in which a man has established his permanent home and it is taken to follow that it is the law of that home to which he should be subject.⁽¹⁶⁴⁾ Secondly, domicile is the only test which can be used if the country of nationality comprises different units which each have different systems of law. Hence, "the expression 'national law' when applied to a British subject is meaningless. It is one system in England, another in Scotland."⁽¹⁶⁵⁾

The main difficulty with the domicile as a test of personal law is that it can lead to an unrealistic and anomalous result due to the doctrine of the revival of domicile of origin, and

158- Law Com.W.P N°28, (1972), pp. 14, 15; Law Com N°48, (1972) paras. 19-20; Scot Law Com. N°25, (1972), paras. 32, 36; *Niboyet v .Niboyet* (1878) 4 P D 1 at 19; Graveson, 7th ed., 316; North, op.cit., (1977), p. 9; (1993), pp. 62-63

159- S.46 (1)(b)(iii) of the Family Law Act 1986; S.3 (1)(b) of the Recognition of Divorces and Lagal Separations Act 1971; *Indyka v.Indyka* [1969] 1 A.C.33;*Quaziv.Quazi* [1980] A.C. 744 at 805, 813, 821; The Royal Commission on Marriage and Divorce, Report 1951-55, Com. 9678.

160- *Quazi v. Quazi* [1980] A.C.744 at 824.

161- *Chaudhary v. Chaudhary* [1985] Fam. 19.

162- S.46(2)(b) of the Family Law Act 1986

163- Private International Law, 1967, p. 160.

164- Kenneth Mck Norrie, (1983) S.L.T. 56

165- Cheshire&North,12th ed., p. 166; Morris, 4th ed., p.33; *Re O'keefe* [1940] Ch 124.

due to the difficulty in losing a domicile of origin in the first place. The domicile of a person is not always easily ascertainable because of the weight attached to the intention of the person concerned. Proof of a person's intentions is the most difficult element of all to prove. Another difficulty with the domicile is that long residence is in itself of no avail.

Thus, neither domicile nor nationality allow the personal law to work properly to provide certainty both for the individual concerned and for those with whom he has legal relationships. Dr. North has pointed out that "as determinants of the personal law, nationality yields a predictable but frequently an inappropriate law; domicile yields an appropriate but frequently an unpredictable law,"⁽¹⁶⁶⁾

The countries which are subject to this thesis appear to be against any substantial change in the present rule of personal law. The Law Commissions have recently examined the point under discussion and recommended that domicile should continue to be used as a connecting factor in the laws of England and Scotland and any general substitution of habitual residence or nationality for domicile is unacceptable.

Finally, it is interesting to note that if legislation is sought to implement the recent proposals of the Law Commissions for reform of the law of domicile, then domicile as a test of personal law will be more workable and there will be a greater chance of a person's status being governed by the law of the country with which he has a genuine connection.

¹⁶⁶- Cheshire & North, 12th ed., p. 167

CHAPTER TWO

Jurisdiction Over Divorce Proceedings

The means by which a divorce may be obtained vary considerably, for they are determined by the law of the forum, i.e the law of the country where divorce is sought.⁽¹⁾ In England and Scotland, for instance, divorce is obtainable only through the institution of judicial proceedings before a competent authority, i.e court of law,⁽²⁾ and therefore any extra-judicial proceedings are ineffective to dissolve the marriage.⁽³⁾ A divorce, according to Iraqi law, may be obtained either by judicial proceedings, or extra-judicial proceedings such as mutual consent, or without any proceedings such as *talaq*.

In the vast majority of cases no jurisdiction problem arises and the question of which court has jurisdiction to entertain proceedings and pronounce a decree of divorce is purely one of the internal matter of domestic law. The problem arises only in cases which involve a foreign element and therefore, the question of jurisdiction is not which court of any particular country should have jurisdiction but which country can claim the power to do so on principles of conflict of laws.

The rules relating to jurisdiction in this subject matter also vary considerably from one legal system to another. This difference depends on what theory is adopted in various legal systems, but there is a degree of similarity in approach, *viz*, that any bases of jurisdiction ought to serve the interests of the country concerned, and of the parties and to ensure that a

1- Wolff, 2nd ed., p. 369; Palsson, *International Encyclopedia of Comparative Law*, V. III *Private International Law*, Chapter 16, *Marriage and Divorce*, (1974), p. 154.

2- This Court is the Court of Session and Sheriff Court in relation to Scotland, Domicile and Matrimonial Proceedings Act 1973, SS. 7(1) and 8 as amended by the Divorce Jurisdiction; Court Fees and Legal Aid (Scotland) Act 1983; the High Court and, in undefended cases, a Divorce County Court: Matrimonial and Family Proceedings Act 1984, S.33; Domicile and Matrimonial Proceedings Act 1973, S.5(1) as amended by Matrimonial and Family Proceedings Act 1984, Sched.1, para. 17.

3- S.44 of the Family Law Act 1986; Contrast with earlier position of *Qureshi v. Qureshi* [1971] P. 315, See, *infra*, 184.

decree granted in the exercise of that jurisdiction would be recognised in other countries.⁽⁴⁾

The grounds of jurisdiction in action of *personam*⁽⁵⁾ do not apply to cases involving the question of status⁽⁶⁾ and an action of divorce is treated as an action in *rem* and a decree of divorce is a judgement in *rem* which binds not only the parties but all the world and is entitled to universal recognition.⁽⁷⁾ These considerations must be taken into account in deciding whether the jurisdiction of any court is to be founded upon celebration of marriage within the territorial jurisdiction or upon actual presence or temporary residence of one or both parties at the time of the proceedings or upon the nationality or domicile of the parties. The law of England and Scotland has long adopted domicile as the major connecting factor in matrimonial causes and it was early established as the main basis of divorce jurisdiction. The law on jurisdiction in divorce is now to be found in the Domicile and Matrimonial Proceedings Act 1973. In Iraq, nationality has been regarded as the main basis in divorce jurisdiction. Under the 1951 Iraqi Civil Code the Iraqi court was also given jurisdiction to grant divorce when the foreigner resided in Iraq at the time of proceedings irrespective of the residence and the nationality of the other party.

This chapter is principally concerned with the jurisdiction of the English, Scottish and Iraqi courts in divorce suit to find out in what circumstances the courts have jurisdiction to grant a decree of divorce, and whether the existing bases of jurisdiction are capable of diminishing 'forum- shopping' and of avoiding, the creation of 'limping marriages', and of anomalies and hardship. Further questions need to be considered, e.g since the bases of

4- Law Com.W.P.Nº 28 *Family Law: Jurisdiction in Matrimonial Causes (Other than Nullity)*, para. 13; Law Com. Rep, Nº 48. *Family Law: Jurisdiction in Matrimonial Causes*, paras. 7-10; Scots Law Com. Nº 25. *Family Law: Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status*, para. 7.

5- An action in *personam* may be defined as an action brought against a person to compel to do a particular thing, e.g., the payment of a debt; or to compel him not to do something, e. g. when an injunction is sought; see Dicey & Morris, 11th ed, p. 264.

6- Thomson & Middleton, *Manual of the Court of Session Procedure*, Edinburgh, (1937), p. 181.

7- See, in nullity, *Salvesen v. Administrator of Austrian property* 1927 A.C.541.

jurisdiction vary considerably from one legal system to another, the possibilities of conflicts of jurisdiction will arise. Thus, it is quite possible for the Scottish or English court to have jurisdiction on the basis of domicile or habitual residence, and the Iraqi court on the basis of nationality, over the same marriage. While the law in England and Scotland has established rules to deal with this problem, Iraqi law has completely ignored it. This chapter will be divided as follows: **I-** Jurisdiction of the English and Scottish Courts. **II-** Jurisdiction of the Iraqi Courts. **III-** Conflicts of Jurisdiction.

I- Jurisdiction of the English and Scottish Courts

The question of jurisdiction in actions of divorce in England did not arise until 1858 when the Matrimonial Causes Act 1857 conferred upon the courts for the first time power to grant a judicial divorce a *vinculo*. Before the 1857 Act, the ecclesiastical courts had no power to grant a complete divorce. The only way was by private Act of Parliament.⁽⁸⁾ The 1857 Act made no reference at all to the bases of divorce jurisdiction⁽⁹⁾ and then English judges had to find some bases of jurisdiction for their new power. Section 22 of the 1857 Act expressed that relief should be given as nearly as may be on the same principle on which the ecclesiastical courts had jurisdiction. The result was that various bases of divorce jurisdiction were exercised by English courts. After a long period of uncertainty, it was eventually laid down by the Judicial Committee of the Privy Council that "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".⁽¹⁰⁾

The law of Scotland indicates that the development of the rules of jurisdiction in actions of divorce began in the sixteenth century and the courts exercised jurisdiction on various bases. The law was also clarified by the principle of domicile.⁽¹¹⁾ Because the concept

8- Graveson, 7th ed, p. 281.

9- Dicey & Morris, 11th ed, p. 681; 12th ed., p. 713; Morris, 4th ed., p. 180.

10- *Le Mesurier v. Le Mesurier* [1895] A.C. 517 at P.540.

11- *WarrendervWarrender* (1835) 2 C1.& Fin. 488.

of domicile is somewhat technical or artificial and because of the refusal of English and Scots law to give in any circumstance to a wife the right to acquire an independent domicile, difficulties arose. In particular the cases of a married woman whose husband had deserted her and acquired a new domicile, or a woman who had married a man domiciled abroad^(1 2) or of those persons who had lived in England or Scotland for some time but whose future intentions were uncertain, were likely to give rise to difficulty. Several attempts were made to reform the law. The reform culminated in the Domicile and Matrimonial Proceedings Act 1973 which introduced the exclusive jurisdictional bases throughout the United Kingdom, i.e domicile or one year's habitual residence of either party.^(1 3) It is interesting to study firstly the common law position and secondly the statutory provisions.

A- Common Law Jurisdictional Bases

The value of an examination of the law prior to the Domicile and Matrimonial Proceedings Act 1973 is that it can provide an attempt to arrive at an appreciation of the nature of the new bases and of the permissible scope and function of a jurisdiction basis. Attention is focused only upon the main jurisdictional bases before 1974.

1- Place of Celebration of Marriage

There is no clear-cut authority for the proposition that the making of a contract of marriage confers jurisdiction upon the courts of the place where the contract was made. Nevertheless, before the passing of the Matrimonial Causes Act 1857 this basis had received a certain amount of support in English courts.^(1 4) The place of celebration of marriage as a jurisdictional basis was influenced by the old idea of marriage as a contract and divorce as the rescission of a contract.^(1 5) It follows that the *forum celebrationis* is

1 2- *Mackinnon's Trustees v. Inland Revenue*, 1920 S.C.(H L) 171, 175; *Att- Gen for Alberta v . Cook* (1926) A.C. 444.

1 3- S.5(2) for England and S.7(2) for Scotland.

1 4- *R v. Lolley* (1812) 1 Ru.& My. 237 at 239; *Tovey v. Lindsay*(1813)1 Dow.643 at 651; *McCarthy v. Decaix* (1831) 2 Ru.& My. 614.

1 5- Dicey, 6th ed, p. 217; Palsson, op.cit., p. 122; Bar, *The Theory and Practice of Private International*

qualified to decide on all matters of divorce and when the law of the *forum celebrationis* does not allow divorce the marriage will not be dissolved anywhere.

It is argued that because the courts of the place of celebration of a marriage are competent to pronounce upon the validity in form of marriage they should also be competent to dissolve it. It has been pointed out that this view is unacceptable because "the reasons which lead to the selection of the *Locus celebrationis* as the forum to determine the validity in form of a marriage have no bearing on the questions which arise in a suit of a divorce."⁽¹⁶⁾

It is difficult to argue the use of the *Lex Loci Celebrationis* as a ground of jurisdiction in divorce, just because it was accepted as such in nullity action,⁽¹⁷⁾ at a time when such a ground has waned away according to the Domicile and Matrimonial Proceedings Act 1973. Moreover, the country of celebration has no interest in assuming jurisdiction in cases where the celebration of marriage in such a country was accidental and the parties have no strong connection with the *Lex Celebrationis*.⁽¹⁸⁾

It is argued that the application of the *Locus celebrationis* has some advantages in that it may protect the court and the parties from some problems relating to proving the domicile or residence of parties and under this system there is complete harmony between the choice of law and jurisdiction. This argument is illusory and immediately is negated by the thought that the *Locus celebrationis qua forum* has no strong case to apply its own law to grounds of divorce⁽¹⁹⁾ unless there are other stronger factors linking at least one of the

Law, Hannover, 2nd ed, (1889), p. 384.

16- Gutteridge, *Conflict of Jurisdiction in Matrimonial Suits*, (1938) 19 B.Y.I.L. 25.

17- *Simonin v. Mallac* (1860) 2 Sw.&Tr.67; *Padolecchia v. Padolecchia* (1867) All. E.R 863. This did not apply if the marriage was voidable, *Ross Smith v. Ross Smith* [1963] A.C 280; *Corbett v. Corbett* [1957] 1 W.L.R.486; *Prawdzińska v. Prawdzińska*, 1954 S.L.T.41.

18- *Jack v. Jack* (1862) 24 D. 467; *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Harvey v. Farnie* (1882) 8 App.Cas. 43; *De Reneville v. De Reneville* [1948] P.100; *Bennie v. Bennie* [1949] 21 Scot.Jur. 481; Law Com. W.P. N° 28; Law Com. Rep. N° 48; Scot Law Com. N° 25; *Report of the Royal Commission on Marriage and Divorce*, 1956, Cmnd. 9678.

parties to the forum. The *Locus Celebrationis* has fallen from favour in divorce conflict rules. Not only is it not a ground of jurisdiction under the Domicile and Matrimonial Proceedings Act 1973 but neither is it a ground of recognition in terms of Family Law Act 1986.⁽²⁰⁾ (These provisions apply also to nullity jurisdiction and recognition).

2- *Locus of the Matrimonial Offence*

The *Locus* of the matrimonial offence as a jurisdictional basis reflects the fact that divorce is a penalty inflicted by the state for offence against the marriage relation. According to this view, divorce questions, therefore, must be decided by the law of the country where the matrimonial offence is committed, i.e. *Lex Loci Delecti*.⁽²¹⁾ Support in favour of applying the *Locus* of the matrimonial offence seems, it is argued, to be found in earlier Scottish cases. In several cases Scottish courts assumed jurisdiction simply on the ground that adultery had been committed in Scotland and the defender was personally cited there.⁽²²⁾ In *Christian v. Christian*,⁽²³⁾ for instance, Lord Cuninghame has pointed out that:

"The forum delecti is generally a just and often a necessary foundation of jurisdiction. The husband can get no warrant to compel his wife to return to England. In many cases the guilt of an erring spouse can be most effectively and at least expense, especially in the case of the humble and poor parties, proved on the spot, I concur with the first Lord Meadowbank in the case of *Utterton* in 1811, where he gave a clear opinion that the forum delecti was generally a relevant ground of jurisdiction."

19- Contrast nullity grounds pertaining to formal invalidity; *Nachimson v. Nachimson* [1930] P. 217; *Starkowski v. Attorney General* [1954] A.C. 155; *Ponticelli v. Ponticelli* [1958] P. 204.

20- Contrast earlier nullity cases of *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Prawdzielazarska v. Prawdzicazarska*, 1954 S.L.T. 41

21- See Dicey, 6th ed., p. 217; Palsson, op.ict., p. 122; Rabel, *The Conflict of Laws: A Comparative Study*, 2nd ed., V.1, (1958), p. 425.

22- *Shields v. Shields* (1848) 15 D. 142; *Walker v. Walker* (1844) 17 Scot-Jur. 87 at 88; *Hannah v. Hannah*, 1926 S.L.T. 370; *Crabtree v. Crabtree* 1929 S.L.T. 675; *Manderson v. Sutherland*, (1899) 1 F. 621 at 629-630; *Stewart v. Stewart*, 1905 S.L.T. 688 at 670.

23- (1851) 13 D. 1149 at 1153.

This ground of jurisdiction was maintained even after the domicile of the husband was established as a jurisdictional basis in divorce actions to cover cases where the matrimonial offence took place in Scotland and the husband was domiciled there at the time the matrimonial offence was committed, but later abandoned his Scottish domicile.⁽²⁴⁾

In England there seem to be no reported English decision concerned mainly with actions of divorce on this ground. Professor Dicey⁽²⁵⁾ pointed out that the fact that a matrimonial offence was committed in England does not confer jurisdiction upon the English court in an action of divorce. However, in *Niboyet v Niboyet*,⁽²⁶⁾ the *Locus* of matrimonial offence was regarded as supporting a claim to jurisdiction when coupled with other grounds. James L.J. stated that: "I do not think that I am overruling any English case... in laying down that where and while the matrimonial home is England, and the wrong is done here, then the English jurisdiction exists and the English law ought to be applied."⁽²⁷⁾ In the same line of argument Cotton L.J. said: "resident founded jurisdiction in divorce by the fact not just that the respondent had been resident in England... but also by the fact that, it must be remembered... that the adultery... was committed in England."⁽²⁸⁾

The *Locus* of the matrimonial offence as a ground of jurisdiction was criticised in the earlier Scottish cases. In *Jack v. Jack*,⁽²⁹⁾ for instance, it was held that: "the mere fact that adultery has been committed within its territory, cannot entitle it (Scottish court) to deal with the status of parties not otherwise subject to its law."

It is difficult to argue in favour of the use of the *Locus* of the matrimonial offence as a

24- *Clark v. Clark*, 1967 S.L.T. 319.

25- Dicey, op.cit., p. 217; *Mordaunt v. Moncreiffe* (1874) L.R. 2 S. C. & Div. 374; *Wilson v. Wilson* (1872) L.R. 2 P.& D. 435.

26- (1878) 4 P.D. 1.

27- At 9.

28- At 21.

29- (1862) 24 D. 475 at 478; *Pitt v. Pitt* (1862) 1 M. 106; *Stavert v. Stavert*, (1882) 9 R. 519; *Low v. Low* (1891) 19 R 115; Fraser, op.cit., p. 1289.

jurisdictional ground in divorce action, for the divorce purpose is not to provide a remedy only to the innocent spouse for a matrimonial wrong committed by the other. The modern idea is that divorce should be available to either spouse when the marriage has irretrievably broken down. Divorce is therefore the act by which a state dissolves the marriage status. It is submitted that matters of status should be governed by a legal system which has a serious interest in determining the status of the parties. The *Locus* of the matrimonial offence seems to be inconsistent with this general rule, and, for this reason, decree of divorce proceedings founded upon this ground of jurisdiction may not attract recognition abroad. Accordingly, the Law Commissions⁽³⁰⁾ did not recommend its inclusion and the Domicile and Matrimonial Proceedings Act 1973 excluded it as a basis of jurisdiction. Moreover, the *Locus* of matrimonial offence has also fallen out of divorce recognition in terms of the Family Law Act 1986.

3- Residence as A Basis of Jurisdiction

As a result of the different nature of the respective laws of England and Scotland upon the subject of divorce, the courts in Scotland faced a number of applications for divorce made by English parties in the beginning of the nineteenth century. Some of them established Scottish domicile and others resided for some time. The question therefore, was whether such residence might be regarded as conferring jurisdiction on the Scottish court.

In *Uttorton v. Tewsh*,⁽³¹⁾ the marriage was celebrated in England between English parties. The husband had, many years afterwards, abandoned his wife and gone to Scotland. The wife petitioned the Consistorial Court in Edinburgh for divorce against her husband. The majority of the judges dismissed the petition upon the ground that the husband had not acquired a *bona fide* permanent domicile in Scotland. Accordingly, a short residential period in Scotland should not be sufficient to found jurisdiction in divorce

30- Law Com. N° 48, Para. 58; Scot Law Com. N° 25, para. 9.

31- (1811) Fergusson's Rep. 55

actions. The Court of Session, reversing the decree, held that there was jurisdiction on the basis of residence and suggested that:

"the duties, obligations and rights to redress wrongs incident to that relation, as recognised by the law of Scotland attach on all married persons living within the territory, and subject to that law wheresoever their marriage may have been celebrated; that jurisdiction or right and duty of the courts of Scotland to administer justice in such matters over persons not natural born subjects arises from the person sued being resident within the territory at the time of their citation and appearance or being duly domiciled, and being properly cited. Accordingly, at the instance of petition having a sufficient interest and title and proceedings in due form of... if the law refused to apply its rules to the relations of husband and wife... among foreigners in this country, Scotland could not be deemed a civilized country". (3 2)

The decision was followed in several cases^(3 3) and approved by Lord Moncrieff in *Ringer v. Churchill*.^(3 4) The learned judge appeared throughout his judgment to be happy with this test and showed a marked inclination in favour of the jurisdiction against a defender who had been resident in Scotland for forty days before the action was raised and the summons was served. He said: "it is settled that if the defender in an action of divorce has been resident for forty days within Scotland he is amenable to the jurisdiction of this court." (3 5)

However, these cases ceased to represent the law of Scotland and about the middle of the nineteenth century were abandoned and replaced by the principle of the matrimonial domicile.^(3 6) It is interesting to observe that in the notable House of Lords decision of *Shaw v. Gould*^(3 7) the English view that a Scottish divorce, obtained after the husband

3 2- Ibid at 58.

3 3- *Show v. Show* (1851) 13 D. 819; *Forrester v. Forrester* (1844) 6 D. 1358; See, Fraser, op.cit., p. 1290; Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contract, Rights and Remedies*, 2nd ed, London, (1841), p. 273; Duncan & Dykes, *The Principle of Civil Jurisdiction As applied in the Law of Scotland*, (1911), p. 160.

3 4- (1840) 2 D. 307.

3 5- Ibid, 309.

3 6- *Jack v. Jack* (1862) 24 D. 475; *Low v. Low* (1891) 19 R. 115; infra, 51.

3 7- (1868) L.R. 3 H.L. 55.

(upon payment) had resided for forty days in Scotland so as to confer jurisdiction on the Court of Session, was unacceptable; hence the children of the wife's second marriage to a Scotsman were illegitimate in the eyes of English law, and could not succeed under an English will.

In the earlier English cases, jurisdiction was found on residence on the analogy of the old ecclesiastical jurisdiction to grant the limited divorce *a mensa et thoro*. In *Niboyet v. Niboyet*,⁽³⁸⁾ for instance, a Frenchman and English woman married in 1856 at Gibraltar according to English form. The husband, who had never lost his domicile of origin , was residing in England when the wife filed a petition for divorce alleging adultery coupled with desertion. The majority of the Court of Appeal, reversing the judgment below, held that there was jurisdiction on the basis of residence on the ground that the mere residence of the husband conferred jurisdiction on the ecclesiastical courts in matters of judicial separation, and other matrimonial causes and consequently that after the 1857 Act was passed, jurisdiction in divorce might be exercised in the same circumstances although the husband was domiciled abroad.⁽³⁹⁾

It seems from the decided cases that the courts accepted jurisdiction generally without discussion as to the character of the residence required to found jurisdiction. There was no insistence upon immobility of residence, not even in the sense of lengthy duration. The courts also did not distinguish between the residence of the husband and wife, petitioner or respondent. The *bona fide* resident, not casual nor as a traveller, was sufficient to found jurisdiction.⁽⁴⁰⁾

The dominance of residence was but short-lived , for in 1895, in *Le Mesurier v. Le Mesurier*⁽⁴¹⁾ the Privy Council disapproved the decision in *Niboyet v. Niboyet* and

38- (1878) 4.P.D. 1, discussed by Morris, *Cases on Private International Law*, 4th ed., Oxford, (1968), p. 107; *Brodie v. Brodie* (1862) 2 Sw.& Tr. 259 at 263.

39- At, 6. 22, See, Brett.L.J's opinion, who dissented the majority of the Court of Appeal, at p. 9.

40- *Brodie v. Brodie*(1862) 2 Sw.& Tr. 259 at 263.

41- [1895] A.C. 517 at 531.

advised that: "[i]t is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage".

It is worthy of note, however, when the principle of domicile became weakened, residence was reintroduced as a basis of jurisdiction but this time with a qualification. The most recent formulation of the residence is "habitual". This will be discussed later.⁽⁴²⁾

4- Matrimonial Domicile

Marriage, according to this basis, is a contract, having civil effects and correlative rights and duties, the observance and enforcement of which concern the well-being of the state itself. The grounds of its dissolution affects the morals and polity of the state. Divorce questions, therefore, must be decided by the law of the country where the parties have their home,⁽⁴³⁾ i.e., the place of residence of the married pair for the time.

"But the true inquiry, I apprehend, in every such case is, where is the home or seat of the marriage for the time, where are the spouses actually resident if they be together, or if from any cause they are separate, what is the place in which they are under obligation to come together, and renew, or commence, their cohabitation as man and wife"⁽⁴⁴⁾

Matrimonial domicile as a basis of divorce jurisdiction had been adopted by the Scottish courts in the middle of the nineteenth century. It was foreshadowed in *Shields v. Shields*⁽⁴⁵⁾ and was first formulated and applied in *Jack v. Jack*⁽⁴⁶⁾ in which both parties were Scottish, and after their marriage they continued to live together in Scotland until the year 1855, when the husband went to America, the wife continuing to reside in Scotland. Four and a half years afterwards the husband, whilst still in America, brought an action in Scotland founded on adultery committed by his wife.

42- See, *Infra*, 67.

43- *Jack v. Jack* (1862) 24 D. 467 at 488.

44- *Ibid*, *per* L.J.C.Inglis at p.484; *Wilson v. Wilson* (1872) 10 M. 573 at 577.

45- (1852) 15 D. 142.

46- (1862) 24 D. 467; discussed by: Burnet, *Matrimonial Domicile in Juisdiction for Divorce*, (1895) 7 Jur. 251.

Lords Neaves and Mackenzie having decided that domicile was the only foundation of jurisdiction in divorce, distinguished between the domicile of the husband and the domicile of married pair. Their Lordships concluded that: "in order to found jurisdiction in cases of divorce, we do not think it always necessary that the parties should have domicile in Scotland sufficient to regulate succession".⁽⁴⁷⁾ Since the proper domicile of the parties was in Scotland it followed that the court had jurisdiction to dissolve the marriage, and also that the remarks quoted must be regarded as *obiter*.

This ground of jurisdiction was subsequently applied by the second Division in several cases.⁽⁴⁸⁾ In *Pitt v. Pitt*,⁽⁴⁹⁾ for instance, the court, reversing Lord Kinloch below, held that there was jurisdiction on the ground that the husband's residence in Scotland had been such as to make that country the domicile of marriage.

The useful concept of matrimonial domicile fell into abeyance in England after *Le Mesurier* until *Indyka v. Indyka*,⁽⁵⁰⁾ when Lord Reid saw advantages in this doctrine and remarked that in many cases he found:

"it easier to say what amounted to a matrimonial home than to say whether there was that *animus monendi* necessary to create a domicile of choice."⁽⁵¹⁾ He recommended, "reviving the old conception of the matrimonial home and...holding that "if the court where that home is grants decree of divorce, we should recognise that decree".⁽⁵²⁾

The principle of matrimonial home as stated in the earlier Scottish cases was a liberal and welcomed approach. There is no doubt that the combination of the unity of domicile rule with, in England, the adherence to a restrictive view of jurisdiction resulted in hardship. However, it seems that the main difficulty of this basis lies in defining the nature

47- *Jack v. Jack* (1862) 24 D. 467 at 488.

48- *Hume v. Hume* (1862) 24 D. 1342, 1343; *Hook v. Hook* (1862) 24 D. 488, 489.

49- (1862) 1 M. 106, 119.

50- [1967] 2 ALL.E.R. 689.

51- *Ibid*, at 699.

52- *Ibid*, at 702; See, *Infra*, 146.

of the residence sufficient for the purpose and to fix the matrimonial home where parties are living in different countries, and to fix it in law when no matrimonial domicile in fact has been yet established.⁽⁵³⁾ In *Pitt v. Pitt*,⁽⁵⁴⁾ for instance, the court fixed the matrimonial home in Scotland, despite the fact that the wife had never been there. Here in the facts of this case one would think matrimonial home is a misnomer. Moreover, to apply the matrimonial domicile might require the court to assume jurisdiction in cases where there is no current connection between the parties and the forum. This seems to be contrary to the general principle for the assumption of jurisdiction, viz that divorce should not be granted to persons without real and substantial ties with a forum.⁽⁵⁵⁾ In the same line of argument Lord Watson rejected any notion that jurisdiction could be founded on the existence of a matrimonial home, remarking that:

"it would be very rash to affirm that, according to the law of Scotland mere matrimonial domicile affords any ground for jurisdiction to divorce. There is no trace of the doctrine to be found in the institutes of Scottish law or in the earlier decisions of the court."⁽⁵⁶⁾

5: Domicile of the Husband at the Commencement of Proceedings

The tendency of the courts to hold that the domicile of the husband at the time of the commencement of proceedings is the only proper ground of jurisdiction in actions of divorce emerged shortly after the passing of the Matrimonial Causes Act 1857.⁽⁵⁷⁾ In *Wilson v. Wilson*,⁽⁵⁸⁾ for instance, Lord Penzance said:

53- See, Burnet, (1895) 7 Jur. 251 255.

54- (1862) 1 M.106.

55- Scot Law Com. N° 25, para. 38.

56- *Le Mesurier v. Le Mesurier* [1895] A.C. 517 at 534; *Jack v. Jack* (1862), 24 D. 475, per Lord Deas, at 534; *Low v. Low* (1891) 19 R. 115; *Dombrowitzk v. Dombrowitzk* (1895) 22 R. 906; *Toylor v. Toylor* (1883) 21 S.L.R. 18; *Hunter v. Hunter* (1893) 30 S.L.R. 915; *Stavert v. Stavert* (1882), 9 R. 519; *Manderson v. Sutherland* (1899) 1 F. 621; See, Anton, 1st ed, pp. 311, 312; Duncan & Dykes, op.cit., p. 162; Fraser, op.cit., p. 1277.

57- *Tollemach v. Tollemach* (1859) 1 Sw.&Tr. 557; *Ratcliff v. Ratcliff* (1859) 29 L.J.P.& M 171.

58- (1872) L.R 2 P& D 435 at 442; *Niboyet v. Niboyet* (1878) 4 P.D 1 per Brett L.J at 25; *Bater v. Bater* [1906] P. 209

"it is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the court of the country in which they are domiciled".

The leading authority for this principle is *Le Mesurier v. Le Mesurier*,⁽⁵⁹⁾ which was followed in Scotland within a few years.⁽⁶⁰⁾ The facts were: The husband was a British subject domiciled in England and the wife was domiciled before her marriage in France. The husband instituted proceedings for divorce from his wife where he had been residing in Ceylon for more than nine years. A district court granted decree *nisi*. The wife pleaded that the district court had no jurisdiction. The case went to the Court of Appeal of Ceylon which reversed the decision of the district court. The husband appealed to the Privy Council on the ground that the Ceylon court had jurisdiction and he based his appeal on the grounds that, although he had retained his English domicile of origin, Ceylon was the domicile of marriage. Lord Watson having rejected the Scottish view of matrimonial domicile,⁽⁶¹⁾ suggested that: "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".⁽⁶²⁾

It is clear for argument that the justification of the principle of domicile as a basis of jurisdiction relied on the fact that marriage and divorce are questions of personal status, namely marriage is a contract which creates or constitutes a special status, so divorce is the act by which, a state through a public authority, dissolves or puts an end to the marriage status. The law then which enables a court to decree an alteration in the status of husband or wife as such, is the law of the country to which by domicile they owe obedience, the only court which can decree by virtue of such law being a court of that country.⁽⁶³⁾

The principle of domicile as the sole test of jurisdiction was universally accepted by

59- [1895] A.C. 517.

60- *Manderson v. Sutherland*, 1899.1 F.621.

61- *Le Mesurier v. Le Mesurier* [1895] A.C. 517 at 534.

62- *Ibid*, at 540.

63- Dicey & Morris, 9th ed., p. 301; Westlake, *op.cit.*, p. 86; Graveson, *Comparative Conflict of Laws: Selected Essays*, V. 1, (1977), p. 268; *Niboyet v. Niboyet* (1878) 4 P.D 1 *per*, Brett L.J. at p. 25.

English and Scottish courts⁽⁶⁴⁾ and it followed from it that there should be only one test of jurisdiction and only one court capable of dissolving a particular marriage i.e the court of the parties' domicile. In the words of Lord Haldane: "nothing short of a full juridical domicile within its jurisdiction can justify a British court in pronouncing a decree of divorce".⁽⁶⁵⁾

The place where the parties had resided,⁽⁶⁶⁾ their nationality,⁽⁶⁷⁾ where the marriage took place,⁽⁶⁸⁾ their submission to jurisdiction⁽⁶⁹⁾ and the motive in acquiring the domicile⁽⁷⁰⁾ are irrelevant. It is submitted that the rule in *Le Mesurier v. Le Mesurier* did not established the law on a rational and satisfactory basis. The case itself illustrates clearly enough the difficulties with this solution to the problem. The emphasis on the fact that jurisdiction in divorce actions belongs exclusively to the courts of domicile coupled with the rigid rules governing the acquisition and loss of domicile led to obvious inconvenience and frequent difficulties for some persons. Here were parties who had resided for more than nine years in Ceylon. Both Ceylon and England had provisions of law under which divorce might be granted on a showing of the facts which were actually present in that case. Yet, the decision was that the courts of Ceylon, where the parties were, could not grant that divorce. The proceedings could be brought only in England, many thousands of miles away, with an obviously great increase in the expense, difficulty

64- Duncan & Dykes, op.cit., p. 164; Falconbridge, *Essays on the Conflict of Laws*, Toronto, (1947), p. 612; Wastlake, op.cit., p. 84; Cheshire, *The International Validity of Divorce* (1945) 61 L.Q.Rev. 356; Anton, 1st ed., p. 315; Lately, *Problems of Divorce Jurisdiction*, (1952) 1 I.C.L.Q. 229 at 231; Cook, *The Logical and Legal Bases of the Conflict of Laws*, Combridge, (1942), p. 458; Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees: A Comparative Study*, (1965) 65 H.L.Rev. 193; Morris, *Cases on Private International Law*, p. 114; Graveson, 7th ed p. 281; North, op.cit, (1977), p. 25.

65- *Lord Advocate v. Jaffrey* [1921] 1 A.C. 146 at 152.

66- *Goulder v. Goulder* (1892) P. 240.

67- *Niboyet v. Niboyet* (1878) 4 P.D. 1.

68- *Brown v. Brown*, 1967 S.L.T. 44; *Gould v. Gould*, 1968 S.L.T. 98.

69- *Harriman v. Harriman* [1909] P. 123; *Hyman v. Hyman* [1929] P. 1; *Commell v. Commell* [1964] 3 All.E.R. 255.

70- *Marchant v. Marchant*, 1948 S.L.T. 143.

and delay involved in achieving the result which was basically authorised by the law of either country. The Indian and Colonial Divorce Jurisdiction Acts (1920-1950)^(7 1) removed this particular injustice in relation to persons residing in territories to which the Acts applied. By these Acts it was clearly recognised that a divorce might be granted by the court of a state in which the parties were not domiciled.

It is also clear that this rule when coupled with the long established British view that the married woman [until 1st January 1974] shared her husband's domicile during the marriage^(7 2) meant English and Scottish courts had no jurisdiction to entertain an action of divorce by the wife unless the husband was domiciled in the jurisdiction at the time of proceedings or as far as Scotland is concerned, at the time the matrimonial offence was committed. The result of this led to hardship to a wife whose husband deserted her and acquired a new domicile, or a woman who had married a man domiciled abroad.^(7 3)

It is not surprising that steps had to be taken to remove this hardship and to give a wife relief. Sir Gorell Barnes P. in *Ogden v. Ogden*,^(7 4) though he asserted that there was no real exception to the principle that jurisdiction to grant divorce depends on domicile, then advised a remedy for the deserted wife by regarding the pre-marriage domicile as sufficient to found jurisdiction. The learned judge also would give a remedy to a wife whose marriage was declared to be void by the court of the husband's domicile. In this case a woman would be a wife in her own country but not in her husband's domicile. He advised "to treat her as having a domicile in her own country which would be sufficient to

7 1- See, Dicey, 6th ed., pp. 379, 380; Griswold, (1965) 65 Har L.Rev 197; Anton, 1st ed, p. 313; Graveson, 7th ed., p. 285; Noted in (1951) 4 I.C.L.Q. 247; *Keyes v. Keyes* [1921] P. 204. These Acts have now been replaced by the Family Law Act 1986. S.68 (2) and Sched, 2.

7 2- *Mackinnon's Trustees v. Inland Revenue*, 1920 S.C (H.L) 171; *Low v. Low* (1891) 19 R 115; *Alt-Gen- for Alberta v. Cook* [1926] A.C 444; *Lord Advocate v. Gaffrey* [1921] 1 A.C. 147; *Garthwaite v. Garthwaite* [1964] P. 356; Graveson, (1954) 70 L.Q.Rev. 500; Wolff, op.ict., p. 121; Anton, 1st ed., p. 173; North, op.cit., (1993), p. 58.

7 3- Dicey, 6th ed., p. 232; Cheshire, (1945 61 L.Q.Rev. 357.

7 4- [1908] P. 46 at 81; *Armstrong v. Armstrong* [1898] P. 168 at 185.

support a suit".⁽⁷⁵⁾ The effect of *Ogden v. Ogden* was given in two undefended cases, *Stathatos v. Stathatos*⁽⁷⁶⁾ and *De montaigu v. De montaigu*.⁽⁷⁷⁾ In both cases, the husband, who was domiciled abroad, deserted his wife and obtained a decree of nullity from the court of his domicile on the ground that the marriage which took place in England was formally invalid by the *lex domicilii*. In both cases English court granted a decree of divorce to the wife although her husband was domiciled abroad at the time of the proceedings. In the later case, Sir Samuel Evans P. expressed:

"I think it is better, where necessary, in a case like this, to make an exception from the ordinary rule that domicile governs these cases and to grant a decree as a practical way of giving the petitioner wife the redress to which she is entitled."⁽⁷⁸⁾

These decisions did not go long unchallenged. The first reaction came from the House of Lords in the Scottish appeal of *Lord Advocate v. Jaffrey*,⁽⁷⁹⁾ in which it was decided that the mere existence of grounds of a divorce or separation is not of itself enough to enable a wife to set up a separate domicile. Hence the Scottish court had no jurisdiction to entertain a divorce petition by a wife whose husband had acquired a new domicile, despite the alleged desertion and adultery he had committed.

On the same lines, it was held in *Att-Gen for Alberta v. Cook*,⁽⁸⁰⁾ that a wife judicially separated from her husband was not entitled to petition for divorce in any other country but that of her husband's domicile. Effect was given to these cases in *H v. H*.⁽⁸¹⁾ and *Herd v. Herd*,⁽⁸²⁾ which finally repudiated the decisions in *Ogden v.*

75- *Ogden v. Ogden*[1908] P. 46 at 82. Although this is an interesting approach of *Ogden*, the decision itself is a notoriously bad one in the conflict of laws.

76- [1913] P. 46.

77- [1913] P. 154.

78- *Ibid.* at 156.

79- [1921] 1 A.C.146; See also, cases as *Mackinnon's Trustees v. Inland Revenue*, 1920 S.C (H.L) 171; See, Mackinnon, *Leading Cases in the International Private Law of Scotland*, p. 7.

80- [1926] A.C. 444; discussed in (1926) 40 Har.L.Rev. 134.

81- [1928] P. 206.

82- [1936] P. 206.

Ogden,⁽⁸³⁾ *Stathatos v. Stathatos*⁽⁸⁴⁾ and *De montaigu v. De montaigu*.⁽⁸⁵⁾

The failure of judicial opinion to remove the hardship of a married woman prompted legislative action to remedy the situation and Parliament interfered by introducing the Matrimonial Causes Act 1937,⁽⁸⁶⁾ which provided in Section 13 that where a wife had been deserted by her husband or where her husband had been deported from the United Kingdom, and the husband was immediately before the desertion or deportation domiciled in England, the court should have jurisdiction for the purpose of any proceedings concerned with divorce notwithstanding that the husband was no longer domiciled in England.⁽⁸⁷⁾ The Act did not extend to Scotland, because such a jurisdictional basis existed already.⁽⁸⁸⁾

The Scottish rule and the 1937 Act were a clear departure from the underlying rule in the *Le Mesurier's* case. They were not broad enough, however, to cover certain cases, particularly the cases where the husband was domiciled abroad at the time of desertion, or the cases when the husband removed from England or Scotland, acquiring a domicile elsewhere, and thereupon committed a matrimonial offence in his new domicile.⁽⁸⁹⁾

The result was the Matrimonial Causes (War Marriages) Act 1944, which was passed to meet the numerous cases of women marrying men resident but not domiciled in England and Scotland. In effect jurisdiction under this Act was based on the continued residence of

83- [1908] P. 46.

84- [1913] P. 46.

85- [1913] P. 154.

86- See, *Cheshire*, (1945) 61 L.Q.Rev. 358; *Stone*, (1954) 17 M.L.Rev. 246; *Falconbridge*, op.cit., p. 615; *Griswold*, (1965) 65 Har.L Rev. 198; *North*, op.cit., (1977), p. 27.

87- Re-enacted as S.18 (1)(a), S.40 (1)(a), S.46 (1)(a), Matrimonial Causes Acts.1950, 1965, 1973, respectively, repealed by Domicile and Matrimonial Proceedings Act 1973, Schedule, 6.

88- *Appleby v. Appleby* (1882) 19 S.L.T. 682; *Hanna v. Hanna* (1895) 3 S.L.T. 163; *Light v. Light*, 1903, 11 S.L.T. 100; *Main v. Main*, 1912, 1 S.L.T. 493; *Mangrulkar v. Mangrulkar*, 1933 S.C. 239; *Redding v. Redding* (1888) 15 R. 1104; *Cordon v. Cordon* (1847) 9 D. 1293; *Croswell v. Croswell* (1881) 8 R. 901; See, *Fraser*, op.cit., p. 1289; *Duncan & Dykes*, op.cit., p. 170.

89- *A.B v. C.D* (1845) 7 D. 556; *Cordon v. Cordon* (1847) 9 D. 1293; *Dicey*, 6th ed, p. 234; *Wolff*, op. cit., p. 77.

the wife in England and Scotland. The Act was of a temporary nature which applied only to marriage celebrated during the war period, 1939-1950, between a husband at the time of marriage, domiciled abroad and a wife who was immediately before the marriage domiciled in England or Scotland. The court should have jurisdiction as if both parties were at all material times domiciled in England or Scotland.⁽⁹⁰⁾

The Committee on Procedure in Matrimonial Causes reported that the previous Acts did not go far enough to meet the case of a married woman.⁽⁹¹⁾ The result was the Law Reform (Miscellaneous Provisions) Act 1949⁽⁹²⁾ which created a new basis of jurisdiction without reference to domicile and operated only where the husband was not domiciled elsewhere in the British Isles. The Act entitled the courts to have jurisdiction in proceedings by a wife notwithstanding that the husband was not domiciled in England or Scotland if she was resident in England and Scotland and had been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings and the husband was not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.⁽⁹³⁾

Although the Act mitigated the most serious hardship occasioned by the rule in the *Le Mesurier*, it is submitted that it did not establish the law on a satisfactory basis. It created a state of discrimination between sexes: while the wife could raise an action against her husband upon her residence, a cross-action by the husband would appear to be incompetent.⁽⁹⁴⁾ Moreover, the use of the words 'resident' and 'ordinarily resident' caused difficulties over the meaning of both terms and the character of the residence

90- Green, *The Matrimonial Causes (War Marriages) Appointed Day, Order 1950*, (1950) 3 In't. L. Q. 417; Lately, (1952) 1 I.C.L.Q. 221.

91- Final Report, Comd. 7024, p. 30.

92- Discussed by Graveson, (1950) 3 In't. L.Q. 371.

93- S.1 (1) Re-enacted as S.18 (1)(b), S.40 (1)(b), S.46 (1)(b) Matrimonial Causes Acts 1950, 1965, 1973 respectively. Repealed by Domicile and Matrimonial Proceedings Act 1973, Schedule, 6. For Scotland, See, S.2 (1) repealed by Domicile and Matrimonial Act 1973.

94- *Levett v. Levett* [1957] P. 156; *Tursi v. Tursi* [1958] P. 54.

required to found jurisdiction.

At one time it was said that ordinary residence means little more than simple residence.⁽⁹⁵⁾ In *Hopkins v. Hopkins*,⁽⁹⁶⁾ Pilcher J. had interpreted the word ordinarily resident with direct reference to the rule in income tax cases⁽⁹⁷⁾ and he expressed the view that the addition of the word ordinarily added nothing of legal significance to the requirement of residence and there is no ground for applying a different meaning to the words resident and ordinarily resident over a defined period. The wife in this case had lived in Canada with her husband for five months and during this period neither she nor her husband had any home of their own in England, then she returned to England where she immediately instituted proceedings for divorce on the ground of cruelty and desertion. The action was dismissed on the fact that the period of three years had been broken in the sense that no connection with England was maintained for the five months, her residence and ordinary residence was with her husband in Canada within the meaning of the 1949 Act and therefore, she was not ordinarily resident in England during the three years immediately preceding the commencement of the proceeding.

A similar approach was adopted in the Scottish case of *Land v. Land*⁽⁹⁸⁾ where it was held that the wife's residence for two months in Holland prevented her from being regarded as ordinarily resident in Scotland because "when she left Scotland she did not leave there a home of her own. She left a single room which she had in her sister's home and so far as the evidence goes she never returned there. It cannot, therefore, be said that she left or retained a home in Scotland".⁽⁹⁹⁾

95- Griew, *Adoption Act 1958: Some conflict Implication*, (1959) 8 I.C.L.Q. 569; Anton, 2n ed, p. 147.

96- [1951] P. 116; See, Mann, (1954) 3 I.C.L.Q. 685; Farnworth, (1951) 67 L.Q.Rev. 32; note, (1950) 3 Int'l.L.Q. 259.

97- *I.R.C. V. Lysaght* [1928] A.C. 244; *Leven v. I.R.C.E.* [1928] A.C.217.

98- 1962. S.L.T. 316. Contrast with *Cabel v. Cabel*, 1974 S.L.T. 295.

99- *Ibid*, per Lord Wheatley, at 317.

A contrary view was suggested, namely that ordinarily resident means something more than mere physical presence, in other words, physical presence with some degree of continuity. On the other hand, uninterrupted presence is not necessary and temporary absence may be innocuous⁽¹⁰⁰⁾ as where a wife joined her husband for some weeks abroad on holiday or even spent months with him while he worked abroad provided she did not sever her connection with the forum court.

The meaning was considered by Karminski J. in *Stransky v. Stransky*⁽¹⁰¹⁾ in which the wife spent fifteen months of three years in Munich, where her husband had been employed for some time. During the whole period of those years, she had maintained a flat in London where the parties lived from time to time and she had never let the flat and had kept it ready for occupation as a permanent home during the absences abroad.

The learned judge interpreted the meaning of ordinarily resident, using the decisions on income tax points as of assistance only. He concluded that the use of the two terms in the 1949 Act was not either meaningless or accidental. The term of resident must be at the time of the institution of proceedings and the term ordinarily resident as a requirement of the preceding three years.

It is clear that one of the difficulties about ordinary residence as a basis of jurisdiction in an action of divorce is that it was interpreted with reference to the income tax cases. It is submitted that the term residence must be interpreted in every case in accordance with the object and intent of the Act in which it occurs.⁽¹⁰²⁾ Since the income tax cases deal with different words from those in the context of the 1949 Act, it follows that it is undesirable to import the decisions of the meaning of residence for tax purpose into family law. The

100- Cheshire & North, 12th ed., p. 169; North, op.cit., (1977), pp. 12-13; McClean, *The Meaning of Residence*, (1962) 11 I.C.L.Q. 1153, 1161, 1166; Dicey & Morris, 9th ed., p. 301.

101-[1954] P. 428; discussed by Mann, (1954) 3 I.C.L.Q. 685; *Macrae v. Macrae* [1949] P. 397; *Cabel v. Cabel*, 1974 S.L.T. 295; *Lewis v. Lewis* [1956] 1 ALL.E.R. 375; discussed by Bolm, (1956) 5 I.C.L.Q. 290; *R v. Barnet London Borough, ex pshah* [1983] 2 ALL.E.R. 309.

102- Anton, 2nd ed., p. 198.

relevant question in tax law is whether a person is subject to a particular country's tax laws which may demand an answer quite different from whether a person should be able to invoke the jurisdiction of a particular country. The necessary degree of connection may well be higher in jurisdiction than in tax cases.⁽¹⁰³⁾ If Parliament had intended such a result then it is difficult to follow the view that the word ordinarily added nothing of legal significance to the requirement of residence. In the absence of a specified period, the expression of ordinary appears superfluous but when a period of three years is required then that expression is relevant and must be given its natural meaning to indicate that a jurisdiction should not be invoked without real and substantial connection and if that connection was established a jurisdiction should not be ignored simply because the wife spent some time abroad.

The jurisdictional basis of ordinary residence has been abolished and replaced by habitual residence of either party for one year.⁽¹⁰⁴⁾ An important question is whether habitual residence is a stronger or weaker connecting factor than ordinary residence. This question will be discussed later.

B- Statutory Jurisdictional Bases

The jurisdiction of the courts at common law to entertain petitions for divorce had grown in a haphazard manner. It was uncertain, complex and anomalous in many respects. It is generally agreed that a person with a real and substantial connection with a country should be able to invoke the jurisdiction of that country. Although it is not easy to define a test as to what constitutes such connection, it is submitted that a long residence in a country satisfies any reasonable test of real and substantial connection.⁽¹⁰⁵⁾ The common law jurisdictional bases failed to meet such a test. Thus, persons who lived in England and Scotland but whose future intentions were too uncertain to establish domicile there, were unable to obtain divorce. It is equally true that in order to discourage "forum-shopping"

103- Hall, (1975) 24 I.C.L.Q. 1 at 26.

104- SS.5 (2)(b), 7 (2)(b) of the Domicile and Matrimonial Proceedings Act 1973.

105- See, *Infra*, 147.

and to avoid the creation of "limping marriages" a person with no real and substantial connection with a country should not be able to invoke the jurisdiction of that country. The common law jurisdictional bases failed to achieve these objectives. Thus, as a result of the technical rules of domicile, a person may be regarded as being domiciled in England and Scotland which he has never visited and with which he has no real social connection. Nevertheless, he was able to invoke jurisdiction on the ground of his domicile of origin.

Similarly, the Scottish jurisdictional basis of matrimonial offence might be criticised as affording relief to wives who no longer reside in Scotland, with the result that decrees of divorce proceeding upon it might be refused recognition abroad.

The common law jurisdictional bases created a state of discrimination between husband and wife. While the wife could raise an action for divorce based upon her own residence, a cross-petition by the husband would appear to be incompetent.⁽¹⁰⁶⁾ Similarly, while the husband could raise an action based upon his own independently ascertained domicile, an action by the wife on this ground was unacceptable.

In 1972, the question of jurisdiction in matrimonial proceedings was examined by the Law Commissions.⁽¹⁰⁷⁾ They recommended the abolition of the common law and statutory jurisdictional bases, and the enactment of a new statute containing all the rules relating to the jurisdiction in matrimonial proceedings; a recommendation which has been implemented in the Domicile and Matrimonial Proceedings Act 1973.⁽¹⁰⁸⁾ This Act introduced the exclusive jurisdictional bases in actions of divorce and other consistorial causes throughout the United Kingdom, i.e., domicile or one year's habitual residence of either party.⁽¹⁰⁹⁾

¹⁰⁶⁻ *Levett v. Levett* [1957] P. 156.

¹⁰⁷⁻ Law Com. W.P.Nº 28; Law Com. Rep. Nº 48; Scots Law Com. Nº 28; Memorandum Nº 13.

¹⁰⁸⁻ The Act came into force from 1st January 1974. See, Leslie, *Jurisdiction in Consistorial Causes Affecting Matrimonial Status*, (1973) S.L.T. (News) 21; Clive, *The New Law on Jurisdiction in Divorce*, (1973) S.L.T. (News) 249; Hartley & Karsten, (1974) 37 M.L.Rev. 183.

¹⁰⁹⁻ SS.5 (2) for England and 7 (2) for Scotland. Nothing affects the court's jurisdiction to certain any proceedings begun before January 1, 1974, .SS.6 (4)(b), 12(b).

1- Conflict Between Domicile and Nationality

The question before the Law Commissions was whether there was any merit in adopting nationality as an alternative to domicile or should domicile be retained? In the earlier Scottish case of *Brunsdon v. Dunlop*,⁽¹¹⁰⁾ the Court of Session held that nationality was not a sufficient connecting factor to justify the Scottish court in involving itself in the status of parties not domiciled or resident in Scotland. An opposite view was taken in the English case of *Dond v. Dond* ⁽¹¹¹⁾ and had been preceded in *Deck v. Deck*⁽¹¹²⁾ where it had been held that divorce could be granted on the ground that "both parties were natural born English subjects... and the allegiance could not be shaken off by change of domicile. The husband therefore, although he became domiciled in America, continued liable to be affected by law of his native country."

These cases as Dr. Cheshire said "have never been treated with respect".⁽¹¹³⁾ However, nationality as a basis of jurisdiction was disapproved in *Niboyet v. Niboyet*⁽¹¹⁴⁾ and ever since the courts have never relied on it in exercising divorce jurisdiction.

The Royal Commission on Marriage and Divorce saw advantages in the principle of nationality in that it would allow people to resort to the British courts who would otherwise be debarred from such access and recommended that the courts should have jurisdiction to hear a divorce suit if the petitioner was a citizen of the United Kingdom and Colonies, and was domiciled in a country the law of which referred the question of personal status to be determined by the law of his national state and did not permit divorce to be granted on the basis of his domicile or residence.⁽¹¹⁵⁾

110- (1789) Fergusson's Rep. 260.

111- (1860) 2 Sw. & Tr. 93,927.

112- (1860) 2 Sw.& Tr. 90, 926 at 927.

113- Cheshire, (1945) 61 L.Q.Rev. 355; Morris, 2nd ed., p. 136.

114- (1878) 4 P.D. 1 at 25.

115- 1956 Com.9678, paras. 811, 840-844. For commentary See, Mann, (1958) 21 M.L.Rev. 1; Grodecki, *Recent Development in Nullity Jurisdiction*, (1957) 20 M.L.Rev. 566; William Latey,

The Law Commissions, when considering this matter, expressed their concern that if nationality sufficed there arose a risk of 'forum shopping'. They pointed out that nationality is not a strong connecting factor to justify the person's status being determined by the court of that country, particularly in the United Kingdom. Here a person who is a citizen of this country "will have a choice of three courts in which to petition for divorce and might select a court in a part with which neither party has or had any connection".⁽¹¹⁶⁾

Furthermore, the principle of nationality, on the one hand led to more than one court having jurisdiction to dissolve the same marriage such as in the case of double nationality. On the other hand, it led to absence of remedies for persons who are stateless. In the result the Law Commissions recommended⁽¹¹⁷⁾ that nationality should not be introduced as a ground of jurisdiction in actions of divorce, even in the restricted circumstances proposed by the Royal Commission on Marriage and Divorce.

Although adopting nationality as the prime connecting factor in the place of domicile is unwelcome, it is submitted that the reasons given by the Law Commissions are not free from doubt. The point that nationality is a weak or inadequate connecting factor in that it would allow a person to invoke the jurisdiction of a country which he has never visited and with which he has no real social connections is inconvenient in that the domicile principle in certain circumstances would also allow a person to invoke the jurisdiction of the English and Scottish court which he may never have visited.

The argument that a citizen of the United Kingdom would have a choice of several jurisdictions is academic. Although England and Scotland have their own legal systems, it is submitted that the English substantive law of divorce is substantially similar to that in

Q.C. (1956) 5 I.C.L.Q. 499. Professor Gutteridge advocated the principle of nationality as a basis of jurisdiction in condition that the *lex fori* should govern the grounds of divorce, (1938) 19 B.Y.B.I.L. 38.

116- Law Com. Rep. N° 48, para. 22; Law Com. W.P. N° 28, para. 34; Scots Law Com. N° 23, para 34.

117- Law Com. N° 48, para. 25; Scots Law Com. N° 25, para 36.

Scotland. Accordingly, it is thought that an Englishman would resort to the English courts and a Scotsman to the Scottish courts. In any event, nationality is a stronger connecting factor than habitual residence for one year of either party. In principle, one year is not a long period of time, particularly when the personal law of the parties is not to be applied, and it does not denote a substantial connection. It allows a person deliberately to choose to reside temporarily within the jurisdiction with a view to taking advantage of its law of divorce. A nationality on the other hand may not be changed simply because a person so wishes to obtain divorce, since a change of nationality involves a public act.

The recommendation of the Royal Commission on Marriage and Divorce that nationality should be a ground in an action of divorce in certain circumstances⁽¹¹⁸⁾ is attractive since it would allow a remedy to those who are domiciled abroad but still holding British nationality. A decree of divorce founded upon such a ground of jurisdiction will receive wide recognition abroad.

2- The Supremacy of Domicile

Having rejected nationality as a ground of jurisdiction, the Law Commissions concluded that domicile should be retained as a ground even if a general residential ground was also adopted.⁽¹¹⁹⁾ Despite the defects of domicile, the Law Commissions pointed out that jurisdiction based upon it will often achieve the basic objectives of rules of jurisdiction in divorce actions, namely those of including persons with substantial connection with the forum and of excluding persons without those connections.⁽¹²⁰⁾ Thus, domicile meets the needs of persons who are permanently settled in England and Scotland. Moreover, jurisdiction based on the domicile principle meets the needs of persons who, for business or other reasons, reside abroad but who still retain their domicile. Hence, the Scottish Law

¹¹⁸- paras. 811, 840-844.

¹¹⁹- Law Com. N° 48, paras. 17-26; Scots Law Com. N° 25, paras. 48-64; Leslie, (1973) S.L.T. (News) 21; Clive, (1973) S.L.T. (News) 249; Hartley, & Karsten, (1974) 37 M.L.Rev. 183.

¹²⁰- Scots Law Com. N° 25, para. 48; Law Com. N° 48, para. 7; Cheshire & North, 12th ed., p. 634; North, op.cit., (1993), p. 62.

Commission pointed out:

"It is traditional and common for Scotsmen to pursue careers in other parts of the United Kingdom and in foreign countries with the fixed intention, nevertheless, of returning to Scotland at a later stage of their lives. In many cases, their children are being educated in Scotland and they retain strong social connections there. In these circumstances, it would seem wrong to deny them resort to the Scottish court to determine their matrimonial status, particularly since they may be resident in countries which regard nationality as the appropriate criterion for jurisdiction in consistorial actions and whose courts might expect them to have their matrimonial affairs dealt with by the courts of the state of their nationality". (121)

Since a married woman can acquire a domicile independently of her husband,(122) the Domicile and Matrimonial Proceedings Act 1973 states that the domicile of the husband or that of the wife at the time of the commencement of proceedings founds jurisdiction in a divorce action brought by either party.(123)

As has been mentioned earlier, domicile as a connecting factor does not necessarily indicate a sufficient connection between the parties and the forum to justify applying its law. However, if the proposals of the Law Commissions(124) to reform the present rules of domicile are implemented by legislation, then this anomalous result will be removed and only persons with a genuine connection can raise divorce actions.(at least under the jurisdictional basis of domicile).

3- Habitual Residence as A Basis of Jurisdiction

The domicile principle as a sole basis of jurisdiction is too narrow. It does not meet the needs of persons who have been living in England and Scotland for some time but whose future intentions are uncertain. There is much to be said for making residence a further basis to enable such persons to invoke the divorce jurisdiction. But what sort of residence, and for how long? The Law Commissions emphasised that the new basis should be

121- Ibid, para. 51.

122- S.1 of the Domicile and Matrimonial Proceedings Act 1973. Supra, 31.

123- S.5 (2)(a) for England and S.7 (2)(a) for Scotland.

124- Law Com. N° 168 & Scots Law Com. N° 107; See, supra, 30.

sufficiently stringent to discourage forum shopping and to ensure that English and Scottish divorces should be readily recognised abroad and indicate stability of ties within the jurisdiction.⁽¹²⁵⁾ Accordingly, the Law Commissions considered three adjectives, viz permanent, ordinary, habitual. The first was thought to be objectionable as suggesting an intention to settle which is at least as strong as that required for a change of domicile.⁽¹²⁶⁾ The second was rejected to avoid the restrictive effect of *Hopkins v. Hopkins*⁽¹²⁷⁾ and *Land v. Land*⁽¹²⁸⁾ and to avoid tying the law on jurisdiction too closely to the law of taxation.⁽¹²⁹⁾ In the result the Law Commissions concluded that the appropriate adjective of residence is one which "may continue despite limited period of absence", and "is more than occasional or casual residence whatever the period" and that this could be correctly described by using the term "habitual residence".⁽¹³⁰⁾

Although the general idea is that the adjective 'habitual' refers to a residence of a certain stability in a country, it is not free from difficulties to define. It has been said that habitual residence is the same as domicile or the centre of the social relations of an individual.⁽¹³¹⁾ Dr.Graveson argues that habitual residence is "Lying midway between domicile and residence... differs from ordinary residence in its quality of continuing for substantial period and from domicile in its lack of the need for permanence".⁽¹³²⁾

125- Law Com. Rep. N° 48, paras. 7-10; Law Com W.P. N° 28, para. 13; Scots Law Com. N° 25, paras. 65-79.

126- Law Com. Rep. N° 48, para. 53.

127- [1951] P.116; See, supra, 60.

128- 1962 S.L.T. 316; See, supra, 60.

129- Scots Law Com. N° 25, para. 71; Clive, (1973) S.L.T. (News) 249.

130- Law Com. Rep. N° 48, para. 42. The notion of habitual residence appears in the early work of the Hague conference on private international law. It has increasingly adopted by the International Conventions, e.g. Hague Convention on Guardianship (1952), on Adoption (1964), on Recognition of Divorces and Legal Separations (1970), on the Civil Aspects of International Child Abduction(1980). The concept has been employed in many areas of English and Scots law, e.g. SS.15,28 Matrimonial and Family Proceedings Act 1984, See, infra, 96; S.46 Family law Act 1986, See, infra, 171; Child Abduction and Custody Act 1985.

131- Palsson, op.cit., (1978),.p. 77; North, op.cit., (1977), p. 14; Mc'lean, *Recognition of Family Judgments in the Commonwealth*, London, (1984), p. 29.

132- Graveson, 7th ed., p. 194.

This view was reinforced by Lane J. in *Cruse v. Chittum*⁽¹³³⁾ in which the learned judge accepted the argument that habitual residence "is similar to the residence normally required as a part of domicile, although in habitual residence there is no need for the element of animus which is necessary in domicile". Habitual residence required the present intention to reside not the future intention as in domicile and this ought to be assumed from the fact of continuous residence.⁽¹³⁴⁾

Habitual residence in contrast to domicile cannot be conferred on a person by the operation of law. There is no habitual residence of origin or habitual residence of dependence. It is a question of fact whereas domicile is a legal concept.⁽¹³⁵⁾ Moreover, a person can be habitually resident in more than one place.⁽¹³⁶⁾ However, such duality of habitual residence has been rejected in the context of Child Abduction cases when Lord President (Hope) in *Dickson v. Dickson*⁽¹³⁷⁾ held that: "[a] person can, we think, have only one habitual residence at any one time". It is interesting to note that the learned judge in this case appears to accept that a person can be without a habitual residence.⁽¹³⁸⁾

The nature of residence requires of its being habitual that it must not be temporary or of a secondary nature. Habitual denotes a regular physical presence which must endure for

- 133-** [1974] 2 ALL.E.R 940; discussed by Hall, G., (1975) I.C.L.Q. 1; Parry, (1975) C.B.R.L. 111 135; Note, (1974) 4 Family law 152. This case concerned with the concept as employed in the Recognition of Divorces and Legal Separations Act 1971); See now, Family Law Act 1986.
- 134-** Law Com. Rep. N° 48, para. 42; Cheshire & North, 12th ed., p. 170.
- 135-** *Scullion v. Scullion* 1990 S.C.L.R. 557 at 581; *C. v. S.* [1990] 2 All.E.R. 449 at 454; *Re J (A Minor) (Abduction: Custody Rights)* [1990] 3 W.L.R.492; Cheshire & North, 12th ed., p. 170; Mc'lean, op.cit., p. 31; Clive, 3rd ed., p. 611.
- 136-** Cheshire & North, 12th ed., p. 170; Clive, 3rd ed., p. 613; Hall, (1975) I.C.L.Q. 1 at 27. It has also been said that a person can be ordinarily resident in more than one place; *I.R.C. v.Lysaght* [1928] A.C.234; *Hopkins v. Hopkins* [1951] P. 116; *R v. Barnet London Borough, ex p Shah* [1983] 2 A.C. 309 at 342; *Britto v. Secretary of Stase for the Home Department* [1984] 1 mm AR 93.
- 137-** [1990] S.C.L.R. 693 at 703. Discussed by, Elizabeth B.Crawford, "Habitual Residence of the Child" As the connection factor in child Abduction Cases: A consideration of Recent Cases,(1992) 2 J.R 177 at 182. Such duality has also been rejected in the context of adoption, See Blom, *The Adoption Act 1968 and the Conflict of Laws*, (1973) 22 I.C.L.Q. 109, 135-136.
- 138-** Ibid at 703; See, Elizabeth B. Crawford, (1992)2 J R 177 at 187.

some time. In *Oundjian v. Oundjian* (139) French J. states that habitual residence does not require continual physical presence in a country and can continue despite a considerable period of absence. In this case the judge held that the respondent was habitually resident in England for the purpose of divorce jurisdiction even though she spent 149 days of the relevant year elsewhere. While a person can cease to be habitually resident in a single day by leaving the country and having no intention to go back to it,⁽¹⁴⁰⁾ it is submitted that it is not easy to decide how long this period of residence must be to establish "habitual". In *V. v. B (A minor) (Abduction)*,⁽¹⁴¹⁾ an habitual residence was acquired after less than three months residence in Australia. The same view had been previously taken in *Dickson v. Dickson*⁽¹⁴²⁾ when Lord Caplan held that: "the child had lived for two months in England ...a considerable period in the life of a young child ...it is difficult to see where else could be described as his normal home during that period". On the other hand, Lord President (Hope) took the view that: "a habitual residence is one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time".⁽¹⁴³⁾

This view is supported by the House of Lords in *Re J (A minor) (Abduction: Custody Rights)*⁽¹⁴⁴⁾ where it was held that residence for an "appreciable period of time and settled intention" to reside on a long term basis are needed for acquisition of a new habitual residence. When the words "habitually resident" must be satisfied at a particular time as in the cases above (Child Custody and Child Abduction) and in relation to the recognition of foreign divorces under the Family Law Act 1986 the period of habitual residence is irrelevant. What is decisive is whether the residence may be accounted habitual. It is submitted that the court must look at the nature of the residence of the person's life to decide whether or not habitual residence was acquired at the relevant date. Hence a person

139- [1980] 10 Family Law 90 at 91.

140- *Dickson v. Dickson* 1990, S.C.L.R. 693 at 699; *C. v. S.* [1990] 2 ALL.E.R. 449 at 454.

141- [1991] F.L.R. 266.

142- [1990] S.C.L.R. 693 at 700.

143- *Ibid.*, at 703.

144- [1990] 2 A.C. 562 at 578-579.

may be accounted habitually resident in a country even though he is not resident there at a particular time.

Under the Domicile and Matrimonial Proceedings Act 1973 the word habitual residence in England and Scotland throughout a one year period ending with the date on which divorce proceedings were begun⁽¹⁴⁵⁾ refers not only to the quality of residence but also to its quantity. This means that for the purpose of divorce jurisdiction a person must be both habitually resident in England or Scotland and this residence must have lasted for the year immediately preceding the commencement of the proceedings. A person cannot be habitually resident in England and Scotland throughout a year if he has never been there at all during that year.⁽¹⁴⁶⁾ On the other hand, a person who has lived for a year in England and Scotland may be habitually resident throughout the year. The stability and duration of ties with England and Scotland are important factors by virtue of which residence can be characterized as habitual.

Conflicting views have been expressed judicially and academically on the question as to whether habitual residence is different from ordinary residence. One view suggested that "the essential difference lies in that ordinary residence does not require the element of habitation which is crucial to habitual residence".⁽¹⁴⁷⁾ In the same line of argument it was said that "habitual residence differs from ordinary residence in its quality of continuity for a substantial period".⁽¹⁴⁸⁾ Support for this view it is submitted is to be found in *Cruse v. Chittum*⁽¹⁴⁹⁾ in which Lane J. thought that:

"ordinary residence is different from habitual residence in that the latter is something more than the former and similar to the residence normally required as part of domicile, although in habitual residence there is no need for element of animus which is necessary in domicile".

¹⁴⁵- SS.5 (2)(b), 7 (2)(b).

¹⁴⁶- Cf, *Turnbull v. Inland Revenue* (1904) 7 F. 1; See, Clive, op.cit., p. 612; and also, 1973 S.L.T. (News) 249.

¹⁴⁷- Hall, (1975) I.C.L.Q. 1 at 27

¹⁴⁸- Graveson, 7th ed., p. 194; Hartley & Karsten, (1974) 37 M.L.Rev. 183.

¹⁴⁹- [1974] 2 ALL.E.R. 940 at 943; *Hack v. Hack*[1976] 6 Family Law 177.

A contrary view was expressed by the House of Lords in *R v. Barnet London Borough ex p Shah*⁽¹⁵⁰⁾ in which Lord Scarman concluded that: "ordinarily resident" meant that "the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration".

The same view was adopted by Bush J. who accepted jurisdiction to hear a petition filed by a husband who arrived in England in August 1981 and who had been granted limited leave to remain until June 1984. His Lordship referred with approval to the decision of the House of Lords in the *Shah* case and said:

"In my view, there is no real distinction to be drawn 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, or, in other words, the same as ordinary residence, a voluntary residence with a degree of settled purpose."⁽¹⁵¹⁾

This view was affirmed in recent Abduction cases when Lord President (Hope) in *Dickson v. Dickson*⁽¹⁵²⁾ said:

"In our opinion a habitual residence is one which is being enjoyed voluntarily for the time being and with settled intention that it should continue for some time. The concept is the same for all practical purposes as that of ordinary residence".

Although the equation of the two terms was welcomed by some academics⁽¹⁵³⁾ and it was the view of the Law Commission,⁽¹⁵⁴⁾ doubt must be expressed as to whether the cases on ordinary residence are a reliable guide to the meaning of habitual residence in the context of divorce jurisdiction.⁽¹⁵⁵⁾ Professor Anton has said: "The equation of 'ordinary residence' with 'habitual residence' brings with it the danger that rules appropriate to the

150- [1983] 2 A.C. 309 at 342.

151- *Kapur v. Kapur* [1984] F.L.R. 920 at 926.

152- [1990] S.C.L.R. 693 at 703; See also *V. B (A Minor) (Abduction)* [1991] F.L.R. 226.

153- Cheshire & North, 12th ed., p. 170; Blom., (1973) 22 I.C.L.Q. 136; Mclean & Patchett, *English Jurisdiction in Adoption*, (1970) 19 I.C.L.Q. 1 at 16.

154- Law Com. Rep. N° 48, para. 42.

155- Clive, 3rd ed., p. 612.

former concept will be applied unthinkingly to the latter".⁽¹⁵⁶⁾

In the light of the House of Lords decision in the *Shah* case, it seems that if a person is ordinarily resident in England or Scotland for one year then he will also have been habitually resident here for the same period.⁽¹⁵⁷⁾ If this is correct, one consequence of this is that such a person can invoke the divorce jurisdiction of the English and Scottish courts. This is an undesirable result since there is much force in the fear that ordinary residence for one year may come to mean no more than presence.⁽¹⁵⁸⁾

A question may arise, namely was the substitution of one year's habitual residence for three years ordinary residence reasonable? The Scots Law Commission concluded in favour of a period of one year as follows:

"No length of residence is by itself a clear guarantee of the durability of a person's ties with a country, and 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. Nor does any period of time afford a clear guarantee against forum-shopping. But the fact is that few people will be both able and willing to reside in Scotland for more than a year simply to take advantage of our divorce or ancillary provision. Most people have to work to earn a living and in some cases immigration controls and the need to obtain work-permits would be a barrier. For the few, there are other countries with less strict rules of procedural and substantive law in the realm of divorce. We agree, too, that the period selected should be one likely to attract recognition abroad".⁽¹⁵⁹⁾

Against this argument one might strongly argue that the longer a person remains in a country the greater the likelihood of establishing strong ties with the society concerned. Accordingly, a period of one year is too short to distinguish effectively between persons who are *bona fide* habitually resident in this country and those who came to England or

156- Anton, op. cit., pp. 149, 152; *R. v Immigration Appeal Tribunal, exp. Siggins* [1985] Imm.A.R. 14.

157- Clive, 3rd ed., p. 612, n. 14; cf, *Kapur v. Kapur* [1984] F.L.R. 920 at 926.

158- See, cases like *Hopkins v. Hopkins* [1951] P.116; *Land v. Land* 1962, S.L.T. 316; See, supra, 60.

159- Scots Law Com. N° 25, para. 78

Scotland seeking to obtain a divorce decree.⁽¹⁶⁰⁾ Relying on the matter of fact that English and Scottish courts apply the *lex fori* rule in divorce cases,⁽¹⁶¹⁾ a period of one year is not a sufficient connecting factor to justify the application of the law of the forum, since it allows a person deliberately to choose to reside temporarily with a view to take advantage of English and Scots divorce law. Conflict lawyers continue to disagree on the strength of meaning of habitual when applied to residence. In any event this period is too short.⁽¹⁶²⁾ In the light of the House of Lords decision in the *Shah* case, it seems that the jurisdictional basis of three years ordinary residence by the wife under the 1949 Act is a stronger connecting factor than habitual residence of either party for one year under the 1973 Act.

Another query arises: whether the jurisdiction should be founded upon the habitual residence of both parties or upon that of the petitioner or respondent or either of them. It is submitted that habitual residence of both parties within the jurisdiction is impractical, for the introduction of such jurisdictional basis is aimed to meet the needs of spouses one of whom perhaps must work abroad,⁽¹⁶³⁾ or to help the spouse deserted in Britain.

It is commonly recognised in so many legal systems that the forum courts may assume jurisdiction on the ground that the respondent is habitually resident within its jurisdictional competence. This acceptable jurisdiction rule has been firmly adopted in the Hague Convention on the Recognition of Foreign Divorces and Legal Separations of 1970, for it provides clearly that a foreign divorce shall be recognised if the respondent is habitually resident in the forum country when the proceedings are begun,⁽¹⁶⁴⁾ and therefore it would seem to be an acceptable choice of jurisdictional rule.

160- Wade, *Residence As a Jurisdiction basis on English Conflict of Laws Relating to Matrimonial Causes*, University of Hull, (1974), p. 186.

161- See, *Infra*, Chapter Three.

162 -See, Leslie, 1973 S.L.T. (News) 21 at 23.

163- Memorandum N° 13, para. 46.

164- Art. 2(1).

The petitioner's habitual residence has been also adopted by this Convention as a basis of recognition of foreign divorces and legal separation⁽¹⁶⁵⁾ but this residence, unlike the former jurisdiction rule, must be accompanied by a reinforcing factor, viz, either that it should continue for not less than one year immediately prior to the date of proceedings⁽¹⁶⁶⁾ or that the spouses last habitually resided together there.⁽¹⁶⁷⁾ The Law Commission declined to follow the Hague Convention in distinguishing between the petitioner and the respondent and it was held that habitual residence should be treated as a ground of jurisdiction equal in weight to domicile.⁽¹⁶⁸⁾ The Domicile and Matrimonial Proceedings Act 1973 accepted this view when it stated clearly that the habitual residence of the husband or that of the wife at the time of the commencement of proceedings found jurisdiction in a divorce action brought by either party.⁽¹⁶⁹⁾

Material Time

The question of what time the connecting factor must be found is very important, because it follows that jurisdiction may be acquired or lost or that a marriage which was valid at the date of the contract may become invalid or vice versa, by a change of the connecting factor.⁽¹⁷⁰⁾ At one time it was said that the connecting factor must be satisfied at the date of the commencement of the proceedings and exist at the date of the decree of divorce.⁽¹⁷¹⁾ On the other hand, some argument exists in favour of the view that the connecting factor must be found at the time when the proceedings are commenced, not at the later time when the case is tried⁽¹⁷²⁾ and a change of connecting factor, therefore is immaterial⁽¹⁷³⁾ and the court will retain its jurisdiction.⁽¹⁷⁴⁾ "The justification for such

¹⁶⁵- Art. 2(2).

¹⁶⁶- Art. 2(2)(a).

¹⁶⁷- Art. 2 (2)(b); cf, Matrimonial and Family Proceedings Act 1984, Part IV.

¹⁶⁸- Law Com. Rep. N° 48, para 47; Scots Law Com. N° 25, para. 83.

¹⁶⁹- S.5 (2)(b) for England and S.7 (2)(b) for Scotland.

¹⁷⁰- Palsson, *op.cit.*, (1978), p. 120.

¹⁷¹- *Harvey v Farnie* (1880) L R 5 P.D. 153 at 162.

¹⁷²- Cheshire, 6th ed., p. 384.

¹⁷³- Dicey & Morris, 11th ed, p. 683; 12th ed., p. 714; Anton, 1st ed, p. 316; Duncan & Dykes, *op.cit.*,

rules, as Dr North has said, is to prevent one spouse, over whom the court has jurisdiction when the proceedings are commenced, from frustrating the objectives of a petitioner, domiciled and resident abroad, by abandoning his domicile before the trial in order to prevent the case being heard".⁽¹⁷⁵⁾

The Domicile and Matrimonial Proceedings Act 1973 makes it clear that the domicile and habitual residence as connecting factors in divorce proceedings must be satisfied at the date when the proceedings are begun and any change after that is immaterial. However, there is an exception to this general rule relating to cross-proceedings where the connecting factor must be found either at the time of the original proceedings or of the cross-proceedings.⁽¹⁷⁶⁾ It is interesting to note that prior to 1973 the jurisdiction of English and Scottish courts did not extend to a cross-petition presented by the respondent. Thus, in *Levett v. Levett and Smith*,⁽¹⁷⁷⁾ an Englishman domiciled in England married a German woman resident in Germany. The wife left the husband and went to live in Germany. She presented a petition in Germany for the dissolution of her marriage on the ground of her husband's cruelty. The husband in those proceedings cross-petitioned for divorce on the ground of the wife's adultery. The German court granted a decree to the husband and dismissed the wife's petition. The husband presented a petition asking the English court for a declaration that the divorce granted by the German court had validly dissolved his marriage. The court dismissed the petition holding that Section 18 (1)(b) of the Matrimonial Causes Act 1950 was enacted to enable a wife to obtain relief which she could not otherwise get and did not confer a right on a husband respondent to a wife's proceedings to present a cross-petition.

p. 156.

174-*Leon v. Leon* [1967] P.275 at 284.

175- Op.cit., p. 29.

176- SS.5 (5), 7(5) of the Domicile and Matrimonial Proceedings Act 1973; S.47 (1) of the Family Law Act 1986; S.4 (1) of the Recognition of Divorces and Legal Separations Act 1971; Cheshire & North, 12th ed., p. 654; Clive, 3rd ed., p. 663; Morris, 4th ed., p. 182.

177- [1957] P. 156, 168; applied in *Russell v. Russell and Reobuck* [1957] P. 375.

This rule is clearly unsatisfactory if its effect is that, where a husband finds a competent divorce action directed against him in any country, he should not be able to raise a cross-petition there.⁽¹⁷⁸⁾ This rule prevents the courts from considering all the issues between the parties.⁽¹⁷⁹⁾ The cross-petition seems to be increasingly recognised in modern law, e.g. it is accepted by article 4 of the Hague Convention on the Recognition of Divorces and Legal Separations.⁽¹⁸⁰⁾ Since 1974, the Domicile and Matrimonial Proceedings Act 1973 makes provisions for jurisdiction to be assumed in a cross-petition.⁽¹⁸¹⁾ if three conditions exist: firstly, that the court had jurisdiction to entertain the original petition by reason of the grounds laid down in sections 5(2) or 7(2); secondly, that the original petition is still pending;⁽¹⁸²⁾ thirdly, the cross-petition must be brought in respect of the same marriage.

The 1973 Act provides that the court also has jurisdiction to entertain proceedings for divorce by the extension of the rule of cross-proceedings itself,⁽¹⁸³⁾ e.g. a wife petitions an English court for judicial separation on the ground of her habitual residence there at the time when the proceedings are begun, but before the petition is heard she abandons her English residence. A cross-petition for nullity is brought by the husband. The court will have jurisdiction if the proceedings for judicial separation are pending. The proceedings for judicial separation are abandoned. The husband (the cross-petitioner) changes his cross-petition from nullity to divorce. In this case the court will have jurisdiction if the nullity cross-petition is still pending even though neither party is domiciled or habitually resident in England at the time when the cross-petition for nullity and for divorce are begun.⁽¹⁸⁴⁾ It may be convenient to mention that the 1973 Act conferred to the courts

178- Memorandum, N° 13, para. 49.

179- Law Com. Rep. N° 48, para. 48.

180- See, S.47 of the Family Law Act 1986.

181- Hartley & Karsten, (1974) 37 M.L.Rev. 184; Clive, 3rd ed., p. 613; Rayden, op.cit., p. 50; Palsson, op.cit., (1978), p. 122.

182- See, S.12 (4).

183- This is seen from the parenthetic phrase in SS.5 (5), 7 (5), 13 (5) ('or of this subsection').

184- Morris, 3th ed., p. 190.

further jurisdiction. This appears in the case where the proceedings are brought by the same petitioner. For instance, a wife, who is domiciled and habitually resident in Scotland, petitions for judicial separation. She abandons her domicile and habitual residence, while the judicial separation proceedings are pending, and decides to petition for divorce. The court will have jurisdiction over divorce by reason of its jurisdiction over judicial separation.⁽¹⁸⁵⁾

II- Jurisdiction of the Iraqi Court

Until the beginning of this century there were no explicit rules regulating civil jurisdiction in the international sector. It was clearly held that the general statutory provisions governing the domestic cases applied also to conflict cases.⁽¹⁸⁶⁾ It is only much later with the increase in international mobility after the first world war that the Iraqi government saw the practical need for establishing new rules setting out the grounds upon which the forum court may assume jurisdiction in cases involving foreign elements.

The 1925 Iraqi Constitution stated that the Iraqi court may assume jurisdiction in criminal and civil proceedings over all persons living in Iraq at the time when the proceedings began without distinguishing between nationals and foreigners or petitioners or respondents.⁽¹⁸⁷⁾ It is therefore clear beyond any doubt that an Iraqi court might assume jurisdiction in divorce proceedings on the basis of either party's residence in Iraq at the time of the commencement of the proceedings.

The 1931 Code governing the personal status of foreigners established for the first time civil courts⁽¹⁸⁸⁾ alongside the existing religious courts⁽¹⁸⁹⁾ to deal with personal status

185- North, op.cit., (1977), p. 31; Clive, 3rd ed., p. 613.

186- Civil and Commercial Procedure Code 1879.

187- Art. 73.

188- Art.2; See, also, Art. 33 of the Civil Procedure Code 1968; Art.22 of the Judicature Act N° 160 of 1979; The Religious Courts for the Christian and Mosaic Denominations Act N° 32 of 1947; Armenian Orthodox Act N° 70 of 1931. In 1948 the jurisdiction for Catholic Denomination was

matters concerning foreigners. The test to define the powers of civil and religious courts in divorce proceedings depends on the religion to which the parties belong.⁽¹⁹⁰⁾ Non-Muslim Iraqi nationals⁽¹⁹¹⁾ and foreigners, as well as Muslim foreigners who are subject to the civil law in their country, such as Turkey, have recourse to the Iraqi civil courts, whereas Iraqi Muslims and Muslims foreigners who are subject to Islamic law in their country, such as Egypt, have recourse to the religious courts. The difficulty is in the case where the husband is Muslim and the wife is not. The question arising here concerns the jurisdictional competence, i.e. which court has power to entertain divorce proceedings? The law was silent, but according to the Islamic general rules they have recourse to the religious courts. However, this option merely seeks to cater for religious sensibilities, for there is no difference in the choice of law adopted by the different courts. In all cases the courts principally apply the national law of the husband.⁽¹⁹²⁾ The 1931 Code made no reference at all to the basis of divorce jurisdiction but the courts continued to grant a divorce on the ground of either party's residence in Iraq at the time of the proceedings by virtue of article 73 of the 1925 Iraqi Constitution.

The 1951 Iraqi Civil Code has made important changes as far as the jurisdictional rules are concerned. This Code has adopted the principle of nationality as the test of the personal law⁽¹⁹³⁾ and the major connecting factor in civil jurisdiction as well as the traditional basis of residence.

transferred to the Civil Courts. Jo, NN° 2646, 1948, and in 1951 the Religious courts for the Mosaic was abolished and the jurisdiction was transferred to the Civil Courts, Jo, N° 2927, 1951; Abbas, M. op.cit., p. 160.

189- Arts 26-28 Judicature Act N° 160 of 1979; Art. 300 Civil Procedure Code 1968; See, Faried Fatyan, *Conflict of laws* (1973) 2 J. Jan 26; Adam-Al Nadawy, *Civil Proceedings Law*, Baghdad, (1988), p. 93 (In Arabic); All-Hadway, op.cit., p. 236.

190- Adam-Al Nadawy, op.cit., p. 93

191- Such jurisdiction is exercised by Catholic, Arcmenian Orthodox Act N° 87 of 1963; Syrian Orthodox Act N° 107 of 1963.

192- *Infra*, chap 3.

193- Art. 18, See, *supra*, 34

There are now only two grounds of jurisdiction over divorce proceedings, i.e. nationality⁽¹⁹⁴⁾ and residence.⁽¹⁹⁵⁾

A- Nationality as A Basis of Jurisdiction

The text of article 14 reveals that the Iraqi nationality of the respondent at the time divorce proceedings are commenced is sufficient to confer jurisdiction upon the Iraqi courts.⁽¹⁹⁶⁾ This article can give rise to difficulties of knowing exactly the position of the converse case namely, where the petitioner only is the holder of Iraqi nationality at the time of the proceedings. It is submitted that a narrow interpretation of article 14 leads to a clear result that the Iraqi nationality of the petitioner is not a sufficient ground for exercising jurisdiction. This result is unsound and illogical. The nationality of the petitioner should be a sufficient ground equally with that of the respondent. This view is consistent with the accepted rule in Iraq namely, that the status and capacities of Iraqi nationals are governed by the Iraqi law and with the view that the court of the forum (nationality) is the appropriate court to afford protection of its nationals. It is equally clear that a decree of divorce proceeding upon the nationality of the petitioner is always worthy of recognition abroad.⁽¹⁹⁷⁾

Accordingly, the wording of article 14 should be interpreted to the effect that the Iraqi courts should have jurisdiction to entertain divorce proceedings if either the petitioner or the respondent is an Iraqi national at the time of the commencement of the proceedings. It is therefore, immaterial which of the parties -petitioner or respondent, husband or wife- has the Iraqi nationality, and so are the domicile and residence of the parties.⁽¹⁹⁸⁾ It is also immaterial that the Iraqi national may, under the law of some foreign country, also be a national of that country.⁽¹⁹⁹⁾ Hence it is submitted that nationality as a head of jurisdiction

194- Art. 14.

195- Art.15.

196- All-Nadawy, op.cit., p. 77; All-Hadway, op.ict., p. 238.

197- See, S.46 of the Family Law Act 1986 and Art. 2 of the Hague Convention on Recognition of Foreign Divorces and Legal Separations of 1970; See, *Infra*, 171.

198- All-Hadway, op.ict., p. 238.

may lead to more than one court having jurisdiction to dissolve the same marriage. The systematic preference for Iraqi nationality appears arbitrary and difficult to justify and it may lead to the granting of divorce in Iraq to persons who are most closely connected with a foreign country. The nationality of Iraq in the case under discussion should not be a sufficient ground of jurisdiction unless the person concerned is most closely connected with Iraq.

B- Residence as A Basis of Jurisdiction

Article 15 of the Iraqi Civil Code 1951 provides that the courts will assume jurisdiction in cases involving a foreign national if he is the respondent and happens to be within Iraqi territory. It is interesting to underline that the wording of article 15.(happens to be within Iraqi territory) is inconclusive and irrational, for it gives rise to a wide interpretation. It has been argued that a mere presence within the territory for a few days is sufficient to confer jurisdiction upon the courts.⁽²⁰⁰⁾

This view seems to be based on the territorial theory by virtue of which a state assumes jurisdiction over all persons and things within its frontiers. This view is strongly criticised and stigmatised as unworthy to apply in cases of divorce, for dissolution of marriage involves a change of status that affects not only the parties but also the society to which they belong. The aim of this article was to avoid the difficulties which might arise from the principle of nationality if it were to be treated as the only basis of divorce jurisdiction, and to meet the needs of spouses neither of whom was an Iraqi national at the time of the proceedings. It is a matter of policy which requires that the words "happens to be within Iraqi territory" be interpreted with a view to ensuring that a decree proceeding upon this basis receives a wide recognition. Accordingly, the words "happens to be within Iraqi territory" must indicate stability of ties within Iraq and must be construed to mean domicile. It is important to emphasise that the Iraqi law uses the term domicile to mean the same as

¹⁹⁹⁻ Cf, *Torok v. Torok* [1973] 3 All.E.R. 1001.

²⁰⁰⁻ All-Hadway, op.cit.,p. 236.

habitual residence.⁽²⁰¹⁾ The residence that confers jurisdiction under article 15 is that of the respondent. The residence of the petitioner is not a sufficient ground. This restriction was not to be found in the 1925 Iraqi Constitution. It is hard to understand the policy behind this restriction. However, if the policy is to avoid 'forum-shopping', one might strongly argue that this risk should not be exaggerated, unlike the position in English and Scots law, in the context of Iraqi law. For the Iraqi courts in exercising jurisdiction over divorce proceedings have regard to the personal law of the parties.⁽²⁰²⁾

It seems that the jurisdictional basis of residence under article 15 is not working well as an additional basis in divorce actions to avoid the difficulties arising from the principle of nationality. Thus, one consequence of this article is that stateless persons and political refugees cannot invoke Iraqi courts even if they have been living in Iraq for a long time. However, it is thought that the Iraqi courts can assume jurisdiction over stateless persons and political refugees by virtue of article 30 of the 1951 Civil Code. This provides that "the principles of private international law apply in the case of a conflict of laws for which no provision is made in the preceding articles". The New York Convention of 1954 Relating to the Status of Stateless Persons⁽²⁰³⁾ and Geneva Convention of 1951 Relating to the Status of Refugees⁽²⁰⁴⁾ provide clearly that in the contracting state in which he has his habitual residence, such a person shall enjoy the same treatment as a national in matters pertaining to access to the court. This solution has been adopted by several legal systems⁽²⁰⁵⁾ and according to article 30, the Iraqi courts should treat those persons on an equal footing with Iraqis in invoking jurisdiction if they are domiciled (habitually resident) in Iraq.

201- Article 42 of the 1951 Civil Code describes domicile as "the place where a person temporally or permanently resides, and a person may have more than one domicile at the same time". See, Hammed Mostapha, *op.cit.*, p .46.

202- See, *Infra* Chapter 3

203- Art. 16.

204- Art. 16.

205- See, Palsson, *op.cit.*, (1978), p. 120.

Material Time

It is the rule in Iraqi law that the jurisdictional grounds under articles 14 and 15 must be satisfied at the time of the commencement of proceedings. As soon as the action is considered instituted the jurisdiction established at this moment remains fixed and any change later is immaterial. It is interesting to note that the Iraqi law, unlike some legal nationality systems,⁽²⁰⁶⁾ rejected the proposition that the Iraqi nationality at the time of marriage is a sufficient ground for assuming jurisdiction.⁽²⁰⁷⁾ It is submitted that the Iraqi solution is sound, for the Iraqi court has no interest in assuming jurisdiction in cases where neither party is an Iraqi national or resident in Iraq at the time of proceedings.

However, there is one exception to the general rule that the jurisdictional bases must be found at the time of the proceedings and that is in relation to the cross-petition where the jurisdictional bases must be satisfied either at the time of the original proceedings or the cross proceedings. The Iraqi law gave the respondent the right to raise a cross-petition and the petitioner to a supplemental petition provided that the court had jurisdiction to entertain the original petition on the ground of nationality or residence and that a petition is still pending in respect of the same marriage.⁽²⁰⁸⁾

III- Conflicts of Jurisdiction

The widening and the difference of the bases of jurisdiction in the Domicile and Matrimonial Proceedings Act 1973 and in the 1951 Iraqi Civil Code created the likelihood of concurrent proceedings in different jurisdictions in relation to the same marriage. Thus, under the present jurisdictional rules it is quite possible for the English court to have jurisdiction on the basis of domicile, and the Scottish court on the ground of habitual residence, or both on the basis of domicile or habitual residence and the Iraqi court on the

206- See, art. 3(7) of the Egyptian Procedure Code; Azzedeen Abdallah, *op.cit.*, p. 683.

207- It should be noted that the Iraqi nationality at the time of marriage is considered as a choice of law rule. See, *Infra*, Chapter Three

208- Arts. 66,67 and 86 of the 1969 Civil Procedure Code. See also, Adam Ali-Nadway, *op.cit.*, p. 17

This passage was described by Lord Shaw of Dunfermline in *Societe du Gaz de Paris v. Armateurs Francais* as "the foundation of the whole doctrine".⁽²¹⁴⁾ In this case Lord Sumner stated that: "the object, under the words '*forum non conveniens*' is to find the forum which is the more suitable for the ends of justice and is preferable because pursuit of the litigation in that forum is more likely to secure those ends".⁽²¹⁵⁾

Although the doctrine of *forum non conveniens* had been widely applied in non matrimonial cases, it has been said that it is generally inappropriate to actions affecting the status of persons domiciled in Scotland, such as divorce⁽²¹⁶⁾ in relation to which the Scottish courts not only claim jurisdiction, but claim exclusive jurisdiction in such cases⁽²¹⁷⁾ Even when the 1973 Act extended the jurisdiction of Scots courts to those habitually resident there, it has been argued that the plea of *forum non conveniens* is inappropriate because the circumstances where it may be applied are too narrow and the balance of convenience to the parties is not enough.⁽²¹⁸⁾

It submitted that if too much emphasis is placed on the interests of all the parties, then *forum non conveniens* becomes almost redundant.⁽²¹⁹⁾ The emphasis should not be on the interests of the parties but on the ends of justice.⁽²²⁰⁾ In England, an English court

214- 1926 S.C (H.C) 13 at 19.

215- Ibid at 22. See also *In Sim v. Robinow* (1892) 19 R. 665 at 668. Lord Kinnear stated that "the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice". This view has been adopted by the House of Lords in *Spiliada Maritime Crop v. Consulex Ltd* [1986] 3 W.L.R. 972 at 983 and in *De Dampierre v. De Dampierre* [1987] 2 W.L.R. 1006. See, *infra*, 93.

216- *Marchant v. Marchant* 1948 S.L.T. 143.

217- Anton, 1st ed, p. 149; 2nd ed., p. 462. The pleas of *forum non-conveniens* were considered in actions affecting the status of persons domiciled in Scotland over which the Scottish court did not claim exclusive jurisdiction, as in action for custody of child, see *Mclean v. Mclean* 1947 S.C. 79; *Babington v. Babington* 1955 S.C. 115, and in action for declaration of nullity of marriage, *Balshaw v. Balshaw* 1967 S.C. 63; See, Anton, 1st ed., p. 153.

218- Scots Law Com, N° 25, para.135; Memorandum, N° 13, para. 59.

219- Beaumont, *Conflict of Jurisdiction in Divorce Cases: Forum non conveniens*, (1987) 36 I.C.L.Q. 116 at 119.

has an inherent jurisdiction, reinforced by statute,⁽²²¹⁾ to stay any proceedings of which it is properly seized. Until the decision of the House of Lords in *The Atlantic Star*⁽²²²⁾ the general principle upon which the courts acted to stay proceedings was stated by Scott L.J. in *St Pierre v. South American Stores Ltd*⁽²²³⁾ as:

"(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant".

This test was liberalized first by the House of Lords in *The Atlantic Star*⁽²²⁴⁾ and, secondly in *Macshannon v. Rockware Glass Ltd.*⁽²²⁵⁾ In the latter case Lord Diplock restated the second part of Scott L.J.'s formulation in the following way:

"(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court".⁽²²⁶⁾

Although the House of Lords in these decisions declined to adopt the principle of *forum non conveniens* as part of English law, it should be noted that in *Macshannon v. Rockware Glass Ltd*⁽²²⁷⁾ it was recognised that the reformulation in these decisions of

220- *Societe du Gaz de Paris v. Armateurs Francais* 1926 S.C (H.C) 13; *Robinson v. Robinson's Trustees* 1930 S.C. (H.C) 20 at 24; Scots Law Com. N° 25, paras. 52-53.

221- Supreme Court of Jurisdiction [Consolidation] Act 1925, S.41, See now S.49(3) of the Supreme Court Act 1981; Civil Jurisdiction and Judgments Act 1982, S.49; Cf. R.S.C.Ord. 18, r.19.

222- [1974] A.C. 436.

223- [1936] 1 K.B. 382 at 398 (C.A.).

224- [1974] A.C. 436.

225- [1978] A.C. 795.

226- Ibid, at 812.

the principles on which the English court acted was not far removed in practice from the principle of *forum non conveniens*.⁽²²⁸⁾

The formulation of the principle by Lord Diplock in *Macshannon v. Rockware Glass Ltd*⁽²²⁹⁾ was in practice modified by subsequent cases. In *The Abidin Daver*⁽²³⁰⁾ the first part of Lord Diplock's test was replaced by the requirement that there was another forum "with which the action has the most real and substantial connection"⁽²³¹⁾ and the second part was restated to effect that the existence of a legitimate advantage to the plaintiff of the proceedings continuing in England was not decisive and that where the two parts of the test conflicted, the balance of justice was to determine whether a stay should be granted.

The principles applicable to staying of action on the basis of *forum non conveniences* have been restated and modified in *Spiliada Maritime Corp v. Cansulex Ltd.*⁽²³²⁾ Lord Goff restated the principles as follows:

"(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. (b)... in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.... if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take

227- [1978] A.C. 795.

228- Ibid, at pp. 812 (Lord Diplock), 822 (Lord Fraser) and *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd*, [1979] A.C.568 at pp. 573 (Lord Wilberforce), 544 (Lord Fraser) and See, Dickey & Morris, 11th ed., p. 392.

229- [1978] A.C. 795.

230-[1984] A.C. 398 at 409, 415; *Amin Rasheed Shipping Corp v. Kuwait Insurance Co* [1984] A.C. 50.

231- Or by the requirement that there was another forum which was the "natural forum" *Macshannon v. Rockware Glass Ltd* [1978] A.C. 795 at 829 [per Lord Keith].

232- [1986] 3 W.L.R. 972; Dickey&Morris, 12th ed., p. 402; Collier, (1987) C.L.J.33; Rhona Schuz, *The further implication of Spiliada in light of Recent case law: Stays in Matrimonial Proceedings*, (1986) 36 I.C.L.Q. 374.

place in this country...I do not think that the court should be deterred from granting a stay of proceedings.... simply because the plaintiff will be deprived of such advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum."(233)

Thus, Lord Goff had clearly explained that the principle of *forum non conveniens* which had become established in Scotland was now available in England in choosing the appropriate forum. It is also now quite clear that the court should look first to see what factors there are which connect the case with another forum. Once that has been done and *prima facie* there is a more appropriate forum on the basis of that connection, then unless there are circumstances by reason of which justice requires that that should not be the forum, that should ordinarily be the appropriate forum. The mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in England is not decisive: regard must be had to the interest of all the parties and the ends of justice.

It is interesting to note that prior to the 1973 Act, the inherent power of the High Court to stay proceedings extended to divorce actions. In *Sealey v. Callon*,⁽²³⁴⁾ a wife petitioned the English court for divorce on the basis of her three years ordinary residence in England immediately before the commencement of the proceedings. The husband, domiciled and resident in South Africa, subsequently started divorce proceedings there and applied to the English court for a stay of the wife's action. He argued that any decree granted by an English court would not be recognised in South Africa whereas a South African decree, being from the courts of the parties' domicile, would be recognised in England. The court referred with approval to the Scott L.J.'s *dictum* holding that a stay should not be given on the ground that the wife would not be able to get maintenance award in South Africa, whereas in English divorce proceedings she would be able to get maintenance.⁽²³⁵⁾

233- Ibid, at 985-86 and 991.

234- [1953] P. 135.

235- It should be noted that before 1984 the courts in England and Scotland had no power to grant financial relief after recognition of an overseas divorce. However, this inability has been removed by the Matrimonial and Family Proceedings Act 1984, See, *infra*, Chapter Seven.

B- Statutory Stays or Sists

The 1973 Act established two kinds of staying or sisting proceedings namely, obligatory stays, mandatory sists and discretionary stays or sists. The test or distinction between these two kinds is whether conflicting divorce proceedings are pending inside⁽²³⁶⁾ or outside the British Isles.⁽²³⁷⁾ In both kinds there is an obligation on parties to matrimonial proceedings in England, and anyone who has entered appearance in consistorial action in Scotland to furnish particulars of any proceedings⁽²³⁸⁾ in respect of that marriage or affecting its validity,⁽²³⁹⁾ which he is aware of being carried on in another jurisdiction.⁽²⁴⁰⁾ The duty continues so long as the English matrimonial proceedings⁽²⁴¹⁾ are pending and the trial or the first trial⁽²⁴²⁾ has not begun, or any consistorial action⁽²⁴³⁾ is pending in a Scottish court and the proof in that action has not begun.⁽²⁴⁴⁾ If, at any time after the beginning of the trial, first trial or proof, it is shown that the person concerned has failed to perform his duty, the court may exercise its discretionary power to grant a stay or sist.⁽²⁴⁵⁾

236- This means any of the following countries: England, Wales, Scotland, Northern Ireland, Jersey, Guernsey and the Isle of Man (the reference to Guernsey being treated as including Alderney and Sark), Sched 1, para. 3(2), Sched 3, para. 3(2).

237- Sched 1, para. 3(1); Sched 3, para. 3(1).

238- Sched 1, paras. 5 and 6; Sched 3, paras. 5 and 6.

239- Sched 1, para. 7(B); Sched 3, para. 7(B); Family Proceedings Rules 1991, rr. 2.3, 2.15(4), 2.27 (4), App. 2, para. 1(j).

240- Sched 1, para. 7(a); Sched 3, para. 7(a). The phrase of 'another jurisdiction' means in any country outside England and Wales, Sched 1, para. 3(1); for Scotland means in any country outside Scotland, Sched 3, para. 3(1).

241- Sched 1, para. 2.

242- Sched 1, paras. 8(1), 9(1). Trial of a preliminary issue of jurisdiction does not constitute trial of the proceedings for this purpose; See, Sched 1, para. 4(1) "References to the trial or first trial in any proceedings do not include reference to the separate trial of an issue as to jurisdiction only".

243- Sched 3, para. 2.

244- Sched 3, paras. 8 and 9(1). In any action in the Court of Session or a Sheriff Court neither the taking of evidence on commission nor a separate proof relating to any preliminary plea shall be regarded as part of the proof in the action. Sched 3, para. 4 (a).

245- Sched 1, para. 9(4); Sched 3, para. 9(4) .

An obligatory or discretionary stay may be discharged or recalled on the application of one of the parties to the proceedings, if it appears to the court that the other proceedings are stayed or concluded or that a party to those other proceedings, has delayed unreasonably in prosecuting them.⁽²⁴⁶⁾ If an obligatory stay or mandatory sist has been discharged or recalled, the court cannot be required again to make an obligatory or mandatory stay or sist in respect of the same action, though there is no bar to the court discretion to stay or sist.⁽²⁴⁷⁾

1- Discretionary Stays or Sists

The 1973 Act states that a court in England or Scotland has a discretionary power, either on its motion or on the application of a party to the marriage,⁽²⁴⁸⁾ to stay or sist an action of divorce if, before the beginning of the trial,⁽²⁴⁹⁾ or proof, it appears to the court that any proceedings⁽²⁵⁰⁾ in respect of the marriage in question or capable of affecting its validity or subsistence⁽²⁵¹⁾ are continuing in another jurisdiction⁽²⁵²⁾ and that the balance of the fairness (including convenience) as between the parties is such that is appropriate for those other proceedings to be disposed of before further steps are taken in the English or Scottish proceedings. In assessing the balance of fairness and convenience the court must have regard to all factors appearing to be relevant including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or sisted or

246- Sched 1, para. 10(1); Sched 3, para. 10(1); Family Proceedings Rules 1991, r. 2.27(5).

247- Sched 1, para. 10(2); Sched 3, para. 10 (2) .

248- Dicey & Morris, 11th ed., p. 782; 12th ed.,p. 802; Morris, 4th-ed., p. 206.

249- The meaning of the phrase "before the beginning of the trial" was considered in *Thyssen-Bornemisza v. Thyssen-Bornemisza* [1985] 2 F.L.R. 670. The husband contended that since there had already been hearings in relation to interim custody and financial relief the trial had already started and that therefore the court no longer had jurisdiction to grant a stay. The Court of Appeal held that the word 'trial' referred only to the trial of the issue in the main suit and not to other hearings.

250- These are defined as proceedings for divorce, separation, nullity and declarations as to the validity of marriage; Sched 1, para. 2; Sched 3, para. 2.

251- In *Kapur v. Kapur* [1984] F.L.R. 920 at 922 it has been held that proceedings in India for maintenance and for injunction to allow the wife to reoccupy the matrimonial home do not affect the validity or subsistence of the marriage.

252- This mean any country outside the United Kingdom; Sched 1, para. 3 (1); Sched 3, para. 3 (1).

not being stayed or sisted.(253)

The balance of fairness and convenience between the parties depends on the facts of each case. It is interesting to consider the case law to show how the courts draw this balance. In *Mytton v. Mytton*,⁽²⁵⁴⁾ it was pointed out that comparing the remedies offered by one forum with those offered by another was neither an attractive nor a helpful exercise in terms of fairness, because what was fair for one party may seem to have an equal and opposite effect on the other.⁽²⁵⁵⁾ The real issue lying behind the application for a stay was plainly a question of the ancillary relief. The balance of fairness seemed in favour of not staying the English proceedings because the Swiss court would not be able to make an effective order concerning the matrimonial home in England.

In *Shemshadfard v. Shemshadfard*,⁽²⁵⁶⁾ the parties were Iranian and had entered into a polygamous marriage in Iran in 1974. They came to England with their child in 1977, where after two years the marriage broke down. The wife petitioned for divorce in England in 1979. The husband returned to Iran and started proceedings in the Iranian court seeking a certificate of non compatibility and in 1980 he petitioned for English proceedings to be stayed. The facts of this case were much more complex than a simple comparison of the remedies by way of ancillary relief in the *Mytton* case. In assessing the balance of fairness and convenience the court required to consider all relevant matters such as, the availability of witnesses, the cultural background of the parties, the language in which the proceedings would be conducted, the possibility of the dissolution of the marriage itself and custody of children as well as the ancillary relief.⁽²⁵⁷⁾

Having regard to all these factors, the court decided that the balance of fairness and convenience was in favour of the English proceedings because the burden on the wife of

253- Sched 1, para. 9; Sched 3, para. 9; Family Proceedings Rules 1991, r. 2.27(2).

254- [1977] 7 Fam Law. 244. Discussed by Beaumont, (1987) 36 I.C.L.Q. 123.

255- Ibid, at 245.

256- [1981] 1 All.E.R. 726.

257- Ibid, at 734.

taking witnesses to Iran would be greater than on the husband in bringing them to England.⁽²⁵⁸⁾ The wife had acquired a western culture. The husband would be unlikely to defend the English proceedings in regard to the wife's allegations of unreasonable behaviour and if he obtained a certificate of incompatibility he would be relieved of all obligation to maintain the wife and she would have no protection under Iranian law.⁽²⁵⁹⁾

The cases above were decided at the time when the English courts had no power to grant financial relief after a foreign divorce. This inability was removed by the Matrimonial and Family Proceedings Act 1984.⁽²⁶⁰⁾ Therefore, one might have thought that the questions of such remedies abroad will be less significant in deciding whether or not to stay divorce proceedings, but in *Gadd v. Gadd*⁽²⁶¹⁾ it was pointed out that the provisions of the 1984 Act, although relevant and a factor to be taken into account, should not be given any great weight in assessing the balance of fairness and convenience. The parties were British nationals who married in the Bahamas and lived in France and Monaco until the marriage broke down. The wife returned to England where she became domiciled and petitioned for divorce. A month later the husband filed a petition for divorce in Monaco on the ground of desertion and sought a stay of the English proceedings.

It was argued in favour of the stay proceedings that the balance of fairness and convenience fell in favour of all issues being determined in Monaco since the parties had lived in France or Monaco for the past 11 years. There was no evidence before the court as to the difference in remedies, especially in relation to financial provision, between English and Monegasque laws. The Court of Appeal dismissed this argument on the ground that the purpose of a discretionary stay in the schedule 1 of the 1973 Act is not to ensure that the divorce proceedings are heard in a country with which the marriage is most closely connected but to determine the balance of fairness.

²⁵⁸- Cf, *Mitchell v. Mitchell* 1993 S.L.T. 123; See, *infra*, 95.

²⁵⁹- See, Rhona Schuz, (1989) 38 I.C.L.Q. 951.

²⁶⁰- See, part III in relation to England and part IV in relation to Scotland, See, *infra*, Chapter Seven

²⁶¹- [1985] 1 All.E.R.58; *K v. K* [1986] 2 F.L.R. 111.

In assessing the balance of fairness the court referred to Lord Diplock's formulation in *Macshannon v. Rockware Glass Ltd*⁽²⁶²⁾ and noted that his Lordship had later made it clear that the loss of a legitimate personal or juridical advantage could amount to an injustice.⁽²⁶³⁾ Although the degree of relevance of Lord Diplock's formulation to application for a stay in divorce proceedings under the 1973 Act was not explained clearly by the Court of Appeal, it should be noted that all the court had done was equate the 'balance of justice' mentioned in the *Macshannon* case with the 'balance of fairness' in the schedule (1) para 9 and decided that justice required that a stay should not be granted because under the law of Monaco the wife would be in a much less favorable position than under English law. She would not be entitled to any capital provision or any property adjustment and generally she would suffer financially.

The Court of Appeal's approach in applying the inherent jurisdiction to application for a stay in divorce proceedings under the 1973 Act might be criticised on the ground that it is not very helpful in assessing the balance of justice to compare the remedies offered by one forum with those offered by another because what was fair for one party may seem to have an equal and opposite effect on the other.⁽²⁶⁴⁾ It is quite clear from the judgment that in assessing the balance of fairness too much emphasis was placed on 'legitimate personal or juridical advantage' to the wife in English proceedings and little on the factors mentioned in the 1973 Act.⁽²⁶⁵⁾ It is submitted that Lord Diplock's formulation would narrow the statutory framework for staying divorce proceedings established in the 1973 Act and would not help the courts to assess the balance of fairness.⁽²⁶⁶⁾

In the light of the decision of the House of Lords in *De Dampierre v. De Dampierre*,⁽²⁶⁷⁾ the Court of Appeal's approach in *Gadd v. Gadd*⁽²⁶⁸⁾ can no longer be

²⁶²- See, *Supra*, 86.

²⁶³- Beaumont, (1987) 36 I.C.L.Q. 123 at 127.

²⁶⁴- *Mytton v. Mytton* [1977] 7 Fam Law 244.

²⁶⁵- See, *K v. K* [1986] 2 F.L.R. 111.

²⁶⁶- Beaumont, (1987) 36 I.C.L.Q. 123 at 127.

supported merely on the basis that a stay would deprive the wife of the legitimate advantages of obtaining financial relief. The question of the availability of financial relief was given less weight in *De Dampierre v. De Dampierre*,⁽²⁶⁹⁾ in which the House of Lords applied the principle of *forum non conveniens* as set out in *Spiliada Maritime Corp v. Cansulex Ltd*,⁽²⁷⁰⁾ and allowed an appeal by a French husband who had raised an action for divorce against his French wife in France and had been refused a stay of the wife's action for divorce in England. The connection with France was much stronger than that with England, but the wife, as the party arguably, principally responsible for the marriage breakdown, would face less well in French divorce proceedings if this were established.

Applying *Spiliada* test it was found that French was the appropriate jurisdiction for the case to be heard. The parties were both French nationals who had been married in France and still had significant connections with France. The wife's connections with England were tenuous and she voluntarily severed all connection before instituting her English divorce proceedings. She now lived in the United States and had no connection with England. Although the husband was still living in England this was for business reasons. He owned substantial property in France and maintained very strong links with that country. A stay should be granted unless justice required that the case be heard in England. The mere fact that the wife had a legitimate personal or juridical advantage in proceedings in England did not mean that justice could not be done in French court.⁽²⁷¹⁾

The decision of the House of Lords in *De Dampierre v. De Dampierre*,⁽²⁷²⁾ has recently been applied in the Scottish case of *Mitchell v. Mitchell*,⁽²⁷³⁾ in which the

267- [1987] 2 W.L.R. 1006. Discussed by Kunzlik, *Staying and Restraining Actions: The Application and Limits of Forum non Conveniens*, (1987) C.L.J. 406; Rhona Schuz, (1989) 38 I.C.L.Q. 946.

268- [1985] 1 All.E.R.

269- [1987] 2 W.L.R. 1006.

270- [1986] 3 W.L.R. 972.

271- *De Dampierre v. De Dampierre* [1987] 2 W.L.R. 1006 at 1018.

272- [1987] 2 W.L.R. 1006.

Scottish court decided that a sist should not be granted, taking the view that the overall connection of the marriage was with Scotland. The parties were married in Scotland in 1977 and lived there together for about 12 years until they went to France in 1989 and lived together there for about 15 months before they separated in 1990. They are British nationals, their respective backgrounds are Scottish and by far the greater part of their married life was spent living together in Scotland.⁽²⁷⁴⁾

Thus, the application of the *Spiliada* test to matrimonial proceedings made it clear that the courts should identify first the forum with which the dispute was most closely connected. Although the 1973 Act does not seek to give priority to this factor, and one might have thought that there is a potential conflict between the statutory test and the *Spiliada* test, it is submitted that the conflict is in form rather than real because both tests clearly involve the same aim of determining where the case could most suitably be heard for the ends of justice.

On the other hand, a potential area of conflict between the two tests can be seen in the terms of questions of convenience, expense and delay. It will be remembered that in assessing the balance of fairness and convenience the court must have regard to all factors appearing to be relevant including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or sisted or not being stayed or sisted.⁽²⁷⁵⁾ Under the *Spiliada* test these factors can only be relevant if they would prevent substantial justice being done in the foreign forum. Although these factors may affect the connection with a forum, it should be noted that they will have be weighted against other factors such as the residence of the parties.⁽²⁷⁶⁾

273- 1993 S.L.T. 123.

274- Ibid, at 126.

275- Sched 1, para. 9 ; Sched 3, para. 9.

276- *Spiliada Maritime Crop v. Consulex Ltd* [1986] 3 All.E.R. 843 at 856; Rhona Schuz, *Stay in Matrimonial Proceedings*, (1989) 19 Family.Law 438 at 441.

However, in the light of the Scottish case of *Mitchell v. Mitchell*⁽²⁷⁷⁾ it seems that the *Spiliada* test will sufficiently satisfy the statutory requirement to take into account convenience, expense and delay. In this case the Scottish court considered that the convenience of witnesses was not a factor making it more appropriate that the action be heard in France. The main factor was to consider the overall connection of the marriage with the jurisdiction in question.⁽²⁷⁸⁾

The application of the principle of *forum non conveniens* to matrimonial cases represents the unity of principle in jurisdictional discretion in both matrimonial and non matrimonial cases⁽²⁷⁹⁾ and this would make the statutory test redundant.⁽²⁸⁰⁾

2- Obligatory Stays or Mandatory Stays

It is the duty of the English⁽²⁸¹⁾ and Scottish⁽²⁸²⁾ courts to stay or sist divorce proceedings if, before the beginning of the trial, first trial or the beginning of the proof, the court is satisfied on the application of a party to a marriage,⁽²⁸³⁾ that proceedings for divorce or nullity of marriage are continuing in respect of the relevant marriage in another British Isles' jurisdiction.⁽²⁸⁴⁾ Moreover, the court also must be satisfied that certain additional requirements are complied with, namely, (a) that the parties to the marriage have resided together after its celebration and; (b) that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and (c) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date

277- 1993 S.L.T. 123 .

278 -Ibid, at 126-27.

279- Kunzlik, (1987) C.L.J. 407; Rhona Schuz, (1989) 38 I.C.L.Q. 953; A full discussion of Scottish *forum non conveniens* principles is to be found in *De Mulder v. Jadranska Linijska* 1989 S.L.T. 269.

280- Schuz, (1989) 38 I.C.L.Q. 949; (1989) Fam.Law 438 at 443.

281- Sched 1, para. 8; Family Proceedings Rules 1991, r. 2.27(1).

282- Sched 3, para. 8.

283- Not on the Court's own motion; cf, discretionary stay or sist, *supra*

284- Sched 1, para. 3(2); Sched 3, para. 3(2).

on which the proceedings were begun. The object of the obligatory stay is mainly to ensure that divorce proceedings are heard in the more appropriate forum, i.e. the country with which the marriage is closely connected.⁽²⁸⁵⁾

3- The Effect of Stay or Sist on Ancillary Orders

The 1973 Act contains elaborate provisions to deal with the effect of stay or sist divorce proceedings in a "related jurisdiction". The provisions may be summed up as follows:⁽²⁸⁶⁾

(a) The courts have no power to make any orders for maintenance of a spouse pending suit, or for periodical payments or the payments of lump sums or for custody and education for children or restraining a person from removing a child out of jurisdiction or out of custody, care or control of another person.⁽²⁸⁷⁾

(b) If such orders, other than a lump sum, have already been made, they will lapse after expiration of three months from the date when the stay is imposed or the sist comes into operation, unless the stay is previously removed or the sist is recalled.⁽²⁸⁸⁾

(c) The courts have power in some circumstances to make or extend orders in connection with the stayed or sisted proceedings if they consider it necessary to do so as in the case of necessity or urgency.⁽²⁸⁹⁾

(d) If an order for periodical payments for a spouse or child or for the custody or education of a child has been made in the other British proceedings then any order in the

285- Law Com. Rep. N° 48, para. 85; Dicey & Morris, 11th ed., p. 781; Clive, 3rd ed., p. 616 ; Anton, 2nd ed., p. 463.

286- Dicey & Morris, 11th ed., p. 783; 12th ed., p. 804; Clive, 3rd ed., p. 618; Anton, op.cit., p. 465; Halsbury, op.cit., p. 369; Radyen, op.cit., p. 71.

287- Sched 1, para. 11 as amended by Children Act 1989 Sched 13, para. 33; for Scotland, Sched 3, para. 11; Dicey & Morris, 11th ed., p. 783; 12th ed., p. 805; Clive, 3rd ed., p. 618; Anton, 2nd ed., p. 465.

288- Sched 1, para. 11(2)(b); Sched 3, para 11(2)(b).

289- Sched 1, para. 11(2)(c); Sched 3, para. 11(2)(c).

stayed or sisted proceedings ceases to have effect when the stay is imposed or the sist comes into operation or when the other court's order comes into force, and no such order may be made even in the case of urgency, and any order of the other court has no effect on a previous order of the English or Scottish courts in relation to the same child in matters of a lump sum payment for the child or restraining a person from removing a child out of jurisdiction or out of custody, care or control of another person.⁽²⁹⁰⁾

(e) The 1973 Act makes clear that nothing affects any power of the courts to vary or discharge or recall an ancillary order, or to enforce it for any period when it is or was in force, or to make an ancillary order in connection with proceedings which were but are no longer stayed or sisted.⁽²⁹¹⁾

The amount of detail a study of the subject of conflicting jurisdictions necessitates makes it all the more surprising that there is no equivalent chapter in Iraqi law. It has been said that since the present jurisdictional divorce bases are designed to protect and ensure justice to Iraqi nationals, rules to resolve conflicts of jurisdiction are unnecessary.⁽²⁹²⁾ This argument raises doubts in cases where no Iraqi national is involved in the proceedings. The absence of such rules may encourage parties to take advantage of the Iraqi law, prolong proceedings, and substantially increase expenses as well as produce conflict of decisions. It is submitted that nothing in the Iraqi law prejudices any power to stay proceedings. A stay should be granted if the court thinks that justice requires the case to be heard in a foreign court. The above discussion of the English and Scottish rules can provide guidelines to Iraqi courts to establish a system of staying proceedings.

290- Sched 1, para. 11(1)(3) as amended by Children Act 1989, Sched 13, para. 33; for Scotland, Sched 3, para.11(3).

291- Sched 1, para. 11(5) ; Sched 3, para 11(4) .

292- Azzedeen Abdallah, op.cit., p. 746.

CHAPTER THREE

Choice of Law Rule in Divorce

It is the view both in England and Scotland that when the courts have jurisdiction in divorce proceedings, they apply exclusively their own laws to determine whether a divorce should be granted. Any other legal system, it is submitted, is irrelevant. In Iraq, while reference is made in principle to the national law of the husband as the law to govern divorce, this system has been restricted in favour of the application of the Iraqi law in several cases.

The Hague Convention to regulate the Conflict of Laws and Jurisdiction in Regard to Divorce and Separation of 1902 provided a double-barrelled choice of law rule, requiring both the *lex fori* and the *lex patriae* to be satisfied. This Convention was denounced by certain countries because of difficulties with its interpretation. It is now regarded as outdated. The Hague Convention on Recognition of Foreign Divorces and Legal Separations of 1970 does not deal with choice of law rules because its scope is limited only to questions relating to recognition.

It is the purpose of this chapter to analyse the choice of law rule to find out why one system of law should be preferred to another. The choice of law rule means substantive law, the law that determines the grounds for divorce, the influence of conditions, defences, bars, etc. Matters relating to procedure will be beyond the scope of this chapter, because it is submitted universally that these matters are governed by the law of the forum. This chapter will consider choice of law as follows:

- I- Choice of Law in England and Scotland.
- II- Choice of Law in Iraq.
- III- Evaluation of the Choice of Law Rules.

I- Choice of Law Rule in England and Scotland

In contrast to issues concerning jurisdiction to grant relief and whether a foreign decree of divorce should be recognised, which attract judicial and academic opinion, the question of choice of the applicable law to determine whether relief should be granted has been largely neglected and has been treated purely as a jurisdiction question. In other words, the question of choice of law in divorce is always dependent on that of jurisdiction and no separation has been made between them. Thus, the courts have disregarded whatever grounds of divorce might be available to the parties in their own country and have always applied their own laws in cases heard by them.⁽¹⁾

In England, when domicile was the only basis of jurisdiction the problem of choice of law could not be said to arise, simply because the *lex fori* was invariably the *lex domicilii* and no choice between them needed to be made. What was questionable was whether English law was applied as the *lex domicilii* or as the *lex fori*.⁽²⁾ The attitude of the courts reveals that in the majority of cases this was as the *lex domicilii*.⁽³⁾ This attitude might be justified on the ground that divorce was regarded as a question of status and questions of status demand not only the exclusive jurisdiction of courts, but the application of the personal law of the parties by those courts.⁽⁴⁾

In Scotland the position seems to be that the Scottish courts applied Scots law as the *lex fori* whatever the personal law of the parties,⁽⁵⁾ despite the fact that Scottish courts

1- Dickey & Morris, 11th ed., p. 684; 12th ed., p. 720; Morris, 4th ed., p. 184; Mendes Dacosta, (1968) 46 Can Bar Rev, 277; Graveson, op.cit., (1977), p. 105; North, *Development of Rules of Private International Law in the Field of Family Law*, (1980) 1 Hague Recueil, 9 at 77, 78; See, also North, (1993), p. 68.

2- Cheshire & North, 11th ed., pp 632, 633.

3- *Lord Advocate v Jaffrey* [1921] 1 A.C. 146 at 152.

4- North, *Private International Law of Matrimonial Causes in the British Island and Republic of Ireland*, (1977), p. 146; Graveson, 7th ed., p. 286;

5- Clive, 2nd ed., p. 619.

had jurisdiction to entertain divorce proceedings on grounds other than the husband's domicile.⁽⁶⁾ In *Jack v. Jack*,⁽⁷⁾ jurisdiction had been taken on the ground of matrimonial domicile. The court applied Scots law without any consideration of the personal law of the parties. Lords Neaves and Mackenzie justified the application of the Scots law by saying:

"no consistorial court, in any country, ever, so far as we are aware, administers foreign law in the matter of divorce. Such a court will take cognizance of foreign law in the proof of marriage; but, in decreeing the dissolution of a marriage well contracted, it will not do so. A Scottish court will not grant a divorce to French or Prussian parties upon French or Prussian grounds. It will, in every case in which it has jurisdiction, decree a divorce upon those grounds only which are held sufficient by its own law."⁽⁸⁾

The same view was followed in England, when the courts applied English law as the *lex fori* in cases where the husband was no longer domiciled in England at the time of the proceedings. For instance, in *Niboyet v. Niboyet*,⁽⁹⁾ the court took jurisdiction on the basis of residence and applied English law as the *lex fori* despite the fact that the husband's personal law was French.

The application of the *lex fori* to determine whether a divorce should be granted where neither spouse is domiciled within the jurisdiction might be justified on the ground that the judges were influenced by Savigny's view that divorce touches fundamental forum conceptions of morality, religion and public policy.⁽¹⁰⁾ Choice of law in divorce becomes acute, with the statutory creation of extra-domiciliary jurisdiction,⁽¹¹⁾ but it must be admitted that the courts have shown little awareness of the difficulties and have applied their own law without explanation or reference to any rule of choice of law.⁽¹²⁾

6- *Christian v. Christian* (1851) 13 D. 1149; *Lack v. Lack* 1926, S.L.T. 656.

7- (1862) 24 D. 467.

8- Ibid, at 475.

9- (1878) 4 P.D. 1 at 9.

10- Savigny, *A Treatise On The Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, Guthrie's Transl, 2nd ed., Edinburgh, (1880), p. 298; Wolff, 2nd ed., p. 374.

11- Cheshire & North, 12th ed., p. 639; Graveson, op.cit., (1977), p. 107, Anton, 2nd ed, p. 465; Mendes Dacost, (1968) 46 Can Bar Rev, p. 277.

Under Section 13 of the Matrimonial Causes Act 1937, the English court was given jurisdiction to entertain divorce proceedings where a wife had been deserted by her husband or he had been deported, if he had been domiciled in England prior to his desertion or deportation. The Act was silent as to whether the applicable law to grant divorce under such a jurisdiction should be determined by reference to the *lex fori* or the *lex domicilii*. The issue came before the Court of Appeal in *Zanelli V. Zanelli*,⁽¹³⁾ in which a husband, an Italian national, domiciled in England had married an English woman and lived with her in England. Later he deserted her and resumed his Italian domicile. The wife petitioned for divorce. The court granted a decree of divorce by applying English law, without taking into consideration Italian law, i.e the *lex domicilii* of the parties by virtue of which divorce was legally impossible. Although the facts of this case may justify the application of the *lex fori* because the wife's domicile of origin prior to the marriage was English and it is inconvenient and undesirable to bind her by a dead marriage, it is submitted nevertheless that the application of *lex fori* creates 'limping marriages'. The Matrimonial Causes [War Marriages] Act 1944 was also silent on choice of law rule. The absence of this rule produced no difficulties and the courts continued to follow the decision of the Court of Appeal in *Zanelli v. Zanelli*. The result in this case was formally confirmed by the Law Reform [Miscellaneous Provisions] Act 1949 in the following terms:

"In any proceedings in which the court has jurisdiction by virtue of this Act or under the 1937, 1944 Acts, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England or [Scotland] at the time of the proceedings."⁽¹⁴⁾

It is interesting to note that the effect of this statutory choice of law rule was confined only to limited cases which fall within those provisions and did not cover cases which were brought by a husband or a wife on the basis of domicile (admittedly, there, the problem

12- Graveson, (1950) 3 In't L.Q. 321.

13- [1948] 64 T.L.R. 312.

14- See, S.1(4) for England and S.2(4) for Scotland; Re-enacted as S.18(3), S 40 (2) S.46 (2) Matrimonial Causes Acts, 1950, 1965, 1973 respectively, repealed by S.17(2) of and Sched, 6 to the Domicile and Matrimonial Proceedings Act 1973.

would not arise). However, this limitation had no effect in practice because in all cases the courts applied their own laws.⁽¹⁵⁾

The Domicile and Matrimonial Proceedings Act 1973 repealed the statutory jurisdictional ground⁽¹⁶⁾ and established new exclusive jurisdictional rules based on domicile or habitual residence of either party.⁽¹⁷⁾ Since a wife under this Act can acquire a domicile independent from that of her husband,⁽¹⁸⁾ it follows that the spouses may have different domiciles and thus the *lex domicilii* may no longer coincide with the *lex fori*. Accordingly the problem of choice of law rule will arise and the need for such a rule becomes necessary, because it is quite possible that the *lex fori* contains grounds for divorce not recognised as such by the law of domicile. Conversely, a divorce may be sought in the English and Scottish courts on grounds so recognised by the law of domicile but which are not recognised by the *lex fori* and then how will the choice of law process be resolved? When the Matrimonial Causes Act 1973 and the Divorce (Scotland) Act 1976 abolished the statutory choice of law rule, which had been introduced under the 1949 Act, they made no provision for choice of law. It was recommended that such a provision was unnecessary and the courts must continue to have regard only for the law of the forum.⁽¹⁹⁾

In the absence of statutory provision dealing with this issue, it is submitted that the choice of law process is to be resolved by reference to the *lex fori*. This conclusion is consistent with the attitude of the courts in practice where the law of the forum had been applied in cases in which the *lex domicilii* no longer coincided with the *lex fori*.⁽²⁰⁾ Moreover, section 14 of the Matrimonial Causes Act 1973 permits the English courts to

15- Graveson, 7th ed., p. 385.

16- S.17(2) of and Sched, 6.

17- SS.5(2),7(2).

18- S.1.

19- Law Com. Rep. N° 48, paras. 103, 108; Scots Law Com.N° 25, paras. 24, 30.

20- *Zanelli v. Zanelli* [1984] 46 T.L.R.; *Jack v. Jack* (1862) 24 D. 467 at 475.

apply foreign law to determine the validity of a marriage. This Act contains no such provision in matters of divorce, so the Act indicates that a divorce petition is always governed by the *lex fori*, even when the parties are both domiciled abroad.⁽²¹⁾ If the *lex fori* is the chosen law, then that will determine the permissibility and grounds on which a party may obtain a divorce, the nature of relief⁽²²⁾ and conditions upon which the decree will be granted.

The result of this system is that the courts will disregard the law of the parties at the time of divorce proceedings,⁽²³⁾ the *lex loci celebrationis*,⁽²⁴⁾ the law of the place where the matrimonial offence is committed,⁽²⁵⁾ or the law of the parties at such time. In *Czepek v. Czepek*,⁽²⁶⁾ the English court granted a decree of divorce to the husband on the ground of desertion which was not a ground under his personal law when the alleged desertion took place in Poland. In *Pratt v. Pratt*,⁽²⁷⁾ the court considered the husband's petition on the ground of desertion by his wife, although this was not a ground for divorce in English law before the time of litigation.⁽²⁸⁾

It seems unjust and anomalous to divorce a person for conduct which is not a ground for divorce according to his personal law. Divorce should not be granted on facts which were not wrongful according to the personal law when they occurred.⁽²⁹⁾ However, it is

21- North, op.cit.p.(1977) p.177.

22-Clive, op.cit p.619. The forum will consider its own approach to the granting, or not, of financial provision after foreign divorce; Matrimonial and Family Proceedings Act 1984 (alleviating the problem found and solved on that occasion in *Torok v. Torok* [1973] 3All.E.R.1001; See, infra, Chapter 7.

23- *Zanelli v. Zaneeli* [1948] 64 T.L.R. 312.

24- This law was adopted in earlier cases when English court contended that a marriage concluded in England could only be dissolved by English law. See, supra, 44.

25- *Tulloh v. Tulloh* (1861) 23 D. 639; *Czepek v. Czepek* [1962] 3 ALL.E.R. 990.

26- [1962] 3 All E.R. 990 at, 992.

27- [1939] A.C417; In *Chapman v. Chapman*[1938]1 All.E.R.635 and *Green v. Green* [1939] 3 ALL.E.R. 89; the court granted a decree of divorce on the basis of facts which occurred before they were made a cause for divorce and the legislation is not in terms given retroactive operation.

28- This ground was introduced as a cause of divorce for the first time by S.1 of the Matrimonial Causes Act 1937. For history of this ground, See, Radyen, op.cit, p. 230.

29- See, Mann, (1954) 31 B.Y.B.I.L., 247.

the view of academic authorities that the *lex fori* should determine all questions in divorce proceedings and any other legal system is completely irrelevant.⁽³⁰⁾ Professor Dicey justified the rejection of the personal law on this point on the ground that: "divorce is not a punishment for a wrong but a determination by the state it is not in the public interest that a particular marriage should continue".⁽³¹⁾

The learned author's view seems to reflect the attitude of English courts that the dissolution of marriage is very much a matter of English public policy. However, since the choice of law has an effect on questions of recognition and enforcement of judgements by other courts, it is submitted that consideration should also be given to the interest of the parties or to the interest of their country. The talk only about the interest of English society may lead to the denial of an English decree abroad which would create a 'limping marriage'; the negative consequences of which cannot be ignored.

II- Choice of Law Rule in Iraq

Contrary to the English and Scots law which uses *lex fori* as the appropriate choice of law rule for determining the permissibility and grounds for divorce, the Iraqi law has, in principle, rejected the *lex fori* in favour of the *lex patriae*. The two questions of jurisdiction and choice of law in matters of divorce are distinguished as a matter of course and the Iraqi courts do not automatically apply Iraqi law. Rather consideration is given to the *lex patriae*. However, there are certain significant exceptions, *infra*, which result in a homeward tendency. Before the Civil Code of 1951, there was no specific provisions regarding choice of law rule in divorce cases. The matter was subject to the general rule in article 1 of the law of 1931 which provided that "In deciding matters of personal status regarding foreigners, in which it is customary to apply the law of another country, the court of Iraq will apply the same, in accordance with usages of private international law, but so

30- Cheshire & North, 10th ed., pp. 365, 366.

31- Dicey & Morris, 9th ed., p. 313.

that the personal law of any person shall mean the law of the state of which he is a national".⁽³²⁾

The choice of law rule in matters of dissolution of marriage was clarified by article 19(3) of the Civil Code which provided that "*Talaq*, Judicial divorce and Separation are subject to the law of the country to which the husband belongs either at the time of *talaq* or of the commencement of the legal proceedings". The application of the national law of the husband has been restricted in favour of the Iraqi law in cases when either of the spouses possesses Iraqi nationality, or when its application is contrary to public policy or morality in Iraq.⁽³³⁾

Unlike the *lex fori*, the application of the personal law in divorce cases is not easy. In Iraqi law, for instance, the application of the national law may give rise to difficulties which are related to the determination of the appropriate national law in cases where the spouses have different nationalities, the cases where one of the spouses has a double nationality, the cases where the spouses belong to a composite legal system, and where the spouses are stateless. Further, the question arises whether the reference to the national law should be to the substantive law only or should it include the conflict rules in that law.

A- The Principle: Application of The *Lex Patriae*

The principle of submission of divorce to the parties' national law has been adopted at the beginning of this century by civil law countries and has been embodied in the Hague Divorce Convention of 1902.⁽³⁴⁾ Under the Convention, the pronouncing of a decree of divorce must conform with the national law of the parties and with the *lex fori*.⁽³⁵⁾ In

32- See, also Art. 73 of the Code of 1925; Farid Fatyn, op.cit., p. 27; All-Hadway, op.cit., p. 31.

33- See, *Infra*, 109.

34- Art. 1, and 8; See, Gutteridge, (1938) 19 B.Y.B.L30; Rabel, op.cit., p. 461.

35- Article 1 provided that "Married persons may apply for a divorce provided the law of the state to which they belong (national law) and the law of the place where the application is made both permit divorce". Article 2 provided that "Divorce may be granted only if obtainable in the particular case under both the national law of the spouses and the law of the place where the application is made, though on different grounds".

other words, the Convention deprives the parties who are foreigners from obtaining a divorce in the court of their domicile, if their national law forbids it or the ground upon which the divorce is claimed is not recognised by their national law. Thus, under the double requirements foreigners could not obtain divorce unknown to the forum nor could divorce be obtained if the national law did not permit dissolution of marriage during the life time of both parties.

The principle of cumulation under the Hague Convention to grant divorce did not necessarily mean that the grounds for divorce must be identical in both the *lex patriae* and the *lex fori*. It is submitted that it was sufficient if divorce was obtainable in a particular case under both laws, though on different grounds. Thus, a divorce might be granted to the foreigner on the ground of desertion, although this ground did not constitute a ground for divorce by the *lex fori*; provided that divorce was obtainable in the *lex fori* on another ground such as, injures graves.⁽³⁶⁾

The solution in Iraq is, on one hand, that the Iraqi law follows the view embodied in the Hague Convention that the granting of divorce must be in accordance with the *lex patriae*. On the other hand, the conjunction with *lex fori* embodied in the Hague convention is rejected by Iraqi law.⁽³⁷⁾ This means that a divorce may be granted on the grounds found in the *lex patriae* but not in the Iraqi law or on grounds not even recognised by Iraqi law.⁽³⁸⁾ Hence, it seems that the Iraqi approach is consistent with the English and Scottish view in the limited sense that the right to divorce and the grounds for divorce are decided by one law. While this law is the *lex fori* in England and Scotland, it is the *lex patriae* in Iraq.

36- Rabel, op.cit., p. 468; Gutteridge, (1938) 19 B.Y.B.L. 30, 32.

37- All-Hadway, op.cit., p. 175; Abbas, M., op.cit., p. 17; AbdulWhahed, K., op.cit., p. 35.

38- This rule is subject to public policy, See, infra, 110.

1- The *Lex Patriae*: Means the Law of the Husband

The principle of submitting the choice of law rule in divorce cases to the *lex patriae* presents difficulties where the parties are subject to different nationalities. Various legal systems have adopted various methods to solve the problem either by reference to the husband's nationality, or to the law of the nationality of the petitioner or to the last common domicile or to the last common nationality. The last criterion was considered by the Hague Convention of 1902 when article 8 provided that "where the spouses are of different nationality, their national law shall be considered to be the law of their last common nationality".

The text of article 19(3) of Iraqi Civil Code indicates that the choice of law rule in cases where the parties have different nationalities is the national law of the husband only, irrespective of the wife's national law. To justify this system, it has been said, that it is the simplest one and most convenient in practice, because under this system divorce is governed by one law and therefore, it will avoid for the court the difficulties arising from the application of the principle of cumulation.⁽³⁹⁾

The simplicity of this system in practice should not prevail over justice and interests of the parties. Moreover, this system is arbitrary because it ignores the modern idea of equality of the parties. It is submitted that this system is inconsistent with the Iraqi Constitutional Code and the Iraqi Nationality Code and with the Conventions containing provisions as to equality of sexes.⁽⁴⁰⁾ The hardship of this system in practice can be seen in cases where a woman married a person whose national law does not permit divorce or a person who obtains after the marriage naturalization in a foreign country whose laws deprive the parties from obtaining divorce as a way to dissolve the marriage.⁽⁴¹⁾

39- All-Hadway, op.cit., p. 175; Palsson, op.cit., (1978), p. 130.

40- Art.3 of the Convention on the Nationality of Married Woman of 1958; Art.12(1) of the Iraqi Nationality Code N° 43 of 1963; Weis, op.cit., p. 97.

41- Abdul Whahed, K., op.cit., p. 38.

As regards the cases where the husband has more than one nationality at the time of the proceedings, the Iraqi law has adopted the solution that divorce must be determined by the Iraqi law whenever one of the nationalities involved thereof is that of the Iraqi state.⁽⁴²⁾ This rule is anomalous because of its nationalistic bias. It is thought that the effective nationality should prevail because it represents the country with which the person concerned is most closely connected. On the other hand, the law is silent upon which nationality the court must select in cases where neither of the nationalities is Iraqi. The view of the Iraqi academics suggest that the effective nationality is the appropriate solution in such cases.⁽⁴³⁾

2- The Exception to the Law of the Husband

The principle by virtue of which the permissibility and grounds for divorce is determined by the husband's national law has become subject to various exceptions in favour of the Iraqi law. These exceptions can be seen in cases where one of the parties was an Iraqi national at the time of the marriage ceremony, where the application of the foreign law is contrary to public policy and where the husband is stateless at the time of the proceedings.

a- Possession of Iraqi Nationality

Article 19 (5) of Iraqi Civil Code provides clearly that divorce is determined by Iraqi law if one of the parties is an Iraqi at the time of the marriage, notwithstanding the parties' personal law at the time of the proceedings.⁽⁴⁴⁾ It has been argued that this exception protects mainly the wife whose nationality was Iraqi at the time of the marriage ceremony in case the husband acquires a nationality the law of which does not permit divorce and therefore, to prevent evasion of the law governing the marriage at the time when the contract took place. This is because the wife acquired according to Iraqi law a right to

42- Art.33(2) of the 1959 Civil Code; All-Hadway, op.cit., p. 153.

43- Hammed Moustapha, op.cit., p. 193; All-Hadawy, op.cit., p. 154.

44- Abdul Whahed, K., op.cit., p. 41.

divorce when she entered the contract of marriage, that cannot be denied by the fact that the husband changes his nationality.⁽⁴⁵⁾

It should be noted that the application of article 19 (5) is not limited to cases where the wives were Iraqi at the time of the marriage. Moreover, the case where the husband acquires a new nationality by virtue of which divorce is permitted, or the change of nationality is not based on any evasive intention is left open.⁽⁴⁶⁾

This exception is anomalous for there is no sound policy reason that might justify the application of Iraqi law to parties neither of whom is a holder of Iraqi nationality at the time of divorce proceedings. One might also argue that it is hard and illogical to accept this rule for its nationalistic bias, inasmuch as Iraqi courts would never recognise a foreign divorce granted in the same circumstances where an Iraqi national is involved. It is thought that protection of the wives in cases where the husband acquires a new nationality for evasive purposes can be achieved by the use of the public policy principle. However, this exception is limited in practice since the Iraqi nationality at the time of marriage is not a sufficient ground for divorce proceedings.⁽⁴⁷⁾

b- Public Policy

It is a well settled principle in private international law that the applicable law in any case must be disregarded if it is contrary to the *lex fori* public policy. To this extent, article 32 of the Iraqi Civil Code provides clearly that the provisions of a foreign law applicable by virtue of the preceding articles of the Code shall not be applied if they are contrary to public policy and morality in Iraq. Determination of whether the relevant

45- All Hadway, op.cit., p. 175, Cf. generally *Drammeh v. Drammeh* (1970) 78 Ceylon L.W. 55, P.C., where wife had 'contracted' for a monogamous marriage.

46- It is interesting to see that in Scotland a change of domicile to secure a divorce was able to be made, provided that the court took the view that the usual domicile requirements were present, i.e. in the days when divorce jurisdiction depended on domicile alone. See, *Carswell v. Carswell* (1881) 8 R. 901; *Stavert v. Stavert* (1882) 9 R. 519; *Morton v. Morton* (1831) 10 S. 162.

47- See, Supra, 80.

foreign law is contrary to public policy is left to the courts' discretionary powers.⁽⁴⁸⁾ It is generally submitted that the relevant foreign law is contrary to public policy in cases where both or one of the parties, whose personal law forbids divorce, is converted to Islam. In such cases, the courts apply Iraqi law without any consideration of the personal law of the parties. The application of Iraqi law in such cases might be justified on the ground that Muslims always have the right to divorce irrespective of the personal law or of where they are domiciled or residing and depriving a Muslim of this right is contrary to public policy and morality.⁽⁴⁹⁾ The Iraqi law is applicable even if the conversion is to secure divorce, because it is not the duty of the courts to investigate why the person concerned converted his religion. Although this exception has been established for religious considerations, it is noteworthy that it creates 'limping marriages', because it is unlikely that the Iraqi decree will be recognised in the country to which the parties belong. Moreover, it promotes 'forum-shopping' by making divorce easier for those whose personal law does not permit it.

c- Stateless Person

It has been mentioned earlier⁽⁵⁰⁾ that the Iraqi law is silent about the question by which law the personal status of stateless persons should be determined. However, the view in Iraq suggests that the law of domicile (habitual residence) of the husband should determine the status and capacity of stateless persons. Accordingly, Iraqi law applies over divorce proceedings when brought either by the husband or the wife, if the husband is stateless and has his domicile [habitual residence] in Iraq at the time of the proceedings, even if the wife has nationality of a foreign state.⁽⁵¹⁾

48- Abdul Whahed, K., op.cit., p. 40.

49- All-Hadway, op.cit., p. 99; Azzedeen Abdallah, op.cit., p. 538.

50- See, Supra, 35.

51- Arts.30 and 33(1) of the 1959 Civil Code; All-Hadway, op.cit., p. 154.

B- Composite Legal System

The principle that divorce is governed by the national law of the husband presents difficulties in cases where this law is a composite legal system. Here, the domestic laws are either territorial, i.e., they apply in different legal districts, or personal in character, i.e. several legal systems applicable throughout the entire territory of the state, but govern only a specific category of persons according to their religion or ethnic origin.⁽⁵²⁾ The question therefore is which legal system within the composite state applies? To deal with this question, one might distinguish two different situations depending on whether the law in the composite state is based on personal or territorial criteria.

1- Composite Legal System Based on Personal Criteria

In many countries, the law of divorce depends on membership of a certain religious community or other personal criteria, namely class, caste or race.⁽⁵³⁾ Such a system may be found in India and African countries. In Arab countries, for instance, divorce is governed by the religious principles to which the parties belong. However, article 31(2) of the 1951 Iraqi Civil Code provides clearly that the applicable law where the choice of law rules refer to a composite legal system must be determined by the internal conflict rules of the state concerned. This article shows that the Iraqi court shall call the foreign law in aid to determine the applicable law, whether the law of the composite state is based on the national law or domiciliary law of the person concerned. On the other hand, this article is silent as far as the case where the composite legal system has no internal conflict rules. It is submitted that no difficulties arise inasmuch as the Iraqi conflict rule is quite sufficient in itself to solve such a case. This is because it refers to the national law of the husband in such a state, a reference that can be construed as a reference to the particular set of rules applicable under the domestic law of the state to which the husband belongs. Let us

52- Edoard Vitta, In. Enc. Com. I. vol, III, chap. 9, International Conflict of Laws, 1985, p. 3; Kurt. Lipstein & Istvan .Szasz, In. Enc. Com. I., vol. III, chap. 10 International Conflict of Laws, 1985, p. 3; Palsson, op.cit., (1974), p. 95; Azzedeen Abdallah, op.cit., p. 179.

53- Rabel, op.cit., p. 134; Palsson, op. cit., (1978), p. 141; Azzedeen Abdallah, op.cit., p. 18.

suppose that an Egyptian woman petitions for a divorce before an Iraqi court which assumed jurisdiction on the ground that the husband was resident in Iraq. Applying Iraqi conflict rule the court must apply Egyptian law, i.e the husband's national law, by virtue of which divorce is governed by the religious principle to which the parties belong. The judge therefore must inquire whether the husband is a Muslim, a Christian or a Jew in order to determine the applicable law.

2- Composite Legal System Based on Territorial Criteria

The foremost example of this type of legal system is the United Kingdom. Here the territory is divided into two parts where two main law districts are formed, namely England (including Wales) and Scotland.⁽⁵⁴⁾ Conflicts between the territorial laws of this region are determined by the courts operating within that region which apply the same conflict rules as in international conflict of laws. Since the test of nationality in such states is of a little use and it is impossible to connect the British national, for instance, with one local district rather than with another on the strength of their nationality, reference to the national law is insufficient and therefore should be supplemented by other complementary criteria.⁽⁵⁵⁾ Article 31(2) of the 1951 Iraqi Civil Code places this kind of composite legal system on equal footing with composite legal systems based on personal criteria, even though they are different in nature and character. According to this article, however, the Iraqi court should respect and apply the law district determined by the internal conflict rules of the national law appointed by the relevant Iraqi choice of law rule.

This approach proves insufficient to ascertain the applicable law if the designated state has no internal conflict rules. It is generally submitted that the place where the interested person is domiciled may serve as a criteria to determine the applicable law. When considering a divorce suit of a British couple, for instance, the Iraqi court should inquire about the husband's domicile in order to determine the applicable law. It is therefore clear

⁵⁴ There is also the legal system of Northern Ireland, but that is beyond the scope of this thesis.

⁵⁵ Consider, e.g the well known Renvoi case of *Re O'keefe* [1940] Ch. 124.

that the court should apply Scots law if it is established that the husband is domiciled in Scotland. The remaining question requiring consideration here is where the husband's domicile is situated outside the United Kingdom, say for example, in Iraq. In this case, it is argued, the court should apply the law of the last domicile within the country of his nationality.⁽⁵⁶⁾

C- Renvoi

The Iraqi conflict rules, as we have seen, refer the matter of choice of law in divorce to the national law of the husband. The question which requires examination here is whether reference to the husband's national law means a reference to the domestic law, or to the conflict of law rules as well as the internal ones. This question is discussed by academic authorities under the principle which is called 'renvoi'.⁽⁵⁷⁾

Renvoi may arise when the relevant choice of law rule under the personal law of the parties, applicable according to the *lex fori* conflict rule, refers to the *lex fori* or to a third state law as being the applicable law. The renvoi problem presents itself in two different forms, namely, remission, a reference to the *lex fori*, and transmission which is a reference to the law of a third state.⁽⁵⁸⁾ It is interesting to emphasise that renvoi in its remission form has been accepted in the 1931 Act regulating civil status of foreigners in Iraq.⁽⁵⁹⁾ Conversely, the 1951 Iraqi Civil Code, abolishing the 1931 Act, has completely rejected renvoi in both forms. To this extent, article 31(1) of the 1951 Code states, and it is

56- Azzedeen Abdallah, op.cit., p. 192.

57- Three theories have been suggested for the solution of the Renvoi problem, namely, (1) the internal law theory, (2) partial Renvoi, Renvoi or single Renvoi theory, (3) the foreign court law theory or Total Renvoi or Double Renvoi theory. More details, See, Georges, L.S., In. Enc. Com. law, vol. III, chap. 6, *Private International Law*, 1988; Dicey & Morris, 11th ed., p. 73; Cheshire & North, 12th ed., p. 60; Abdul-Hamied Washy, *Private International Law In Iraq*, Baghdad, (1940), p. 159 (In Arabic); The Hague Convention of 1902 rejected Renvoi, but this principle was adopted by the Renvoi Convention [Convention for regulating the conflict between national law and the law of domicile of 1955]. This Convention was only ratified by two States, Belgium and Netherlands; as five ratification were required for its entry into force, it never become effective.

58- Palsson, op.cit., (1978), p.143.

59- Art. 1.

too clear for argument, that the internal provisions of the relevant foreign law are applicable to the exclusion of its conflict of law provisions.⁽⁶⁰⁾

The main justification advanced by academic authorities in support of this view is that the law of personal status in Iraq depends mainly on the Islamic religious principles. It is therefore beyond any doubt that acceptance of renvoi in this situation would lead to the application of Islamic religious rules to persons belonging to another religious denomination.⁽⁶¹⁾

D- Material Time

Although the dissolution of marriage by *talaq* does not require constitution of an action before the court,⁽⁶²⁾ the Iraqi law contains provisions regulating the choice of law rules in *talaq* as well as the dissolution of marriage by judicial proceedings. According to article 19(3) of the 1951 Code, however, *talaq* and judicial divorce are treated on an equal footing as far as choice of law rules are concerned. This article states clearly that *talaq*, judicial divorce and separation are determined by the husband's national law at the time when *talaq* is pronounced or when the legal proceedings are begun.

As regards dissolution of marriage by judicial proceedings, the court should apply the husband's national law at the time of institution of the legal proceedings, notwithstanding that the husband subsequently acquires a new nationality before the decree is pronounced. It is note worthy that this rule applies to every single case unless one of the parties was an Iraqi national at the time of the marriage, a case where the supremacy of Iraqi law overrides the effect of the general choice of law rule.⁽⁶³⁾

60- Farid Fatyan, op.cit., p. 48; All-Hadway, op.cit., p. 97.

61- Azzedeen Abdallah, op.cit., p. 158.

62- Arts.35(1) and 39 (1)(2) of the 1959 Personal Status Code.

63- All Hadawy, op.cit., p. 175; Abdul Whahed, op.cit., p. 44.

III- Evaluation of the Choice of Law Rules

At the present date, judicial and academic opinions in England and Scotland appear to support the application of the *lex fori* to determine the permissibility and grounds of divorce. It is interesting to note the recommendations of the English and Scottish Law Commissions on this matter. The English Law Commission recommended that: "It is our strongly held view that practical considerations should prevail and that, notwithstanding the theoretical arguments to the contrary, the grounds of, and defences to, a divorce suit heard in this country should continue to be those of English law."⁽⁶⁴⁾ The Scottish Law Commission recommended on the same lines that: "[n]o change should be made in the present rules whereby (a) the internal law of Scotland is applied in determining the substantive rules in an action of divorce".⁽⁶⁵⁾

As regards Iraqi law, on the other hand, the strongly held view is that the application of the husband's national law at the time of the proceedings, as a principle, to determine a divorce suit remains unchallengeable. This principle is not applicable, however, if either party is an Iraqi national at the time of the ceremony or the personal law of the husband is contrary to Iraqi public policy. Consideration must be given then, to an analysis of the arguments for and against the two doctrines of choice of law rules.

The application of the *lex fori* has been theoretically justified by Savigny on the ground that divorce is imperative in nature inasmuch as it expresses a moral conception of an absolute value. The learned writer has clearly stated that:

"Divorce is distinguished from the legal institution relative to property, by the circumstance that the laws relating to it depend on the moral nature of marriage, and therefore have in themselves strictly a positive character, Hence the judge, in a case of divorce, must follow only the law of his country, without respect to the other relations of the spouses".⁽⁶⁶⁾

⁶⁴- Law Com, Rep, N° 48, para. 105.

⁶⁵- Scots Law Com., N° 25, para. 30.

Within the same line of reasoning, Professor Wolff justified the application of English law in divorce suits solely on the ground that: "the question of the conditions under which the nuptial tie may be loosened or destroyed touches fundamental conceptions of morality, religion and public policy".⁽⁶⁷⁾

It is undoubtedly clear that the policy justification for the application of the *lex fori* on morality and public policy considerations is reasonable if there is a strong connection between the parties and the forum's society. But when the connection is not so strong, especially when jurisdiction is based on habitual residence for one year of one party only, it is submitted that the public policy considerations can hardly justify the application of the *lex fori* because, it is thought, the application of the personal law in such cases would not offend the forum's notions of morality and public policy. Thus, the application of the *lex fori* in such cases may not reflect the marital relationship within the forum's society.⁽⁶⁸⁾

Another argument advanced in support of this view is that divorce remedies are special or equitable, and cannot therefore be exercised except by the courts of the state establishing the remedy.⁽⁶⁹⁾ To this extent Story has pointed out that divorce, unlike nullity, is so closely bound up with remedies as to merit a procedural classification to which the *lex fori* should be applied.⁽⁷⁰⁾ This justification may be criticised on the ground that divorce is not a merely procedural matter, but it is a matter of substantive nature that effects the status of the parties.

Another justification for the *lex fori* approach seems to be derived from the statutory

66- Savigny, op.cit., p. 298.

67- Wolff, op.cit., p. 374. The judgment of Lords Neaves and Mackenzi, referred to above, for the application of the Scots law seems to be based on the same view.

68- Cheshire & North, 12th ed., p. 640; North, (1980) I Hague Recueil 83, 84; Cf. Delictual cases where the forum had no interest or a lesser interest in the case (cf. lack of) interest of Maltese law in *Boys v. Chaplin* [1971] A.C. 356.

69- Rabel, op.cit., p. 454.

70- Story, op.cit., p. 298; Fleming, *Evasion of Law and Divorce Adjudication*, (1952) 1 I.L.C.Q. 381 at 383.

nature of divorce. This view appears to be influenced by the old theory that statutes should only be accorded territorial effect.^(7 1) The fallacy of this argument lies in the fact that there is no obvious and logical policy reason that might induce the treatment of divorce in a different way than the other questions related to personal status, e.g., nullity is governed in certain cases by the *lex causae*.^(7 2)

In practice, it has been said, to justify the application of the *lex fori*, that it would be highly inconvenient and undesirable to apply foreign law in divorce proceedings, because it would cause difficulties regarding proof in divorce petitions, most of which are undefended. Such proof is more complicated and expensive in England and Scotland than in other legal systems, so reference to foreign law would prolong proceedings and substantially increase expenses. Further difficulty arises in obtaining expert evidence of foreign law.^(7 3) There is no doubt that the application of the *lex fori* is less costly and puts the judge at ease, particularly in the legal systems where foreign law is treated as a mere fact. However, the ease of application of the *lex fori* should not prevail over the interest of the parties.

It has been argued also that the application of the *lex fori* will avoid the court having further difficulties arising from the application of the *lex domicilii*. Since a wife can acquire an independent domicile,^(7 4) the spouses may have different domiciles. It is therefore quite possible that the law of one spouse permits divorce and the other does not. This may give rise to the problem of which party's domiciliary law would be applied. Moreover, the difficulty may remain pending even if the parties have a common domicile, for there is a possibility that domicile may be differently defined from one country to another, a fact that requires examination of the private international law of the parties'

7 1- Dicey & Morris, 9th ed., p. 312; Palsson, op.cit., (1978), p. 126; Rabel, op.cit., p. 454.

7 2- Palsson, op.cit., (1978), p. 126.

7 3- Law Com. Rep. N° 48, para. 104; Law Com. W.P. N° 28, para. 83; Scots Law Com. N° 25, para. 25; Cheshire & North, 11th ed, p. 634; North, (1980) I Hague Recueil 82; Anton, 2n ed., p. 467.

7 4- S.1 of the Domicile and Matrimonial Proceedings Act 1973.

domicile.⁽⁷⁵⁾ Dr. Morris, one of the leading authorities in the subject, being in favour of the *lex fori* approach, states clearly that: "to require English courts to dissolve marriage on exotic foreign grounds would be distasteful to the judges and unacceptable to public opinion".⁽⁷⁶⁾

Although there is a good policy in favour of applying the *lex fori*, it is submitted that the powerful arguments in favour of the application of the *lex domicilii* cannot be ignored. The nature of a decree of divorce as affecting status appears to demand the application of the *lex domicilii*.⁽⁷⁷⁾ With the broader jurisdictional rules, the *lex domicilii* becomes necessary to reduce the evils of 'limping marriage' and 'forum-shopping'. On the same line of reasoning, the Royal Commission on Marriage and Divorce⁽⁷⁸⁾ criticised the 1949 Act which based jurisdiction on three years' residence of a wife on the ground that the personal law of the parties had been completely ignored, a factual situation that would undermine the universal recognition of the English or Scottish divorces. The Royal Commission, however, submitted in clear terms that if jurisdiction was based on residence combined with the application of the parties' personal law,⁽⁷⁹⁾ the English or Scottish divorce would be recognised abroad, on condition that divorce should not be granted unless the personal law of both parties recognised as sufficient ground for divorce a ground substantially similar to that on which a divorce is sought in England or Scotland, or would allow the applicant to be obtain a divorce on some other grounds.⁽⁸⁰⁾

Although it may be argued that the Royal Commission's particular argument in criticising the 1949 Act which had been enacted to provide a remedy in a particular

75- Scots Law Com. N° 25, para. 29.

76- Morris, 3rd ed., p. 192; 4th ed., p. 185.

77- Graveson, 7th ed., p. 286; Weintraub, *Commentary on the Conflict of Laws*, 2nd ed., pp. 373, 74.

78- Comd. N° 9678; See also, Report of the Departmental Committee on Administration of the Law of Divorce and Nullity of Marriage in England and Wales, Comd N° 7024 [The Denning committee].

79- Personal law means the law of the domicile unless that law regarded the law of a person's nationality as his or her personal law, in which case it would be the law of nationality. paras. 836, 839.

80- Paras. 827-835; compare with Gutteridge, (1938) 19 B.Y.I.L. 38, who suggested that nationality should be a basis of jurisdiction, but that the grounds of divorce should be governed by the *lex fori*.

situation, i.e., desertion and therefore a wide international recognition was not of pressing concern to a deserted wife who intended to remain in Scotland or England, it is submitted that the recommendation in principle tends to the application of the personal law when, divorce jurisdiction is broadened to allow courts to grant divorce on grounds other than domicile, and so to reduce 'limping marriages' and 'forum-shopping'. As it has been mentioned earlier, habitual residence under the present law would not end the forum-shopping, particularly when the meaning of this term is still under active discussion. A one year qualification is not enough because it is not difficult for people to stay for one year to obtain divorce. Moreover, there is another difficulty with this jurisdictional basis in that the decree proceeding upon it may be denied recognition abroad, especially in the country of domicile. Accordingly, the recommendation of the Royal Commission that consideration must be given to the personal law of the parties seems to be sound in the context of the present law of jurisdiction.

The *lex domicilii* has been widely accepted as a good law to test the validity of marriage. Admitting that the dissolution of marriage is not less substantial than its creation, one might say that the *lex domicilii* should play an active role in its dissolution. The argument that it is difficult to prove foreign law or to obtain expert evidence is not sufficient to obliterate the interests of the parties concerned i.e., if one can identify the interests of the parties: are they opposing? It may be possible to say (in many cases) that their interests are to obtain a divorce generally recognised as valid. Moreover, the argument that the application of *lex domicilii* would lead to difficulties where the parties have different domiciles is also not convincing. This problem can be resolved by adopting a choice of law rule that ensures the balance of interests between the competing laws. If it is impossible to achieve this as in cases where divorce is permitted by one domiciliary law but not under the other, reference must be made to another system. Some academic authorities indeed suggested the scales should be in favour of applying the law of the petitioner's domicile, for it is the only law that would protect his interests.⁽⁸¹⁾ The last actual

81- Seidelson, *Interest Analysis and Divorce Action*, (1971) 21 Buffalo Rev., 315, 331-332.

matrimonial home of the parties has been favoured by some other.⁽⁸²⁾

As regards the Iraqi choice of law rules, it is said that the application of the *lex patriae* has certain advantages, namely, it creates a more stable connecting factor, and provides a more effective safeguard against evasion of laws and the creation of 'limping marriage'.⁽⁸³⁾ Since the legal position of persons must be the same everywhere or at least that must be our aim and hope, it would be unjust and impractical to determine it by different laws in different countries. A further argument in support of the *lex patriae* is based on the fact that since the law of divorce in Iraq depends on Islamic principles, it would be undesirable to apply Iraqi law to persons belonging to another religious denomination simply because their case happens to be adjudicated before Iraqi courts.

The *lex patriae* approach provides no objective solution to cases of stateless persons, and where the parties have more than one nationality. Recently, as a result of political crisis, millions of people have lost their nationality or they are unable to prove their nationality. Although the view in Iraq is that nationality should be supplemented by another connecting factor, it is submitted that such a connecting factor has not been settled yet. In some cases reference has been made to Iraqi law, in others to the law of domicile and sometimes to the law of the effective nationality.

The reference to the national law of the husband to determine divorce in cases where the parties have different nationalities is unacceptable in modern times, for the equality between the sexes and the principle that the wife can acquire an independent nationality are established. In practice, the difficulty of this system can be seen in cases where the wife's personal law does not recognise the Iraqi decree with the result the legal status of the parties will be different in different countries. Accordingly, reference must also be made to the national law of the wife to ensure the balance of the interest between the parties and to

82- Prevezer, *Divorce in the Conflict of Laws*, (1954) 7 Current Legal Problem, 114 at 122.

83- All-Hdway, op.cit., p. 175.

permit justice to be done. In general it may be fair to say that, in the subject of choice of law (in contrast with that of conflicting jurisdictions), Iraqi law is well-developed, and seemingly liberal, but that, on examination, there is a discernible homeward and husband-favoring bias.

To conclude one might submit that both the choice of law rules in the United Kingdom and in Iraq have undesirable consequences on the parties as far as recognition and capacity to marry are concerned. It would be possible therefore to say that in cases involving a foreign element, the common personal law of the parties should determine the divorce suit. If, however, the parties have different personal laws, divorce should be determined by the petitioner's personal law, and the decree should not be granted unless there is a strong possibility of its recognition by the respondent's personal law, or the interests of both parties require the dissolution of the marriage. This choice of law rule would reduce the problems of 'limping marriages' and 'forum-shopping', particularly in cases where jurisdiction is based on one year's habitual residence in English and Scots law and mere residence in Iraqi law.

CHAPTER FOUR

Recognition of Foreign Divorces

Before 1972, the recognition of foreign divorces in England and Scotland was generally governed by common law rules. These had been developed since the nineteenth century, and the most important development had occurred in the second half of this century as a result of the extension of the domestic jurisdictional rules. In 1967, the House of Lords in *Indyka v. Indyka*⁽¹⁾ suggested various bases for recognition which rendered the law complex and uncertain in a field of law where certainty is highly desirable. The Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973, introduced new rules for recognition based on the 1970 Hague Convention provisions and the retention of certain common law rules. This approach was a source of criticism and in 1984 the English and Scottish Law Commissions published a joint report on the recognition of foreign nullity decrees. They also examined the rules of recognition of divorces and legal separations contained in the 1971 Act. They recommended the abolition of the 1971 Act, and the enactment of a new statute containing all the rules relating to the recognition of divorces, annulments and legal separations. The recommendations of the Law Commissions were finally implemented by the Family Law Act 1986 in part II but not completely since the liberal suggestion to assimilate divorces obtained otherwise than by proceedings to those obtained by proceedings has been rejected.

In contrast the Iraqi law contains no specific statutory provisions dealing with this subject. On the other hand, enforcement of civil and commercial judgments are subject to the Enforcement of Foreign Judgments Code 1928 and the Enforcement of Arab Judgments Treaty 1952. Academic authorities, however, have expressed different speculative views as to whether the 1928 Code and the 1952 Arab treaty should be applied to the recognition of divorces. The purpose of this chapter is to scrutinise the recognition rules in order to

1- [1967] 2All.E.R 689.

find out in which circumstances a foreign divorce should be recognised, and whether such rules are effective as far as the avoidance of limping marriages is concerned. The rules for recognition of divorces will be considered as follows: **I- English and Scottish Rules for Recognition of Foreign Divorces.****II- Iraqi Rules Relating to the Recognition of Foreign Divorces.**

I- English and Scottish Rules for Recognition of Foreign Divorces.

Since a distinction is drawn between divorces which are obtained by means of proceedings and those which are not, and as different recognition rules are provided for both categories,⁽²⁾ the two categories are considered separately. We shall assume for the discussion in point (A) below that the foreign divorce in question has been granted by a court of law. The recognition of divorces obtained by means other than the court of law will be discussed in point (B) below under the title of recognition of extra-judicial divorces.

A- Recognition of Divorces Granted by a Court of Law

1- Common Law Recognition Rules

It is worthy of note that the English courts were confronted with recognition problems many years before they had to face problems as to when they could themselves assume divorce jurisdiction. The difference between the English and Scots substantive laws on the subject of divorce prior to the Matrimonial Causes Act 1857 led the parties to an English marriage to cross the border into Scotland to obtain a divorce. At that time, Scottish courts held that a short residence in Scotland was sufficient to give them jurisdiction to dissolve marriage,⁽³⁾ and from time to time the courts asserted and exercised a jurisdiction upon a variety of bases to dissolve marriages which had taken place in England.⁽⁴⁾ The dissolution of English marriages by the Scottish courts raised an important question: would

2- Contrast, S.46 (1) with S.46 (2) of the Family Law Act 1986.

3- *Uttorton v. Tewsh* (1811) Fergusson's Rr.55; *Ringer v. Churchill* (1840) 2 D 307; *Show v. Show* (1851) 13 D 819; *Forrester v. Forrester* (1844) 6 D 1358.

4- *Christian v. Christian* (1851) 13 1149; *Pitt v. Pitt* (1862) 1 M 106

English courts recognise the validity of a Scots divorce? The question seems to have first undergone discussion in the case of *R.v Lolley*.⁽⁵⁾ In that case the Scots decree was rejected on the ground that no sentence of any foreign court could dissolve an English marriage. The court considered that the questions of divorce ought to be decided by the *lex loci contractus*, which could mean in the case under discussion, that a marriage contracted in England could only be dissolved in England, which at that time would only be by the Act of Parliament. It was suggested that the English court refused to recognise the Scots decree, not because of the indissoluble character of an English marriage but because Lolley had never established a Scottish domicile and therefore, an English court might recognise a foreign divorce granted by a court of domicile.⁽⁶⁾ This suggestion had been dismissed in *M'carthy v. Decaix*.⁽⁷⁾ when Lord Brougham held that the decree of the Danish court based on domicile was of no effect in dissolving an English marriage.

a- Domicile as A Basis of Recognition

The effect of Lolley's case gradually disappeared when the courts began to establish domicile as a basis of recognition of foreign divorces, particularly after the Matrimonial Causes Act 1857 came into force. In *Canway v. Beazley*,⁽⁸⁾ Lolley's case was treated as not concluding the point where the divorce was granted in the domicile. Although the decision in this case was against the validity of the divorce, the court held that if a foreign domicile had been acquired the court of such domicile could dissolve an English marriage. Similarly, in *Warrender v. Warrender*⁽⁹⁾ although the recognition of the divorce elsewhere was not strictly relevant, the House of Lords decided that the Scottish courts had jurisdiction to grant divorce in a case where the husband was domiciled in Scotland even if the marriage had been celebrated in England.

5- (1812) 1 Ru & My 237; *Tovey v. Lindsay* (1813) 1 Dow 643; *M'carthy v. Decaix* (1831) 2 Ru & My 614.

6- *Harvey v. Farnie* (1880) 5 L.R.P.D 153.

7- (1831) 2 Ru & My 614.

8- (1831) 3 Hagg Eccl 639.

9- [1835] 2 Cl& Fin.488.

After 1857, the indissoluble character of an English marriage disappeared and the effect of this fact was noticeable shortly in *Dolphin v. Robins*⁽¹⁰⁾ and *Shaw v. Gould*.⁽¹¹⁾ In the former case, recognition was refused to a Scots decree granted to parties not *bona fide* domiciled in Scotland. Lord Cranworth stated that: "the Scottish courts had no power to dissolve an English marriage where the parties are not really domiciled in Scotland".⁽¹²⁾ In the latter case, the House of Lord decided that a Scots divorce would not be recognised because the residence in Scotland did not involve the acquisition of a Scots domicile. Lord Westbury strongly urged the inconvenience of referring to the *lex loci contractus* of marriage on the subject of divorce. His Lordship held that:

"the position that the tribunal of a foreign country, having jurisdiction to dissolve the marriage of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England but who before, and at the time of, the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or consent, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's case*."⁽¹³⁾

Another step to give up the ghost of *Lolley's case* and to support the divorce pronounced in the court of domicile was taken in *Harvey v. Farnie*,⁽¹⁴⁾ in which it was held that:

"[t]he English court will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud. And this although the marriage may have been solemnised in England and may have been dissolved for a cause which would have been insufficient to obtain a divorce in England."⁽¹⁵⁾

10- (1859) 7 H.L. 390.

11- (1868) L R 3 H.L. 55.

12- *Dolphin v. Robins* (1859) 7 H.L. 390 at 444; *R v. Russel* [1901] A.C. 446.

13- *Shaw v. Gould* (1868) LR 3 H.L. 55 at 85.

14 (1882) 8 App Cas 43; *Bater v. Bater* [1906] P. 209 at 232.

15- *Harvy v. Farnie* (1882) 8 App Cas 43 at 47.

It is submitted that the decision in *Le Mesurier v. Le Mesurier*⁽¹⁶⁾ is a good authority to support the proposition that a divorce granted by the court of domicile would receive recognition in England. Their Lordships appear to have been influenced largely by what was said in *Shaw v. Gould* as to the basis of recognition of foreign divorce. Lord Watson who cited with approval Lord Westbury's view said: "when the jurisdiction of the court is exercised according to the rules of private international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be recognised by the tribunals of every civilised country".⁽¹⁷⁾

In Scotland, although judicial divorce has been available since the sixteenth century, the rules for recognition of divorces developed at about the same time as the English rules. Since *Le Mesurier v. Le Mesurier*,⁽¹⁸⁾ Scots law has accepted that the court of the domicile of the husband at the commencement of the action is, in principle, the true court of jurisdiction for a decree of dissolution of marriage by divorce. Accordingly, the law of recognition was formulated upon this principle and therefore, the courts followed the view, of the English authorities, that a foreign divorce would be recognised if it was obtained in the country in which the husband was domiciled in the sense of the Scots law. In *Humphrey v. Humphrey, T R*,⁽¹⁹⁾ Lord Moncrieff stated:

"Where the parties have been throughout domiciled abroad, the Courts of this country would give effect to a decree of divorce pronounced by the Court of the foreign domicile, although it might be granted upon a ground on which the Court of this country would not grant divorce to persons domiciled here, provided always that the ground of divorce was not repugnant to the standard of morality recognised by a civilised and Christian State".

16- [1895] A.C 517.

17- Ibid, at 527.

18- [1895] A.C 517.

19- (1895) 3 S.L.T 151 at 152; *Calder v. Calder*, 1901.8 S.L.T330; *Crabtree v. Crabtree*, 1929. 8 S.L.T 675; *Scott v. Scott*, 1973 S.L.T 632.

b- Divorce Recognised by a Court of Domicile

Since a decree of divorce affects status and all matters of status are subject to the law of domicile,⁽²⁰⁾ it was held to follow that a divorce granted in a court other than that of domicile would be recognised if it was recognised by the court of that domicile. The case which established this rule is *Armitage v. Attorney-General*,⁽²¹⁾ in which Mrs. Gilling, an Englishwoman married in England Mr. Gilling, an American citizen domiciled in New York, but temporarily resident in England. Eight years later the wife went to Yankton, in the state of South Dakota, and one of her objects in doing so was to institute proceedings there for divorce. After residing for 90 days there, she obtained a decree of divorce from the court of the state of South Dakota. Later on she married an Englishman domiciled in England named Armitage. She then petitioned the English court for a declaration that her second marriage was valid. On the facts of the case, the English court found that the husband's domicile of origin was at all material times in New York and by operation of law, the wife's domicile at the time of the South Dakota decree was in New York. The wife acquired a domicile in South Dakota in the New York sense, but not in the English sense, hence insufficient to entitle the decree of divorce granted to her in South Dakota to be recognised in England on ordinary reasoning. However, expert evidence was shown that in the state of New York the divorce would be recognised as valid.

Sir Gorell Barnes P. who held that the English court should recognise the South Dakota decree, asked himself "Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the husband"? Relying on the fact that the question of personal status depends on the law of domicile, the learned judge then concluded that "In my view, this question must be answered in the affirmative".⁽²²⁾

²⁰- Dicey & Morris, 8th ed., P. 311; Cheshire, 6th ed., P. 395.

²¹ -[1906] P.135. Discussed Morris, *Recognition of Divorces Granted outside the Domicile*, (1946) 24 Can.Bar.Rev 71; Raphael Tuck, *Recognition of Foreign Divorces: A Reply to A criticism*, (1947) 25 Can.Bar Rev 226.

²²-At, 141, 142.

This case was followed in *Clark v. Clark*⁽²³⁾ and its principle was recognised in *Cass v. Cass*⁽²⁴⁾ where an English court refused to recognise the South Dakota decree because it was proved that the law of Massachusetts, where the husband was domiciled, would not have recognised it. *Armitage v. A.G* was followed in the Scottish case of *Mckay v. Walls*,⁽²⁵⁾ in which Lord Birnam held that the Iowa decree must be recognised as valid in Scotland because there was evidence that such a decree would be recognised as valid in the state of the husband's domicile, i.e. New York.

In the light of the discussion above, it appears that no foreign divorce would be recognised unless jurisdiction had been assumed on the basis of domicile in the English or Scottish sense. Since a wife could not acquire a separate domicile from that of her husband,⁽²⁶⁾ the principle of recognition was that a divorce pronounced by a foreign court would be recognised as valid if the husband was at the time of proceedings domiciled in the country where the divorce was granted or in a country where such a divorce was recognised. Therefore, nothing less than domicile is sufficient,⁽²⁷⁾ even though the parties are foreigners who were married abroad. Nationality, residence and the place of celebration of marriage are irrelevant. Moreover, if the courts consider that the foreign court had jurisdiction on the basis of domicile, the grounds of divorce in the foreign forum are irrelevant.⁽²⁸⁾

23- [1921] 37 T.L.R 815.

24- [1910] 26 T.L.R 305.

25- 1951 S.L.T (Notes) 6 ; *Perin v. Perin*, 1950 S.L.T 51; *Duffes v. Duffes*, 1971 S.L.T (Notes) 83; See, Duncan & Dykes, op.cit .p 166; Walton, *Husband and Wife According to the Law of Scotland*, 3rd-ed. Edinburgh, W.Green & Son (1951), P. 368; Westlake, op.cit.p. 86.

26- See, *Supra*, 31.

27- But See, Colonial and Other Territories (Divorce Jurisdiction) Acts 1926-1950. These Acts are repealed by the Family Law Act 1986, S.68 (2) and Sched, 2.

28- *Bater v. Bater* [1906] P.209 at 217; *Harvey v. Farnie* (1882) 8 App Cas; *Manderson v. Sutherland* (1899) 1 F 621; *Metzger v. Metzger* [1937] P.19; *Humphrey v. Humphrey's TR* (1895) 3 S.L.T 151; *Perin v. Perin* 1950 S.L.T 51; *C D v. A B* 1908 S.C 737,739; *Westergoard v. Westergoard* 1914 S.C 977; See, Dicey & Morris, 12 ed, p.730; Westlake, op.cit.P. 97; Webb, *The Old order changeth-Travers v. Holley: Reinterpreted* (1967) 16 I.C.L.Q.997 at 1004; North, op.cit.(1977) P. 158; Mc'lean, op.cit.P. 37.

It is clear that the law as to recognition of foreign divorces was a mirror image of the domestic jurisdictional rules. The symmetry between divorce jurisdiction and the recognition of foreign divorces provided no solution to divorces granted on a jurisdictional basis other than domicile. Many countries in the World have adopted nationality or residence as a basis for divorce jurisdiction. To refuse recognition to divorce obtained in such circumstances is to increase the number of "limping marriages" and to cause hardship to the person affected.⁽²⁹⁾ At the time when the *Le Mesurier* case was decided Bar had written that:

"In action of divorce-unless there is some express enactment to the contrary- the judge of the domicile or nationality is the only competent judge". And he adds "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicile or nationality, is to be regarded in all other countries as inoperative".⁽³⁰⁾

Although Lord Watson quoted Bar in the *Le Mesurier* case, his Lordship entirely ignored nationality and enunciated the principle that domicile should be the exclusive test as he thought this was consistent with the practice in all civilised countries. Lord Reid in *Indyka v. Indyka*⁽³¹⁾ suspected that the rule in *Le Mesurier* would keep English law in line with other civilised practice. "It is just possible" his Lordship suggests "that [the Privy Council] were actuated by the hope, common in Victorian times, that if England showed the way, others would see the light and follow: if so, any such hope has been grievously disappointed."

Relying on the fact that divorce jurisdiction is exercised on different bases in different

29- See, Royal Commission on Marriage and Divorce, 1951-55, Com. 9678.P.226; Gordon Bale, *Recognition of Foreign Decrees-A "Proper Forum" A Forum with which the Petitioner has Substantial and Real Connection in Indyka v. Indyka* (1968) 46 Can.Bar.Rev 113 at 116.

30 Bar, op.cit.pp. 382,383; *Deck v. Deck* (1860) 2 SW & TR.90 suggested that nationality was a jurisdictional basis for divorce in England, and there are statements in *Metzger v. Metzger*[1937] P.19 at 22-25,28-29 conveying the notion that the decree of the courts of the parties' nationality should be recognised.

31- [1967] 2 All.E.R 689 at 700.

countries, the House of Lords indicated that the courts should no longer delude themselves with the comforting thought that domicile is the determinant of the personal law of persons in all countries and that jurisdiction to grant divorce is based primarily on domicile. Thereupon, *Le Mesurier* should not be followed in so far as it laid down a rule that only decrees of the courts of the domicile should be recognised.⁽³²⁾ Accordingly, the principle of domicile in the *Indyka* case lost its position as the only basis of recognition of divorces when their Lordships set out an "entirely new test or tests of recognition"⁽³³⁾ as we shall see later. So far as domicile at the present discussion is concerned, it is interesting to note that although the House of Lords approach was to depart from the old principle that domicile should be the only basis of recognition, their Lordships agreed, with varying degrees of emphasis, that domicile must remain the primary basis. Moreover, Lord Pearson was prepared to recognise a foreign divorce granted by a court of domicile according to a less exacting definition than that applied in England. Since some countries allow a wife to acquire domicile separate from that of her husband for the purpose of suing for divorce, his Lordship suggested that there was no reason for refusing recognition of divorce obtained in such circumstances.⁽³⁴⁾

This approach has been achieved incidentally in the Family Law Act 1986 in which a foreign divorce will be recognised if either party at the date of the commencement of the proceedings was domiciled, either in the United Kingdom or foreign sense, in the country where the divorce was obtained.⁽³⁵⁾ This provision recognises and accepts that the essential rules or components of domicile vary (even) among those countries of the world which adopt domicile as the personal law.

As regards the rule of *Armitage v. A.G.*, all their Lordships⁽³⁶⁾ except Lord Reid

32 - Webb, (1967) 16 I.C.L.Q. 997 at 1003; Gordon Bale, (1968) 46 Can.Bar.Rev 113 at 120.

33- *Angelo v. Angelo* [1968] 1 W.L.R. 401 at 405; *Brown v. Brown* [1968] 2 W.L.R. 969

34- *Indyka v. Indyka* [1967] 2 All.E.R. 689 at 730, 731; See, Lipstein (1967) G.L.J. 183.

35- S.46 (1) (2) and (5); See, also S.3 (2) of the 1971 Act; *Messina v. Smith* [1970] P. 322 at 339; *Lawrence v. Lawrence* [1985] 2 All.E.R. 733 at 745.

36- *Indyka v. Indyka* [1967] 2 All.E.R. 689 at 706 *per* Lord Morris at 714 *per* Lord Pearce at 726 *per*

agreed that this rule must be maintained as supplementary to the jurisdiction of the court of domicile. There is no doubt that this rule enabled many divorces granted in some countries to be recognised in England and Scotland, although the parties were not domiciled in the country where the divorce was granted. In practice, this rule is regarded as a good step to reduce the number of "limping marriages"⁽³⁷⁾ Most academic authorities welcomed this rule⁽³⁸⁾ and it remained a good law until 1986 when the Family Law Act 1986 abolished it following the recommendation of the Law Commissions⁽³⁹⁾ for reasons which will be considered later.⁽⁴⁰⁾

c- Recognition Based on *Travers v. Holley* Rule

From 1937 statutory provisions existed within the United Kingdom conferring jurisdiction on bases other than domicile in special cases of hardship, viz. the Acts of 1937, 1944 and 1949. This departure from the domicile principle raised the question whether the courts would recognise decrees granted by a non-domiciliary court, but under circumstances where the English and Scottish courts have themselves the power to entertain jurisdiction.⁽⁴¹⁾ It was argued that the general rule requiring domicile as the test to determine the validity of foreign divorces should remain without change, because the Acts of 1937 and 1949 contained no provisions in regard to recognition of foreign divorces. If the rule of recognition was to be changed, it should be changed by legislation, as was done in the 1944 Act.⁽⁴²⁾ This approach received support from the Scottish courts in *Warden*

Lord Wilberforce.

37- Morris, (1946) 24 Can.Bar.Rev.71 at 81; Falconbridge, op.cit.P.619.

38- Westlake, op.cit.pp .86, 87; Falconbridge, op.cit p .617; Raphael Tuck, (1947) 25 Can.Bar.Rev 226; Cheshire, 6th ed., p. 394. The actual decision was criticised by Dr. Morris, (1946) 24 Can.Bar.Rev.71 at 75. "The case was wrongly decided and that the doctrine is an inadequate mitigation of the iron-clad rule that jurisdiction to divorce depends upon domicile alone".

39- Law Com No. 137 & Scot Law Com No. 88. *Recognition of Foreign Nullity Decrees and Related Matters* (1984) paras 6.24-6.30.

40- See Infra, 161.

41 -Sec, Castel, *Validity of Foreign Decrees Based on Jurisdictional Ground not Recognised in English Law at the Time when Obtained*, (1967) 45 Can Bar Rev 140 at 142.

42- Dicey, 6th ed , pp. 315-316; Cheshire, (1945) 61 L Q Rev 368; Cf J.Gow, *Travers v. Holley*:

v. Warden,⁽⁴³⁾ in which Lord Strachan refused to recognise a divorce obtained by the wife from the courts of Nevada on the jurisdictional basis of six weeks' residence, on the ground that Nevada was not the court of the husband's domicile. The learned judge said:

"The Act of 1949 extends the jurisdiction of the Court of Session, but it makes no provision whatever in regard to the recognition of foreign decrees of divorce. Had it been the intention of Parliament that the law as to the recognition of foreign decrees should also be changed, some provision to that effect would have been made".⁽⁴⁴⁾

The argument based on the intention of Parliament seems unconvincing because it is submitted that the law relating to the recognition of divorces was judge made law. There was no reason why the courts should not recognise divorces granted on jurisdictional bases similar to that conferred on the English and Scottish courts by the 1937 and 1949 Acts. To recognise such decrees was to promote a better understanding in the international sphere and possibly to secure wider recognition of English and Scottish decrees. One commentator was writing that "If the facts are such that the courts of the forum would have jurisdiction, on proper cause, to grant a divorce, then it is my submission that it should recognise a divorce granted elsewhere on the basis of the same facts-regardless of any question of domicile."⁽⁴⁵⁾ The Court of Appeal accepted this argument, embodying the principle that the English court should recognise a foreign divorce decree obtained in jurisdictional

Recognition of Foreign Divorces-Domicile, (1954) 3 I.C.L.Q.152 at 154; S.4 of the 1944 Act provided that the English and Scottish courts are to recognise any decree or order made by virtue of this Act or by virtue of any law of Her Majesty's dominions outside the United Kingdom, or of any British protected state, which has been declared by order in council to be a law substantially corresponding to the provision made in respect of Great Britain by the Act, provided that reciprocity of treatment is granted to English or Scottish decrees. This Act is repealed by the Family Law Act 1986, S.68 (2) and Sched.2.

43- 1951 S.C.508.

44- Ibid, at 511.

45- Griswold, (1965) 65 H.L.R193 at 227-228; Westlake, op.cit.p. 84; Graveson, *Arnold v. Arnold: Divorce-Recognition of Foreign Decrees Based on Residence* (1957) 6 I.C.L.Q.351at 352; Mann, *Recognition of Foreign Divorces*, (1954) 17 M.L.Rev 79 ; Wickens, *Recognition of Foreign Divorces-Domicile*,(1945) 23 Can.Bar.Rev.244 at 247 ; Kennedy, "Reciprocity" in the *Recognition of Foreign Judgments: the Implication of Travers v. Holley* (1953) 32 Can.Bar.Rev.359.

circumstances where, *mutatis mutandis*, the English court would have had jurisdiction.

The leading case in this point is *Travers v. Holley* (46) in which a husband and wife, domiciled in England, after their marriage emigrated in 1938 to Sydney, New South Wales, where the husband was held to have acquired a domicile of choice. In 1940, he abandoned both his wife and his domicile and returned to England. In 1943, the wife petitioned the court of New South Wales for divorce on the ground of his desertion. The decree was granted and made absolute in 1944. The court of New South Wales assumed jurisdiction under section 16 (a) of the Matrimonial Causes Act 1937, which is substantially identical to English section 13 of the Matrimonial Causes Act 1937. Later, the husband, whose second marriage proved unsatisfactory, petitioned the English courts for divorce from the first wife on the ground that he had never acquired a domicile of choice in New South Wales and therefore, that the decree granted by the court of that state was invalid. This raised the direct issue of the recognition of the New South Wales divorce.

The Court of Appeal, without considering *Warden v. Warden*(47) held that the decree, though not given by the court of the domicile, must be recognised as valid. Both Somervell L.J. and Hodson L.J. pointed out the relevant provisions of the two Matrimonial Causes Acts; although different in wording, the result for the present purpose was the same. Hodson L.J. said:

"It must surely be that what entitles an English court to assume jurisdiction, must be equally effective in the case of a foreign court. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves." (48)

46 -[1953] P.246; Discussed, Thomas, *Note on Travers v. Holley*, (1954) 31.C.L.Q156; Gow, *The External Effects of the Travers v. Holley Doctrine* (1954) 3 I.C.L.Q152; Chon, (1958) 7 I.C.L.Q 637. It was applied in *Carr v. Carr* [1955] 1 W.L.R 422; *Jackman v. Jackman*[1956] Reported in [1957] 2 W.L.R 317; *Brown v. Brown* [1968] 2 All.E.R11.

47- 1951 S.C.508.

48- *Travers v. Holley* [1953] P.246 at 259.

The decision in *Travers v. Holley* was a significant development in the common law and its precedent value in removing much hardship cannot be denied.⁽⁴⁹⁾ The decision was also a significant forward step in the spirit of internationalism. It had the effect of equating the rule for recognition with the jurisdictional rules. This was likely to help in the avoidance of "limping marriages". It is interesting to note that all the judges in the House of Lords in the *Indyka* case agreed that *Travers v. Holley* was rightly decided and its doctrine received approval by the three judges. In the view of Lord Morris the decision followed "quite naturally" and "was both reasonable and desirable".⁽⁵⁰⁾ Lord Pearce said "It has worked well and it has removed much hardship. In my opinion it would be wrong to overrule or narrow it. One should rather broaden it" ⁽⁵¹⁾ On the other hand, Lord Reid and Lord Wilberforce disapproved of the rigidity of the doctrine of *Travers v. Holley*. Lord Reid was of the view that the doctrine would not lead to a rational development of the law. To adopt this doctrine with regard to the 1949 Act would lead to very undesirable consequences.⁽⁵²⁾ Lord Reid's criticism would seem to stem from his disapproval of the domestic jurisdictional rules. Having roundly condemned these rules, it is not surprising that he condemned a recognition rule based thereon. Lord Wilberforce did not find it necessary to discuss this case since he said that he was in general agreement with what Lord Reid had said about it. In his view the rule should be demoted to "no more than a general working principle that changes in domestic jurisdiction should be taken into account by the courts in decisions as to what foreign decrees they will recognise."⁽⁵³⁾

Another criticism of *Travers v. Holley* came from Lord Morris who rejected the justification of this rule on the principle of reciprocity which is given by Hodson L.J.:

49- Kennedy, *Recognition of Foreign Divorces: The Effect of Travers v. Holley*, (1955) 4 I.C.L.Q.389; (1953) 32 Can.Bar.Rev.361; Mann, (1954) 17 M.L.Rev 79 ; Ziegel, *Foreign Divorces*, (1953) 31 Can.Bar.Rev.1077; Gow, (1954) 3 I.C.L.Q152; Graveson, (1954) 17 M.L.Rev 501.

50- *Indyka v. Indyka* [1967] 2 All.E.R 689 at 708.

51- Ibid, at 715; See also, at 729 *per* Lord Pearson.

52- Ibid, at 696.

53- Ibid, at 727.

"There is peril in assuming that only our rules are rational and justifiable. Looking back upon the course of judicial decisions, it is readily seen that though doctrine evolved one way, it might quite easily have evolved another. This leads me to the view that no essential or fundamental superiority of our basis for jurisdiction can be claimed over all others." (54)

Some academic opinion⁽⁵⁵⁾ argued that the decision in *Travers v. Holley* was bad law on the ground that it was inconsistent with the decision of the House of Lords in *Shaw v. Gould*⁽⁵⁶⁾ and with the judgment of the Privy Council in *Le Mesurier v. Le Mesurier*.⁽⁵⁷⁾ This kind of argument is unacceptable because it is submitted that at the time of the Scottish divorce in *Shaw v. Gould*, an English marriage was absolutely indissoluble except by private Act of Parliament. Therefore, how could any question of reciprocity in regard to the recognition of foreign divorce possibly have arisen in such circumstances? On the other hand, the Court of Appeal did not act against the *Le Mesurier* case. In any event, *Shaw v. Gould*, raises many subtle questions, and is a case about which much has been written; the decision in *Le Mesurier* it could be argued, held back the development of the law for many years. What the court did in *Travers v. Holley* was that both Somervell L.J. and Hodson L.J. cited a dictum of Lord Watson:

"A decree of divorce a vinculo pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it entrenches upon the interests of any country to whose tribunals the spouses were amenable, claim extra-territorial authority". (58)

And they pointed out that the New South Wales court was not exercising a jurisdiction solely derived from a rule of municipal law peculiar to its forum and that therefore Lord Watson's dictum did not apply. In other words, the Court of Appeal was able to employ this negative passage of Lord Watson in a positive and affirmative sense to uphold the New

54 -Ibid, at 708; See also, Diplock L.J. in the Court of Appeal [1966] 3 All.E.R 583 at 587.

55 -Blackburn, *Recognition of Foreign Divorces: The Effect of Travers v. Holley*, (1954) 17 M.L.Rev 471; Thomas, (1953) 3.I.C.L.Q 156.

56- (1868) L.R.3H.L.55.

57- [1895] A.C.517.

58-*Le Mesurier v. Le Mesurier* [1895] A.C.517 at 528.

South Wales decree. Hodson L.J. said that "the principle laid down and followed since the *Le Mesurier* case must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of a person not domiciled here".⁽⁵⁹⁾

In Scotland, as Professor Anton pointed out,⁽⁶⁰⁾ it is not clear whether the rule in *Travers v. Holley* formed part of the law. There were no reported cases dealing with this rule until the decisions in *Galbraith v. Galbraith*⁽⁶¹⁾ and *Bain v. Bain*,⁽⁶²⁾ in which the *Indyka* case was followed. The statement of Lord Wheatley in *Galbraith v. Galbraith*⁽⁶³⁾ may lead us to think that the Scottish court would recognise the foreign divorce on the principle of *Travers v. Holley*. His Lordship in deciding the case before him referred to the decision of the House of Lords in the *Indyka* case and said that

"that was an English case dealing with English law, but I do not believe that different considerations and arguments would have prevailed if the case had been a Scottish one, involving as it did questions of private international law. While technically that decision is not binding on Scottish courts, the opinions expressed by their Lordships must be regarded as being of the highest standing and persuasion. While the laws of Scotland and England are separate and self-contained systems, and are accordingly capable of being different, it would be most unfortunate if the principle of recognition of foreign jurisdiction were to be different in the two countries."

On the same point the Law Commissions concluded that the approval by various members of the House of Lords in *Indyka* of the principle of *Travers v. Holley* might cause the Scottish court to adopt it.⁽⁶⁴⁾

59- *Travers v. Holley* [1953] P.246 at 257.

60 -2nd- ed., P. 468.

61- 1971, S.C.65.

62- 1971, S.C.146.

63- 1971, S.C.65 at 68.

64- Law Com.No. 34 & Scots Law Com No.16. p. 3.

1- Modern Interpretation of *Travers v. Holley*

The decision of the Court of Appeal in *Travers v Holley* meant the formulation of the new rule in the field of recognition of foreign divorces according to which a decree of divorce pronounced by a foreign court was recognised as valid if it was founded on circumstances in which a court in the United Kingdom would assume jurisdiction.⁽⁶⁵⁾ This rule raised the question of whether the English court should seek similarity of jurisdictional requirement in the English law and the relevant foreign law or whether the English court could look at the actual facts of the case on which the foreign decree had been granted to decide whether *mutatis mutandis* the English court would be enabled to assume jurisdiction on these facts.⁽⁶⁶⁾

In *Dunne v. Saban*,⁽⁶⁷⁾ Davies J. who adopted the principle of seeking similarity in the specific provisions, found that there was no sufficient degree of similarity between the jurisdiction exercised by the Florida court and that under section 18 (1) (a) of the Matrimonial Causes Act 1950 and so he refused recognition of a decree granted by the Florida court to a wife deserted by a husband domiciled there until the resumption of his English domicile of origin. The Florida court based its jurisdiction on the ground of domicile [a domicile separate from that of her husband, as is permitted in the United States] plus 90 days' residence. Although the wife had been resident in Florida for two years immediately preceding the presentation of her petition, the learned judge limited himself to looking at the substantial similarity in statutory provision as to jurisdiction and it was sufficient for him that the period of residence required of the wife under the law of Florida-90 days-bore no adequate resemblance to the three years' period which is the foundation of

65- Mann, (1954) 17 M.L.Rev 79.

66- See, Graveson, *Arnold v. Arnold-Divorce Recognition of Foreign Decrees Based on Residence* (1957) 6 I.C.L.Q.351.

67- [1955] P.178, Discussed Thomas, (1955) 4 I.C.L.Q.220; Sinclair, (1954) 31 B.Y.B.I.L.472; Carter, (1959) 35 B.Y.B.I.L.226; Kennedy, *Recognition of Foreign Divorces: The Effect of Travers v. Holley*, (1955) 4 I.C.L.Q.389.

the extraordinary competence of an English court.

Apart from this case the rule in *Travers v. Holley* had developed in a liberal manner and was moving forward, namely from the jurisdictional requirement to the factual position.⁽⁶⁸⁾ This development was initiated in *Robinson-Scott v. Robinson-Scott*,⁽⁶⁹⁾ which established that the true rule in *Travers v. Holley* is not that an English court will recognise a foreign divorce when the rule by virtue of which the foreign court assumes jurisdiction is similar to a rule which would confer jurisdiction on an English court but rather that an English court will recognise a foreign divorce wherever the circumstances were similar to those in which an English court would assume jurisdiction. It is the facts of the case not the content of the jurisdictional rules which must be investigated.⁽⁷⁰⁾ The facts in that case were: The husband, of British nationality and domiciled at all material time in England, married in Switzerland a Swiss woman who all her life had been domiciled in Switzerland and never left that country even after her marriage. There was a short honeymoon in Switzerland after which the husband returned to England and the parties never lived together again. The wife obtained a decree of divorce in the District court of Zurich, the court assuming jurisdiction on the basis that the wife had, in the circumstances, acquired a separate domicile from that of her husband and that her domicile was in the canton of Zurich. The Zurich court was informed that by English law the domicile of the wife would remain that of her husband during the marriage, notwithstanding her separation from him, but nevertheless the court applied the provisions of the Swiss Civil Code, which allowed her to acquire a separate domicile, and assumed jurisdiction upon that basis. Four years later the husband petitioned in England for a declaration that his marriage had been validly dissolved by the Swiss decree.

68- See, Graveson, 6th ed , p. 318.

69- [1958] P.71; discussed Carter, (1959) 35 B.Y.B.I.L.265; Webb, (1958) 21 M.L.Rev 169; Graveson, (1958) 7 I.C.L.Q.166. Followed in *Manning v. Manning* [1958] P.112; discussed Carter, (1958) 35 B.Y.B.I.L.267; Webb, (1958) 7 I.C.L.Q.374.

70- Castel, (1967) 46 Can.Bar.Rev 144; Carter, (1958) 35 B.Y.B.I.L.265; Webb, *Lossening the Bonds of Lord Advocate v. Jaffrey*, (1958) 21 M.L.Rev.169 at 171; (1952) 2 I.C.L.Q.324; Dicey & Morris, 8th-ed.p.313; Cheshire & North, 8th ed , p. 359.

Although the jurisdiction of the Zurich court was based on a concept of domicile wholly unrecognised by English law, Karminski J. nevertheless recognised the Swiss divorce on the ground that the wife had been resident in Switzerland for at least three years immediately preceding the presentation of her petition. The learned judge cited the Griswold's statement⁽⁷¹⁾ and noted that the Court of Appeal in *Travers v. Holley* had lifted the heavy hand of the *Le Mesurier* case or at least mitigated its weight. The learned judge then said:

"where, in fact, there has been three years residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction because it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act 1950. It is sufficient that facts exist which would enable the English court to assume jurisdiction."⁽⁷²⁾

Karminski J. considered the period of three years to be essential.⁽⁷³⁾ In dealing with *Dunne v. Sahar*,⁽⁷⁴⁾ he pointed out that the wife in this case had been resident in Florida

71- (1951) 65 H ar.L.R.193 at 231 "If the heavy hand of the *Le Mesurier* case can be lifted-as to a point which was never decided in that case-the courts should have little difficulty in concluding that a common law state may properly recognise a foreign divorce granted under the factual circumstances where it would itself grant a divorce."

72- At, 88.

73 Ibid at 87. In the House of Lords in the *Indyka* case [1967] 2 All.E.R. 689, none of their Lordships was prepared to grant recognition on the basis of residence other than that falling under the *Travers v. Holley*. Lord Pearce did not express a final opinion on this point and Lord Pearson rejected recognition on the basis of merely residential qualification. Lord Reid and Lord Wilberforce expressed considerable reluctance to accept it as a general basis without qualification. Thus, Lord Reid would recognise it if the wife was habitually resident in a foreign country and had no present intention of leaving it, but he would exclude cases where the spouses went to a country where divorce is easy and stayed only a few years to obtain divorce, at pp.702,703; *Angelo v. Angelo* [1968] 1 W.L.R.401; *Welsby v. Welsby* [1970] 2 All.E.R.467. Lord Wilberforce would recognise divorce given to wives by the court of their residence wherever a real and substantial connection is shown between the petitioner and the country exercising jurisdiction, but he placed on future courts the duty to consider the length and quality of the residence. at p.727.

74 -[1955] P.178.

for more than two years before the proceedings commenced, whereas in the case before him the wife had been resident in Zurich for over three years. The learned judge then agreed with Davies J. that an English court should recognise the right of a foreign court to encroach upon the principle of domicile only to the extent to which an English court also does. On the other hand, he disagreed with Mr. Commissioner Latey in *Arnold v. Arnold*,⁽⁷⁵⁾ that the period of residence by the law of a foreign court to found jurisdiction is immaterial.⁽⁷⁶⁾ He thought rather that if similarity is the basis of recognition, there must be similarity in facts thought not in terminology.⁽⁷⁷⁾ Thus, the rule in *Travers v. Holley* was refined by Karminski J to the effect that it was sufficient for the English court to recognise a foreign divorce if the facts of the case were such as would enable the English court to assume jurisdiction even if the foreign court did not assume jurisdiction on grounds similar to those in English law.

2- Strict Interpretation of *Travers v. Holley*

Although the rule in *Travers v. Holley* had developed in a liberal manner, it is interesting to note, on the other hand that the English courts in some cases interpreted this rule strictly because the recognition of foreign divorces in such cases would go much further than the principle embodied in *Travers v. Holley*.⁽⁷⁸⁾ Thus in *Levett v. Levett* and *Smith*,⁽⁷⁹⁾ the English court refused to recognise the German decree on the ground that it had been obtained by the husband, as a result of the view that the English legislation of 1950 was designed to provide relief for the wife and had no application to the situation where a divorce was granted to a husband. The House of Lords in the *Indyka* case accepted this view and concluded that the husband's residence, even if of more than three

75 - [1957] P.237; discussed Graverson, (1957) 6 I.C.L.Q.351.

76- Ibid at 253.

77- See, Carter, (1958) 35 B.Y.B.I.L.265, 266; Webb, (1958) 21 M.L.Rev 171.

78 -Graverson, 7th ed , p. 309.

79- [1957] p.156; followed in *Russell v. Russell* [1957] P.375; cf, *Tijanic v. Tijanic* [1968] P.181 in which the court recognised a foreign decree granted jointly to both parties, the relevant factor, however, being the wife's residence; See, Mackinnon, (1970) 49 Can.Bar.Rev.716 at 720.

years, would not constitute a basis for recognition.⁽⁸⁰⁾ It seems that *Travers v. Holley* created an untidy recognition situation in its differentiation between men and women and the House of Lords put the male in an inferior position in so far as recognition of foreign divorces is concerned.⁽⁸¹⁾ The justification for this distinction was put by Lord Wilberforce on the ground that "the husband retains his domicile and the right to change."⁽⁸²⁾ Having changed his domicile, he should have petitioned in England.⁽⁸³⁾

Another strict interpretation of this rule was found in *Mountbatten v. Mountbatten*.⁽⁸⁴⁾ In 1958, there was an attempt to create a more extensive recognition principle by combining the rule of *Travers v. Holley* and the doctrine in *Armitage v. A.G.*,⁽⁸⁵⁾ but this attempt failed when Davies J. refused to extend the rule of *Travers v. Holley* beyond its present limit. Accordingly, a foreign divorce would not be recognised just because it would be recognised in the jurisdiction where the wife had been resident for three years.⁽⁸⁶⁾ In this case, the husband domiciled in England, married in 1950. The couple lived in New York and in 1952 the husband returned to England and he alleged that his wife refused to follow him. The wife travelled to Mexico and petitioned for a divorce on May 21, 1954. A decree was granted on May 22, 1954. The Mexican court assumed jurisdiction on the grounds that the wife was resident in Mexico and that both parties had submitted to the jurisdiction. It was proved that the Mexican divorce would be recognised by the court of New York, where the wife was ordinarily resident from 1950 until the date of the English proceedings, in which the husband asked for a declaration that the Mexican

80 -Cf. *Munt v. Munt* [1970] 2 All.E.R.516; See, the position under SS.3 (2) and 46 of the 1971 Act and the Family Law Act 1986 respectively, *infra* 137.

81- *Indyka v. Indyka* [1967] 2 All.E. R.689 at 715.

82 -Ibid at 726.

83- Wade, "To be Resident or not to be Resident" *Recognition of Foreign Decrees of Divorce*, (1969) 32 M.L.Rev 441 at 442.

84 -[1959] P.43; discussed Carter, (1958) 35 B.Y.B.I.L.269; Webb, (1958) 8 I.C.L.Q.404; Lipstein, (1959) C.L.J.10 at 11; cf. *Mather v. Mahoney* [1968] 1 W.L.R.1773 *infra*.

85 -[1906] P.135 *supra* 128.

86- M'clean, *op.cit.*, p. 42.

decree had validly dissolved his marriage. He argued that if England would recognise a foreign divorce in cases where the domicile would recognise it, England should also recognise a decree if the place where the wife had been resident for three years or more would do so, because English legislation allowed a wife to petition for divorce in England when she had been resident there for at least three years.

Davies, J. rejected this argument on the ground that the recognition of foreign divorces is exclusively governed by domicile and therefore, the statutory exception introduced by statute must be narrowly construed. Hence, a decree recognised by a court recognised by the court of the domicile is one step too far for the English rule to operate. Lord Pearce was the only member of the House of Lords in the *Indyka* case to comment on the *Mounbatten* case. His Lordship said: "Davies J. rightly refused to apply the principle of *Armitage* to the wife's court of residence, since, though we acknowledge its right to grant her a divorce, in appropriate cases there seems no adequate reason to regard it as the arbiter on her personal law in other respects".⁽⁸⁷⁾ One can ask oneself what Davies J. achieved by refusing to combine the effect of the *Armitage* case with that of *Travers v. Holley*. There is no doubt that the Learned judge created more limping marriages when he treated the couple as still married in England while they were regarded as divorced in the United States.⁽⁸⁸⁾

D- Recognition Based on *Indyka v. Indyka*

The last common law development and more radical principle in the field of recognition of foreign divorces was found in *Indyka v. Indyka*,⁽⁸⁹⁾ in which the House of Lords, for the first time, was called upon to consider whether or not a foreign decree not granted

⁸⁷ - *Indyka v. Indyka* [1967] 2 All.E.R.689 at 717.

⁸⁸ - See, Kahn-Freund, *The Growth of Internationalism in English Private International Law*, (1960) Lionel Cohen Lecture, Hebrew Univ of Jerusalem, P.34; Cheshire, 6th ed, p. 400.

⁸⁹ - [1967] 2 All.E.R.689; [1967] 3 W.L.R.510; [1969] 1 A.C.33; discussed William Latey, Q.C. *Recognition of Foreign Decree of Divorces* (1967) 16 I.C.L.Q.982; Webb, (1967) 16 I.C.L.Q.997; North, *Recognition of Foreign Divorces Decrees*, (1968) 31 M.L.Rev.257; Mann, *Recognition of Foreign Divorces* (1968) 84 L.Q.Rev.18; Lipstein, (1967) C.L.J.182.

by the law of domicile should be recognised. Their Lordships went far beyond an appraisal of the *Travers v. Holley* rule. They made a complete re-examination and re-appraisal of the law of recognition.

The parties married in Czechoslovakia in 1938, both being Czech citizens. The husband had left Czechoslovakia at the beginning of the War and acquired a domicile of choice in England in 1946. The wife, who had always resided in Czechoslovakia, was granted a decree of divorce in January 1949, which became final in February 1949. In 1959 the husband married an English woman domiciled in England. Six years later, she petitioned for divorce in England on the grounds of cruelty. In his defence, the husband alleged that the Czech divorce was not recognised in England since he was domiciled in England at the time when it was made and therefore, his second marriage was invalid. On the question of the validity of the English marriage, Latey J. at first instance,⁽⁹⁰⁾ held that the Czech decree pronounced in 1949 was not valid in English law, with the result that there was no marriage to dissolve. He made a declaration of nullity. On appeal by the second wife, his decision was reversed by a majority of the Court of Appeal.⁽⁹¹⁾ The husband appealed to the House of Lords.

It was not clear from the judgments whether jurisdiction under Czech law depended on the nationality of the parties or the residence of the wife or both, but it had nothing to do with domicile in the English sense, because the husband and therefore, in the view of the English forum, his first wife, were domiciled in England at the time of the proceedings in Czechoslovakia. The essential question before their Lordships was whether the English court would recognise the Czech decree. The conclusion was not only that the Czech decree should be recognised⁽⁹²⁾ but there was general acceptance among all members of the House of Lords that the rules of recognition should be more broadly based than in

90- [1966] 1 All.E.R.781.

91- [1966] 2 All.E.R.583; discussed Castel, (1967) 45 Can.Bar.Rev.140.

92- See, North, (1968) 31 M.L.Rev.257at 258.

Travers v. Holley, and each "of their Lordships expresses much the same broad view of what should be the new recognition rule, although stating it in quite different terms."⁽⁹³⁾

It is submitted that the Czech decree was recognised because:⁽⁹⁴⁾ (i) the wife was ordinarily resident in Czechoslovakia for three years immediately preceding the institution of the proceedings there, and it was immaterial that the decree was granted before the Law Reform (Miscellaneous Provisions) Act 1949 came into force.⁽⁹⁵⁾ The Czech decree was granted several months before the 1949 Act came into force. This raised the question of time, viz whether the principle of *Travers v. Holley* could be made retrospective to divorces granted before the coming into effect of the statutes extending the domestic jurisdiction. Latey J. at first instance⁽⁹⁶⁾ and Russel L.J. in the Court of Appeal⁽⁹⁷⁾ held that the rule in *Travers v. Holley* could not be invoked to cover foreign decrees granted before the English law was extended. Lord Denning M.R.⁽⁹⁸⁾ and Diplock L.J.⁽⁹⁹⁾ in the Court of Appeal took the view that the principle of *Travers v. Holley* could be made retroactive to divorces granted before the date of the statutory extensions of the domestic jurisdiction. Lord Denning M.R. pointed out that the principle of *Travers v. Holley* was judge made- law, and nothing else; and the judge could make it retrospective if it was just and proper so to do. In his opinion, it was the policy of the English law that it should be so.⁽¹⁰⁰⁾ Diplock L.J. based his decision on the public policy of avoiding limping marriages.⁽¹⁰¹⁾ In sum, the House of Lords has approved the view that the operation of

93- *Angelo v. Angelo* [1968] 1 W.L.R.401 at 403, *per* Ormrod J.

94-William Latey, (1967) 16 I.C.L.Q.at 982; Morris, *Cases on Private International Law*, p.152; Graveson, 7th ed, p. 316.

95- [1967] 2 All.E.R.689 at 708 *per* Lord Morris, at 718 *per* Lord Pearce, at 741 *per* Lord Pearson.

96-[1966] 1 All.E.R.781.

97 -[1966] 3 All.E.R.583 at 591; See, Dickey & Morris. 7th ed , p. 322; Morris, (1966) 15 I.C.L.Q.422 at 425.

98 [1966] 3 All.E.R.583 at 584-586.

99- *Ibid* at 587-591; See, Grodecki, (1958) 35 B.Y.B.I.L.63; Korah, *Recognition of Foreign Divorces Decrees*, (1957) 20 M.L.Rev. 278 at 280; Webb, (1958) 17 I.C.L.Q.384; Cowen & DaCosta, *Matrimonial Causes Jurisdiction* (1961), p.86.

100 *Ibid* at 586.

101- *Ibid* at 591; cf, 592 *per* Russel L.J.

the English recognition rule based on *Travers v. Holley* is retrospective.⁽¹⁰²⁾

(ii) Czechoslovakia was the last matrimonial home of the parties and the petitioner continued to live there after her husband left. Lord Reid was the only member to advocate the old conception of the matrimonial home. It would be a test available to both husband and wife, though his Lordship made it clear that it would continue in favour of a deserted wife.⁽¹⁰³⁾

(iii) Czechoslovakia was the national law of the parties. All the members of the House of Lords, except Lord Reid, agreed, with varying of emphasis, that nationality should be a basis of recognition of foreign divorces.⁽¹⁰⁴⁾ Lord Pearce held that decrees of the court of the nationality, when jurisdiction was taken on the ground of the nationality, should be recognised.⁽¹⁰⁵⁾ His Lordship would also recognise a foreign divorce, if it was recognised by the court of either spouse's nationality by virtue of the rule of *Armitage v. A.G.*⁽¹⁰⁶⁾ Lord Pearson agreed with Lord Pearce in recognising, subject to appropriate limitation, a divorce granted on the basis of nationality. His Lordship was also prepared to extend recognition to the assumption of jurisdiction based on a separate nationality allowed to a married woman for the purpose of matrimonial proceedings, but nationality in his view was insufficient to found jurisdiction if, e.g. there was no longer any real and substantial connection between the petitioner and the country of nationality.⁽¹⁰⁷⁾ Lord Wilberforce appears to have been prepared to recognise nationality as a connecting factor, but combined

¹⁰² -[1967] 2 All.E.R.689 at 708, 716, 718, 731.

¹⁰³- Ibid at 699-703; Webb, (1967) 16 I.C.L.Q.1011 at 1012; Lipstein, (1967) C.L.J.183 at 184; North, (1967) 31 M.L.Rev. at 274; Mann, (1968) 84 L.Q.Rev.at 20; cf, generally the matrimonial home argument found before 1895 (*Le Mesurier*) supra, 51.

¹⁰⁴- See, North, (1967) 31 M.L.Rev. at 272; Gordon Bale, (1968) 46 Can.Bar.Rev.at 116; Mann, (1968) 84 L.Q.Rev.at 21. Before Indyka case, English court recognised German divorce on the ground of nationality in *Metzger v. Metzger*[1936] 3 All.E.R.130. This case was neither discussed in the House of Lords, nor, apparently, cited to the court.

¹⁰⁵ -At, 718.

¹⁰⁶ -Ibid at 718; See also, The Royal Commission on Marriage and Divorce, Comd.9678.p. 204, 226.

¹⁰⁷ -Ibid at 730-731.

with other factors, like residence.⁽¹⁰⁸⁾ Lord Morris was of the opinion that nationality was a connecting factor which in the case before him justified the recognition of the Czech decree.⁽¹⁰⁹⁾

There is no doubt that the approach of the House of Lords in extending the law of recognition to comprehend divorces granted by a court where the parties are nationals would amount to a reasonable exercise of the duty of the courts to reduce limping marriages. It is submitted on the other hand that the view of the House of Lords in deciding in favour of nationality as a basis in recognising foreign divorces was not clear, because each member expresses his view of nationality in general and without attempting to solve difficulties which may arise with this basis, as in cases where the parties have different nationalities or one of them has more than one nationality or in cases where the law of nationality is a composite state.

(iv) Finally, the Czech divorce was recognised because there was a real and substantial connection between the petitioner and the country in which the divorce was granted. What is a real and substantial connection, and what constitutes the minimum relationship between the parties and the jurisdiction granting divorce which qualify as a substantial and real connection?⁽¹¹⁰⁾ Some guide-lines were laid down in the *Indyka* case itself and thereafter the courts developed and gave more specific content to this term. Lord Wilberforce said:

"How far should this relaxation go? In my opinion, it would be in accordance with the development that I have mentioned and with the trend of the legislation- mainly our own but also that of other countries with similar social systems- to recognise divorce given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use this expression so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such

¹⁰⁸- Ibid at 726.

¹⁰⁹-Ibid at 708.

¹¹⁰-See, Gordon Bale, (1968) 46 Can.Bar.Rev 122, 123.

other factors as nationality which may reinforce the connection. Equally they would enable the courts (as they habitually do without difficulty) to reject residence of the passage or residence, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give."⁽¹¹¹⁾

Although a real and substantial connection⁽¹¹²⁾ did not constitute the *ratio decidendi* of the majority in the *Indyka* case and some individual judges have expressed doubts,⁽¹¹³⁾ it has come to be accepted in many cases as embodying the *ratio* and was a basis for recognition.⁽¹¹⁴⁾ In the cases immediately following *Indyka*, the judges did not expressly state what the *ratio* was. Thus, Ormrod J. in *Angelo v. Angelo*,⁽¹¹⁵⁾ appears to accept counsel's formulation of the *ratio decidendi*. He stated that:

"each of their Lordships expresses much the same broad view of what should be the new recognition rule, although stating it in quite different terms. Counsel submits that the real *ratio decidendi* of that case probably is to be found in Lord Morris of Borth-Y-Gest's speech, in which he speaks of it being necessary for the party obtaining the decree to have a real and substantial connection with the country pronouncing the decree".⁽¹¹⁶⁾

Since *Mather v. Mahoney*⁽¹¹⁷⁾ and *Blair v. Blair*,⁽¹¹⁸⁾ the courts generally accepted

¹¹¹- At, 727; See also, at 731 *per* Lord Pearson.

¹¹²- The meaning of this term was examined in *Alexander v. Alexander*, [1969] 113 S.O.L.J.344; where recognition was granted to a decree of the court of a jurisdiction in which the wife had resided for a bout eighteen months, Karminski L.J. said "when she commenced proceedings, the wife had a real and substantial connection with Ohio. Because she went there with her children, to join her parents there, the connection was a 'real one'. It was 'substantial' because she had gone to the United States on a permanent or immigrant's visa. Moreover, since she had obtained the decree of divorce, she had been living in Ohio as the wife of the co-respondent. It was proper to recognise the Ohio decree as a valid decree of dissolution of the marriage."

¹¹³- Ormrod J. in *Messina v. Smith* [1971] P.322 at 336; Bagnall J. in *Law v. Gultin* [1976] Fam.155 at 159.

¹¹⁴- Dicey & Morris, 8th-ed., p. 318.

¹¹⁵- [1967] 3 All.E.R.314.

¹¹⁶- Ibid at 315.

¹¹⁷- [1968] 1 W.L.R.1773 at 1775.

¹¹⁸- [1968] 1 W.L.R.221 at 226; *Brown v. Brown* [1968] 2 W.L.R.969 at 972; *Mayfield v. Mayfield*

that the real and substantial connection was the *ratio decidendi* of the *Indyka* case and expressly stated this in *Welsby v. Welsby*,⁽¹¹⁹⁾ where Cairns J. said: "putting it very briefly, the actual decision in *Indyka v. Indyka* was that a decree could be recognised by our courts if the petitioner had a real and substantial connection with the country whose court granted the decree".⁽¹²⁰⁾

1- Judicial Interpretation of A Real and Substantial Connection

The principle of a real and substantial connection as a basis for recognition had been judicially explored and given more liberal interpretation than in *Indyka* itself. In *Angelo v. Angelo*,⁽¹²¹⁾ a real and substantial connection was held to exist where the wife returned to her native country where she lived all her life except during her marriage and soon afterwards started divorce proceedings. In this case the question before Ormrod, J. was whether a decree granted by the court of the wife's nationality after six months' residence within that jurisdiction would be recognised. It is submitted that such a decree could not have been recognised before the House of Lords decision in the *Indyka* case because it was not granted by the court of domicile in the English sense and did not fall within the rule of *Travers v. Holley*. However, Ormrod, J. noted that⁽¹²²⁾ "the law as to recognition of foreign decrees underwent an abrupt change a week ago when the House of Lords gave their decision in *Indyka v. Indyka*". The learned judge therefore, examined various bases suggested by the House of Lords and concluded that recognition should be given on the ground that the wife is a German national and she is clearly habitually resident within the jurisdiction of the German court granting the decree.⁽¹²³⁾ In those

[1969] P.119 at 121; *Alexander v. Alexander* [1967] 113 S.O.L.J 334; *Kuntsler v. Kuntsler* [1969] 1 W.L.R.1506.

119 -[1970] 2 All.E.R.467. In this case the court accepted the residence for some two years before the decree, with evidence that it had continued thereafter as a test for recognition.

120 -Ibid at 468.

121 -[1967] 3 All.E.R.314; discussed Webb, *Recognition of Foreign Divorces: The post Indyka position* (based on *Angelo v. Angelo* and *Peters v. Peters*) (1968) 17 I.C.L.Q.209.

122- Ibid, at 315.

123 -Ibid, at 317; In *Peters v. Peters* [1967] 3 All.E.R.318 at 320, discussed Webb, (1968) 17

circumstances, Ormrod J. said "she seems to me clearly to fall within the test proposed by all of their Lordships in the *Indyka* case",⁽¹²⁴⁾

It has been seen that any decree obtained by the husband would not be recognised unless granted by the court of domicile or recognised by that court. This position was changed in *Blair v. Blair*,⁽¹²⁵⁾ in which the husband's English domicile of origin was supplanted by a domicile of choice in Norway, where he married a Norwegian national of life long residence. The matrimonial home was established at Oslo. After two and a half years the family moved to England where the husband engaged on a two year course. No intention to abandon Norway was evinced. However, while he was still in England, his wife, having returned to Norway, became pregnant by another man, and it was then that the husband's domiciliary intention changed and his English domicile of origin revived. In response to her request for a divorce, the husband instructed his Norwegian attorney to petition the Norwegian court for divorce. In 1963, the Oslo court granted a decree and in 1967 he petitioned the English court for a declaration that the Norwegian divorce had validly dissolved the marriage. Cumming-Bruce J. accepted the expert evidence that the Norwegian court had assumed jurisdiction on the ground that the wife had been born and was settled in Norway and that Norway was at all times intended to be the country of the matrimonial home.⁽¹²⁶⁾ The learned judge observed that after the *Indyka* case it is open:

"to an English court at first instance to consider all facts appertaining to the grant of a decree by a foreign court, whether to a husband or to a wife, and to determine whether, in spite of the fact that there was no domicile of a petitioner husband at the date of the institution of proceedings, the decree should be recognised."⁽¹²⁷⁾

I.C.L.Q.212, Wrangham, J. held that the mere fact that a marriage is celebrated in a particular jurisdiction is not enough to create a real and substantial connection between a petitioning spouse and that jurisdiction.

124 - At, 318.

125- [1968] 3 All.E.R. 639 discussed Wade, (1969) 32 M.L.Rev.441; Mackinnon, (1970) 48 Can Bar.Rev.716.

126 - Ibid, at 641.

127- Ibid, at 642.

The facts considered relevant by the Learned judge were that until a few weeks before the institution of proceedings, the husband had been both domiciled in and had a real and substantial connection with Norway, and at the time of the proceedings, he was unaware of the loss, according to English law, of his Norwegian domicile. Accordingly, the judge concluded that on these facts it was "appropriate and just to allow recognition to the decree granted to the husband by the Oslo court although he had just ceased to be domiciled in Norway." (128)

This decision was followed in *Munt v. Munt*, (129) in which the English court recognised the decree granted to the husband after less than three years' residence within the jurisdiction of the court of Virginia. In *Mayfield v. Mayfield*, (130) the English court went further than *Blair v. Blair*, when the divorce was recognised even though the petitioner husband had no connection with the granting country. Simon P. justified his decision on the ground that the fact that the petitioner was the husband, and had no connection, was immaterial as long as the wife had this connection. The learned judge concluded that:

"What is the material fact is that the German decree operated on the status of the wife, who had such close, substantial and real connection. If it operated on the status of the wife and should be recognised as such We should recognise the decree as also operating on the status of the husband." (131)

2- *Armitage v. A.G* and A Real and Substantial Connection

It may be recalled that in *Mountbatten v. Mountbatten*, (132) Davies J. refused to combine the rule in *Travers v. Holley* (133) with that in *Armitage v. A.G.* (134) The

128- Ibid, at 643.

129- [1970] 2 All.E.R.516.

130- [1969] P.119; discussed Wade, (1969) 32 M.L.Rev 441; Mackinnon, (1970) 48 Can.Bar.Rev.724; *Turczak v. Turczak* 1969] 3 All.E.R.317; discussed Karsten, *Maintenance and Foreign Divorces*, (1970) 33 M.L.Rev.205.

131- Ibid,at 121.

132 -[1959] P.43.

133- [1953] p.246.

justification for this was that the recognition of foreign divorces is exclusively governed by domicile and therefore, the exception introduced by statute must be narrowly construed. In the *Indyka* case, domicile had lost its position as the sole test of recognition and the new rule was that a foreign divorce would be recognised, if there was a real and substantial connection between the parties and the country granting the divorce. The liberal interpretation of the new rule raised the possibility of an extension of the *Armitage* rule to decrees recognised in the country of real and substantial connection. This situation arose in *Mather v. Mahoney*,⁽¹³⁵⁾ in which the husband was domiciled in England and married in Italy a girl from Pennsylvania. After the marriage in 1961 the parties lived together for more than three years in Italy. The wife then deserted her husband and returned to Pennsylvania where she had lived most of her life. In 1965 she went to Nevada and obtained a divorce there. The husband petitioned the English court for a declaration that the Nevada divorce had validly dissolved the marriage.

Payne J. observed that the wife at all the time of the decree had a substantial connection with Pennsylvania as Mrs. Indyka had with Czechoslovakia. Expert evidence was given to him that the Nevada divorce would be recognised in Pennsylvania. The Learned judge then held that as the Nevada decree would be recognised in the state of Pennsylvania with which the wife had a real and substantial connection it must be recognised in England.⁽¹³⁶⁾ Hence, the rule of *Armitage v. A.G.* which Davies J. refused to transfer to the country of the wife's residence. Payne J. managed to transfer to the country of real and substantial connection.

While this result is a logical extension of the *Armitage* rule, the reasoning leaves something to be desired. There is no apparent realization in the judgment that the *Armitage* rule was being used at all. The case is not on all fours with *Indyka*. In *Indyka* the

¹³⁴ -[1906] P.135.

¹³⁵ -[1968] 1 W.L.R.1773; discussed, Webb, (1969) 18 I.C.L.Q.453; *Spencer v. Spencer-Churchill* (1970) 114 Sol. Jo 806.

¹³⁶ - *Mather v. Mahoney* [1968] 1 W.L.R.1773 at 1775.

granting state was the place of real and substantial connection where as in *Mather v. Mahoney* it was not. It is unfortunate that the judge in reaching an acceptable conclusion did not explicitly deal with the Armitage issue in this the first case where it had arisen since *Indyka*.⁽¹³⁷⁾ The decision in *Mather v. Mahoney* appeared to be in direct conflict with the Mountbatten case, but was later reconciled by Ormrod J. in *Messina v. Smith*,⁽¹³⁸⁾ the last case under the *Indyka* approach. In this case the divorce was given to the wife by the Nevada court after six weeks' residence. The wife had been resident in the United States for six years. Evidence was given that the Nevada divorce would be recognised under American law, but there was no evidence at all as to the wife's connection with any specific state within the United States. Ormrod J. decided that to refuse recognition to the Nevada divorce would be "to produce an entirely artificial result which would in no way advance the cause of justice".⁽¹³⁹⁾

3- *Indyka* in Scotland

The statement of Lord Strachan in *Warden v. Warden*,⁽¹⁴⁰⁾ that only Parliament should alter the rules of divorce recognition was rejected by Lord Wheatley in *Galbraith v. Galbraith*.⁽¹⁴¹⁾ His Lordship believed that the law of Scotland should be more in harmony with the English law and the liberal view should be taken rather than the restricted traditional view. Lord Wheatley followed the decision in the *Indyka* case in the case before him and since then *Indyka* formed part of Scots law. The facts in *Galbraith v. Galbraith* were: The husband, domiciled in Scotland, married his wife, a Finnish national, in Scotland and lived with her in Scotland until she went to Finland, whence she did not return. After two years she obtained a decree of divorce in a Finnish court which exercised jurisdiction on the grounds of the wife's Finnish citizenship at the time of the marriage and,

137 -Mackinnon, (1970) 48 Can.Bar.Rev.724 at 727.

138 -[1971] P.322.

139 -Ibid, at 338.

140 -(1951) S.C.508.

141- 1971, S.C.65.

the husband having no known domicile in Finland, her residence within the district of the court. The husband raised an action in the Court of Session for divorce on the ground of desertion, or alternatively, for a declaration that the marriage had been validly dissolved by the Finnish decree of divorce. Although the Finnish court did not exercise jurisdiction on the ground of domicile in the Scottish sense, Lord Wheatley held that recognition should be given because the wife appears to have satisfied the various tests suggested by the judges in the House of Lords in *Indyka* namely, that at the time of the Finnish proceedings the wife had been habitually resident within the jurisdiction and had no present intention of leaving Finland, she had a real and substantial connection with Finland and she was of Finnish nationality.⁽¹⁴²⁾

This decision was followed in *Bain v. Bain*,⁽¹⁴³⁾ in which the court recognised the divorce granted in Japan to the wife, a Japanese national, married in Japan to a Scots man domiciled in Scotland. The Japanese court exercised jurisdiction on the grounds that the wife was a Japanese national and that both parties had consented to have the case tried in Japan. Lord Robertson held that the decree should be recognised because "although the parties lived together for one day, in Japan, and never had a matrimonial home, the wife was a Japanese national, had lived her life in Japan and had been married in Japan, and such cohabitation between the parties as had taken place had been, in Japan. The wife thus satisfied virtually all of the tests suggested by various judges in the House of Lords in *Indyka*."⁽¹⁴⁴⁾

2- Statutory Recognition Rules

While there is no doubt that the decision of the House of Lords in the *Indyka* case represents a great movement forward in the spirit of internationalism and made the way easier for the United Kingdom to enter into the Hague Convention on the Recognition of Foreign Divorces and Legal Separations of 1970, it is submitted, on the other hand, that the

¹⁴² -Ibid, at 68.

¹⁴³- 1971, S.C.146.

¹⁴⁴ -At, 152.

state of law became more complex and uncertain. The decision of the House of Lords did not make clear in what circumstances a foreign divorce would be recognised. Each judge expressed his view in general terms without attempting to set out clear rules for divorce recognition. The principle of real and substantial connection "is inherently vague and the source of much uncertainty where certainty is desirable"⁽¹⁴⁵⁾ Under this principle the precise status of parties is uncertain. More parties might have to petition for a declaration to determine whether they were married or divorced.⁽¹⁴⁶⁾ It is submitted that the practical problem of whether to decide to recognise a foreign divorce fall preponderantly to the Registrar-General. The significance of such a question may also be relevant for some officials as for example Social Security and Immigration Staff. It follows that it is highly desirable as a matter of policy to have recognition rules which are simply framed and easy for the relevant officials to understand and apply.

Before the advent of rules dealing with financial relief after recognition of foreign divorces, the tendency of the courts to grant recognition whatever there was a real and substantial connection was a source of hardship and anomalies.⁽¹⁴⁷⁾ A legislative law reform was therefore clearly justified and highly desirable to remove the state of complexity and uncertainty imposed on the subject of recognition of foreign divorces by the decision of the House of Lords in the *Indyka* case.

In 1968 the Eleventh Session of the Hague Conference on Private International Law adopted a Hague Convention on the Recognition of Divorces and Legal Separations.⁽¹⁴⁸⁾

¹⁴⁵ -Law Com No. 34 & Scots Law Com No. 16, para. 25.

¹⁴⁶ -See, now for England, S.55 of the Family Law Act 1986. There is no equivalent Scottish provision and the Scots Law Com has sought views on the desirability of introducing such a provision.

¹⁴⁷- *Turczak v. Turczak* [1969] 3 All.E.R.317; See, now Matrimonial and Family Proceedings Act 1984 and *infra* Chapter 7.

¹⁴⁸ -For the text of the Convention, See, Conference de la Hage droit Internationale Prive: Actes Documents de la onzieme Session (1971) Vol.1, p. 241; the Law Com No.34 & the Scots Law Com No.16 includes also the text of the Convention; discussed Anton, *The Recognition of Divorces and Legal Separations* (1969) 18 I.C.L.Q.620.

The Convention was implemented in the Recognition of Divorces and Legal Separation Act 1971⁽¹⁴⁹⁾ as amended by the Domicile and Matrimonial Proceedings Act 1973.⁽¹⁵⁰⁾

The opportunity to make statutory codification of the rules relating to the recognition of foreign nullity decrees similar to that of divorces and legal separations was not taken in 1971, because the 1971 Act was passed to implement the 1970 Hague Convention. The Convention did not deal with the question of foreign nullity recognition,⁽¹⁵¹⁾ which continued to be governed by common law recognition rules. The uncertainty of these rules and the fact that different recognition rules applied to divorce and nullity was a source of criticism⁽¹⁵²⁾ In 1984 the Law Commissions in their report⁽¹⁵³⁾ recommended that the law relating to foreign nullity should be placed on the same legislative basis as that concerning divorces and legal separations. They also recommended the abolition of the 1971 Act. The result of those recommendations is part II of the Family Law Act 1986.⁽¹⁵⁴⁾ This Act replaced the 1971 Act and created an integrated set of recognition rules for divorces, annulments and legal separations.⁽¹⁵⁵⁾

149- The Act implemented the recommendations of the Law Com No.34 and the Scots Law Com No.16, on the Hague Convention on Recognition of Foreign Divorces and Legal Separations, (1970) Com.4542.

150- SS.2 and 15.

151 The reasons why the Convention does not deal with the foreign nullity decrees are considered by the Law Commissions, See, Law Com No. 137 & Scots Law Com No.88 paras. 3.3-3. 13.

152- Carter, (1979) 50 B.Y.B.I.L.250, 252; Collier, *Recognition of Foreign Nullity Decrees-Capacity to Marry in the Conflict of Laws*, (1979) C.L.J.289, 290.

153 -Law Com No. 137 & Scots Law Com No. 88

154- The Family Law Act 1986 does not enact all the Law Commission's proposals; Hansord, Vol, 473, col, 1082 *per* Lord Hailsham, See, *infra*, 197.

155- The decision of *Maples v. Maples* [1987] 2 W.L.R.487, ended the debate on whether or not a foreign divorce is capable of recognition under part 1 of the Foreign Judgments (Reciprocal) Act 1933, S 8. Latey J. stated clearly that section 8 (1) of the 1933 Act did not apply to Judgments of marital status. See, Dicey & Morris, 12th ed., p. 733; Jaffey, (1986) 5 C.J.Q.35; Lipstein, (1981) 40 C.L.J.201; *Vervaeke v. Smith*[1983] 1 A.C.145; David Gordon, *op.cit.*p.153; Cf, the view of the Law Commissions, Law Com No.137 & Scots Law Com No.88,para..6 41.

a- Different Recognition Rules

In accordance with article 17 of the 1970 Hague Convention, which permits contracting States to apply recognition rules more favourable than those of the Convention, the 1986 Act deals with an internal matter which was not considered by the 1970 Hague Convention, namely the recognition throughout the United Kingdom of decrees granted in any part of the British Islands.⁽¹⁵⁶⁾ Accordingly the Act distinguishes between decrees obtained in the British Islands and those obtained outside the British Islands and provides for this purpose different recognition rules.⁽¹⁵⁷⁾ The underlying justification for adopting such a rule is to avoid the absurdity of recognising truly foreign decrees more readily than British divorces⁽¹⁵⁸⁾ and to remove all the uncertainties created under the previous law, and more likely the problem of limping marriages. Moreover, the acceptance of specific recognition rules throughout the United Kingdom may also be justified on the ground that divorce jurisdictional bases are now the same throughout the United Kingdom.⁽¹⁵⁹⁾

b- Divorces Obtained in the British Islands⁽¹⁶⁰⁾

Prior to the Recognition of Divorces and Legal Separations Act 1971, the recognition of all English divorces in Scotland and vice versa was governed by common law rules. Hence, it was quite settled that a divorce would not be recognised if the ground upon which the forum court assumed jurisdiction was not one which would be recognised in the international sense. This position was partially altered by section 1 of the 1971 Act, for it provided that "subject to section 8 of this Act (which states the grounds permitting recognition to be withheld)⁽¹⁶¹⁾ the validity of a decree of divorce...granted after the

¹⁵⁶ S.44; See also, S.1 of the 1971 Act as amended by S 15 (2) of the Domicile and Matrimonial Proceedings Act 1973.

¹⁵⁷- Contrast S.44 with SS.45-48; and S.1 with SS.2-6 of the 1971 Act.

¹⁵⁸ -Karsten, (1972) 35 M.L.Rev 299.

¹⁵⁹- See, Supra, Ch.2

¹⁶⁰- The term 'British Islands' is defined in S.5 of the Interpretation Act 1978: The United Kingdom (consisting of England and Wales, Scotland, and Northern Ireland), the Channel Isles and the Isle of Man. This definition is identical to the 'British Isles' in S.10 (2) of the 1971 Act.

commencement of this section (i.e January 1, 1972) shall, if it was granted under the law of any part of the British Isles, be recognised throughout the United Kingdom."⁽¹⁶²⁾

Although this section clearly provided for the automatic recognition in Scotland of English divorces and vice versa and for automatic recognition in England and Scotland of divorces granted under the law of other parts of the British Isles, there was however, some controversy over the effect of this section. It was questionable whether this section would cover only a decree granted in and under the law of any part of the British Isles or would cover also a foreign divorce in which the foreign court had applied the law of some part of the British Isles.⁽¹⁶³⁾ This doubt came from the phrase "granted under the law of any part of the British Isles". It seems highly unlikely that Parliament intended to extend section 1 to cover divorces granted e.g. by a court in Iraq simply because it applied Scots law as the law of the husband. However, the controversy upon the construction of section 1 and its scope has now been removed. Section 44 (2) states clearly that automatic recognition should be given throughout the United Kingdom to divorce granted only by a court of civil jurisdiction in any part of the British Islands.⁽¹⁶⁴⁾

The actual terms of section 1 of the 1971 Act limited its application to British divorces granted after the 1971 Act came into force. A divorce granted before that date continued to be governed by the common law rules, whereas the rest of the provisions of the 1971 Act concerning the recognition of divorces obtained outside the British Isles were retrospective.⁽¹⁶⁵⁾ This state of law might be criticised on the ground that it is undesirable to have different rules as to retrospectivity applicable in the same statute to divorces

¹⁶¹ -Anton, (1972) S.L.T.89; Eager, (1972) S.L.T.1; Clive & Wilson, 2nd-ed.p.673; North, op.cit.(1977) P. 168.Infra, ch.5.

¹⁶² -As amended by the Domicile and Matrimonial Proceedings Act 1973, S.15 (2).

¹⁶³ -Dicey & Morris, 11th ed , p. 687; North, op.cit.(1977) p. 167.

¹⁶⁴ Subject to S.51 (1) (a) and (2) (a), which states the grounds permitting recognition to be withheld, infra, ch.5. It should be noted that extra judicial divorces obtained in any part of the British Islands will be denied recognition in England and Scotland, S.44 (1), subject to transitional provision, infra.214.

¹⁶⁵ -S.10 (4).

obtained in the British Isles and to those obtained outside the British Isles.⁽¹⁶⁶⁾ This state of confusion has also been removed by the 1986 Act in making it clear that section 44(1) applies to all British divorces obtained before the date of the commencement of the 1986 Act, i.e. April 4, 1988 whether granted before or after the commencement of section 1 of the 1971 Act as well as to divorces granted on or after the date of commencement of the 1986 Act,⁽¹⁶⁷⁾ provided that the validity of such divorces had not already been decided by any competent court in the British Islands and would not affect any property rights established before the Act came into force.⁽¹⁶⁸⁾ A divorce obtained within the British Islands may only be denied recognition on the grounds of *Res Judicata* or if there was no subsisting marriage between the parties⁽¹⁶⁹⁾ The other reasons for denying recognition to foreign divorces, such as the fact that the divorce is contrary to natural justice or to public policy will not be grounds for non-recognition of British divorces. The underlying justification for this approach is to give faith and credit within the British Islands to divorce emanating from any of its courts and that the person challenging the validity of such a divorce ought to do so in the jurisdiction in which it was granted and not in that where recognition is sought.⁽¹⁷⁰⁾

In his comments on section 1 of the 1971 Act [section 44 (2) of the 1986 Act] Mr.Eager criticised strongly the removal of natural justice and public policy as grounds for non-recognition of British divorces⁽¹⁷¹⁾ The learned writer argued that the courts are now bound under this section to recognise a British divorce even if it was obtained e.g by fraud. Although the Law Commissions made it clear that the aggrieved party in such circumstances should seek his remedy in the court which granted the divorce, the learned

166 -See, the Law Com No. 137 & the Scots Law Com No. 88 para. 4.13.

167- S.52; Morris, 4th ed., p. 187.

168- S.52 (2) (a) and (b); Dicey & Morris, 12th ed., P. 728.

169 S.51 of the Family Law Act 1986 infra, ch.5.

170- Anton, *Recognition of Divorces and Legal Separations Act 1971: Some possible misconception*, 1972) S.L.T.89; North, op.cit.(1977) p. 169.

171-Eager, *Recognition of Divorces and Legal Separations Act 1971*, (1972) S.L.T.1.

writer's argument seems to be right if the decision in *Acutt v. Acutt*⁽¹⁷²⁾ correctly states the law of Scotland, bearing in mind the learned writer does not cite this case to support his argument. In this case it was held that the court in Scotland would not take jurisdiction over an action of reduction of one of its own divorces obtained by fraudulent evidence as to domicile and thus as to the jurisdiction of the court unless the defender was in fact subject to the jurisdiction. In the light of the fact that the Court of Session has now jurisdiction to entertain an action for reduction of any decree granted by a Scottish court, irrespective of the date of the decree,⁽¹⁷³⁾ it seems there is no direct authority to support Eager's arguments.

c- Divorces Obtained Outside the British Islands (Overseas Divorces)

In dealing with recognition of divorces obtained outside the British Islands, the 1971 Act drew a distinction between 'overseas divorces' and 'divorces obtained outside the British Isles' and applied different rules for recognition of each.⁽¹⁷⁴⁾ The recognition of overseas divorces is based on sections 2-5 implementing the 1970 Hague Convention.⁽¹⁷⁵⁾ Overseas divorces are defined as divorces which (a) have been obtained by means of judicial or other proceedings in any country outside the British Isles and (b) are effective under the law of that country.⁽¹⁷⁶⁾

A divorce falling within the above definition was recognised if, 'at the date of the institution of the proceedings in the country in which it was obtained', either spouse was habitually resident in that country⁽¹⁷⁷⁾ (or domiciled there if the granting state used domicile as a jurisdiction ground for divorce) ⁽¹⁷⁸⁾ or a national of that country.⁽¹⁷⁹⁾

¹⁷²- 1936 S.C.386.

¹⁷³ -Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, S.20.

¹⁷⁴ -S.10 (4). See, Graveson, 7 th ed , p. 294; Anton, (1972) S.L.T.89; Eager, (1972) S.L.T.2; Morris, 2nd ed., p. 145; North, op.cit.(1977) p. 172; David Gordon, op.cit. 63.

¹⁷⁵ -Arts.1, 2 and 3 but with some modification discussed infra 171.

¹⁷⁶-S.2.

¹⁷⁷ -S.3 (1) (a).

¹⁷⁸ -S, 3 (2).

The recognition of 'divorces obtained outside the British Isles' is based on section 6 of the 1971 Act which preserves some of the common law and statutory rules contained in "any enactment other than this Act."⁽¹⁸⁰⁾ Section 6 (1) defines the common law rules as "the rules of law relating to the recognition of divorces obtained in the country of the spouses' domicile or obtained elsewhere and recognised as valid in that country". The effect of this section is obvious: the rule in *Travers v. Holley*⁽¹⁸¹⁾ and the test of a real and substantial connection in *Indyka v. Indyka*⁽¹⁸²⁾ are abolished on the ground that most cases to which they applied would fall within the provisions of the Act and because the principle of a real and substantial connection was a source of much uncertainty.⁽¹⁸³⁾ A divorce could only be recognised under the rule in *Le Mesurier v. Le Mesurier*⁽¹⁸⁴⁾ and its rider in *Armitage v. A. G.*⁽¹⁸⁵⁾ The Act preserved these two rules on the ground that they were widely known and operated smoothly as a ground of recognition and they did not require expert evidence on the law of the foreign country in contrast to the 1970 Hague Convention rule involving domicile enacted in section 3 (2).⁽¹⁸⁶⁾

In contrast with sections 2-5, the only ground for recognition of foreign divorces under section 6 was domicile. Domicile here meant domicile in the British sense. Moreover, the accepted view was that section 6 did not require that such a divorce must be obtained by means of judicial or other proceedings⁽¹⁸⁷⁾ Nor does it have to be effective under the law

179 -S.3 (1) (b).

180 -S.6 (5) saves a number of statutory provisions for recognition of divorces: The Colonial and Other Territories (Divorce Jurisdiction) Acts 1926-1950; section 4 of the Matrimonial Causes (War Marriages) Act 1944. These Acts have been repealed by the Family Law Act 1986, S.68 and Sched. 2.

181 -[1953] P.246.

182 -[1967] 2 All.E.R.687.

183 -Law Com No. 34 & Scots Law Com No. 16 paras. 22-25.

184 -[1895] A.C.517.

185 -[1906] P.135.

186 -Law Com No. 34 & Scots Law Com No. 16 para.20.

187 -North, op.cit.(1977) pp. 233, 234; Morris, 2nd ed., p.205; Canton, *The Court of Appeal and Non-Judicial Divorces*, (1985) 48 M.L.Rev 212 at 216; Smart, *The Recognition of Extra-Judicial Divorces*, (1985) 34 I.C.L.Q.396 at 397; cf, *Viswalingham v. Viswalingham* [1980] F.L.R.15 at 19; David Gorden, (1986) 37 N.I.L.Q.151.

of the country in which it was obtained.⁽¹⁸⁸⁾ Under section 6 divorce would be recognised if

(1)-it was obtained in a country in which both spouses were domiciled or⁽¹⁸⁹⁾

(2)-it was obtained elsewhere and recognised as valid by the law of the country in which both spouses were domiciled.⁽¹⁹⁰⁾

Since 1974 a married woman could acquire a domicile independent of that of her husband⁽¹⁹¹⁾ and then the parties might be domiciled in different countries. This change had the effect of amending and extending section 6, but only to divorces obtained after January 1, 1974. Thus, rule (1) above was extended to cover the situation where the divorce was obtained in a country where one of the parties was domiciled at the time of the institution of the proceedings and was recognised as valid under the law of the domicile of the other party.⁽¹⁹²⁾ And rule (2) above was extended to cover the situation where the divorce was obtained in a country where neither party was domiciled at the time of the institution of the proceedings but was recognised as valid under the law of each party's separate domicile.⁽¹⁹³⁾

It is submitted that the 1971 Act was enacted to implement the 1970 Hague Convention and to remove all uncertainties on recognition of foreign divorces imposed by the decision of the House of Lords in the *Indyka* case. Unfortunately, it seems that the state of recognition of foreign divorces under common law was likely to be easier to ascertain than under this Act. The two-fold distinction between 'overseas divorces' and 'divorces obtained outside the British Isles' was not to be found neither in the 1970 Hague Convention nor in the common law rules. This distinction is at first sight obscure, and its

¹⁸⁸ -Cf, S.2 (a) but See, *Adams v Adams* [1971] P.188.

¹⁸⁹-S.6 (2) (a).

¹⁹⁰ -S.6 (2) (b).

¹⁹¹- Domicile and Matrimonial Proceedings Act 1973, S.1.supra, 31.

¹⁹² -S.6 (3) (a).

¹⁹³ -S.6 (3) (b).

basis unclear. To the uninitiated they may both appear to be the same. But this is far from being the case.⁽¹⁹⁴⁾ Dr. North, had pointed out that although the phrase 'divorces obtained outside the British Isles' includes 'overseas divorces', the casual observer might think that these phrases are synonymous whereas they were not.⁽¹⁹⁵⁾ The distinction is not immediately apparent and is apt to be confusing. To qualify divorce as overseas divorce it must be obtained in a country outside the British Isles, but not all divorces obtained outside the British Isles would qualify as overseas divorces.

Although section 6 was designed to preserve the traditional British concept of domicile, it created uncertainties and anomalies, its application was a source of difficulty and judicial disagreement. Furthermore, this section was inconsistent with the policy of sections 2-5. Thus, a divorce could not be recognised under section 6 if one party was domiciled in the foreign country unless it would be recognised in the country where the other party was domiciled, whereas a divorce could be recognised under sections 2-5 on the basis of habitual residence, nationality or domicile in the foreign sense of either party even if the law of the other would not recognise it.⁽¹⁹⁶⁾

Another anomaly resulting from section 6 is that if one spouse is domiciled in England or Scotland, and the other e.g. habitually resident in the country where the divorce was obtained, recognition would be given to such a divorce under sections 2-5, whereas if one spouse was domiciled in England or Scotland and the other was domiciled in the foreign country in which the divorce was obtained, such a divorce could not be recognised under section 6 because recognition would involve circular reasoning.⁽¹⁹⁷⁾

It seemed that a more realistic approach was needed and that there was nothing contrary to public policy in abolishing the two-fold distinction between 'overseas divorces' and

¹⁹⁴ Law Com No. 137 & Scots Law Com No. 88 para. 6.3.

¹⁹⁵ -North, op.cit. (1977) p. 172.

¹⁹⁶ -Law Com No. 137 & Scots Law Com No. 88 para. 6.24.

¹⁹⁷ -Dicey & Morris, 11th ed., p. 701; Cheshire & North, 10th ed., p. 373.

'divorces obtained outside the British Isles'. The issue went before the Law Commissions to be discussed and after having examined thoroughly the question, they recommended the abolition of the two-fold distinction: the requirement in section 6 for recognition by the law of the domicile of the spouse who had not obtained the divorce and the possibility of the recognition of a divorce not obtained in the country of the spouses' domicile should be abandoned.⁽¹⁹⁸⁾ A divorce obtained in the country of the domicile of one spouse alone should be recognised.⁽¹⁹⁹⁾ This recommendation, which has been implemented by the Family Law Act 1986,⁽²⁰⁰⁾ is certainly acceptable. It clarifies the rules governing the recognition of foreign divorces by introducing one set of recognition rules applying to all divorces obtained by means of proceedings.

Definition of 'overseas divorce'

In terms of the 1986 Act⁽²⁰¹⁾ an overseas divorce may be defined as one obtained in a country outside the British Islands⁽²⁰²⁾ by means of proceedings⁽²⁰³⁾ and effective under the law of the country in which it was obtained.⁽²⁰⁴⁾ Thus, the 1986 Act requires three conditions to be satisfied in order to qualify a divorce as an overseas divorce. These are:

- (1) it must be obtained in a country outside the British Islands,
- (2) it must be obtained by means of proceedings,
- (3) it must be effective in the country where it was obtained.

In relation to condition (1) above the phrase 'outside the British Islands' was interpreted in *Radwan v. Radwan*,⁽²⁰⁵⁾ which was concerned with a *talaq* by the husband obtained in the Egyptian Consulate General in London. Cumming-Bruce J. held

¹⁹⁸ -Law Com No. 137 & Scots Law Com No.88 para.6.3, 6.5, 6.19, 6, 24-30.

¹⁹⁹ -Ibid, para.6,26.

²⁰⁰ -SS.45, 46(1) (4) (5).

²⁰¹ -SS.45 and 46 (1) (a).

²⁰² - S.45.

²⁰³ - S.46 (1) "Proceedings" means "judicial or other proceedings" S.54 (1).

²⁰⁴ - S.46 (1) (a).

²⁰⁵ -[1972] 2 Family Law.147.

that the Egyptian Consulate General in London was English, not Egyptian, soil and that divorce was not a divorce obtained outside the British Islands.⁽²⁰⁶⁾ In contrast with section 44, the phrase 'outside the British Islands' means that the divorce must be obtained in a country outside the United Kingdom, the Channel Islands and the Isle of Man.⁽²⁰⁷⁾ Hence, it is interesting to note that the 1986 Act applies equally to all foreign divorces and not merely to those obtained in countries which were parties to the 1970 Hague Convention.⁽²⁰⁸⁾ The policy justification for this rule being clear, namely to avoid the anomalous situation when a divorce would be recognised if obtained in a contracting state but would not be recognised if obtained, on the same jurisdictional facts, in a non-contracting state, and to avoid further legislation to declare which states will adopt the Convention and which states will withdraw from the Convention.⁽²⁰⁹⁾

Condition (2) above will be considered later because its effect is very important in connection with extra-judicial divorces and as we mentioned earlier, we have assumed for the moment that the overseas divorce in question has been granted by a court of law.⁽²¹⁰⁾ Therefore it remains to explain condition (3) above: What does 'effective under the law of the country in which the divorce is obtained' mean? This question raises two issues, namely the meaning of effectiveness and the meaning of country.

Effectiveness

Neither the 1986 Act nor the 1970 Hague Convention defines a divorce. It is for the *lex fori* under general principles to characterise what constitutes a divorce.⁽²¹¹⁾ It is submitted that not everything which terminates a marriage during the parties' life time will

²⁰⁶- Clive&Wilson, 2nd ed., p. 675.

²⁰⁷-See, the definition of the term 'British Islands' supra; S.10 (2) of the 1971 Act.

²⁰⁸- The Convention has been ratified by Australia, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, Italy, the Netherlands, Norway, Portugal, Sweden, Switzerland and United Kingdom.

²⁰⁹-Law Com No.34 & Scot Law Com No.16 para19; Mc'lean, op.cit.p.82.

²¹⁰- See, Infra, 176.

²¹¹- Graveson, 7th-ed., p. 295.

constitute a divorce. Under Iraqi law, for instance, if both parties are Muslims and the husband converts his religion, the marriage will be dissolved automatically. Hence, no one can say that this method of dissolution of marriage constitutes a divorce, simply because conversion of religion is not a cause for divorce under Iraqi law.⁽²¹²⁾ In considering whether such a method of dissolution of marriage constitutes a divorce under the 1986 Act, we may refer to Ormrod L.J. in *Viswalingham v. Viswalingham*,⁽²¹³⁾ who held that a dissolution occurring automatically on the change of religion of one of the parties was "a form of dissolution of marriage by operation of law which cannot be fitted into our concepts of divorce or nullity."⁽²¹⁴⁾

It is interesting to note that before the 1986 Act, the court of recognition (Scots or English) might have to decide a question of classification of a foreign decree as divorce or an annulment in its substance (as opposed to the name given to it by the granting state) because of course different (statutory or common law) rules of recognition obtained according to the true nature of the decree and difficulties were possible because the substantive laws of different legal systems vary as to the remedy to be available in a given situation. Since 1986 the recognition rules for divorces and annulments are the same and therefore the question of classification of a foreign decree as a divorce or an annulment becomes less important. The most important question is whether the foreign decree is within the meaning of part II of the 1986 Act. Hence, it is submitted that the recognition court must look at the substance of the foreign decree to decide whether it would fall within the meaning of the 1986 Act. If the determination of a marriage by the husband's unilateral decision to change his religion constitutes a divorce under the personal law, then the better view is that such a decree is within the meaning of the 1986 Act even if it cannot be fitted into the Scots or English concept of divorce or nullity.

However, the 1986 Act requires that a divorce must be effective. A divorce may be

²¹²- See, Supra, 17.

²¹³-[1980] 1 F.L.R.15.

²¹⁴ -Ibid, at 18; cf, David Gordon, (1986) N.I.L.Q.153.

effective for some purposes but not for others. 'Effective' under section 46 means effective to dissolve the marriage.⁽²¹⁵⁾ There is no general rule regulating when divorce becomes effective to dissolve the marriage. This is dependent on the law of the country in which the divorce is obtained. For instance, under Iraqi law divorce in some situations dissolves a marriage immediately,⁽²¹⁶⁾ but in others it does not until a *period of Idda* has elapsed.⁽²¹⁷⁾ This means that such a divorce during the *period of Idda* is not effective because the husband has the right to resume the relationship during this period and therefore, it would not be recognised under the 1986 Act. In *Torok v. Torok*,⁽²¹⁸⁾ Ormrod J. refused to recognise the Hungarian decree granted to the husband on the ground that the divorce did not satisfy the requirements of effectiveness because the appeal was still pending in Hungary and thus "the marriage has not yet been dissolved by the Hungarian court, and is therefore still to day subsisting."

Another example of legal ineffectiveness⁽²¹⁹⁾ is if a divorce was granted by a court incompetent to deal with divorce or by a judge who had not been properly appointed: such a divorce would not be an overseas divorce. Thus, in *Adams v. Adams*,⁽²²⁰⁾ a Southern Rhodesian divorce was refused recognition in England because the judge who pronounced it was not a judge *de Jure* of the High Court of Rhodesia.

The requirement of effectiveness was also to be found in the 1971 Act⁽²²¹⁾ but did not apply to recognition on the domicile basis under section 6 because this section preserved the rule in *Armitage v. A.G.*⁽²²²⁾ This rule was a legal obstacle to applying the

²¹⁵- Dicey & Morris, 11th-ed , p. 696; 12th-ed , p. 733; Morris, 4th-ed., p. 191.

²¹⁶- Art.38 (2) of the 1959 Iraqi Personal Status Code.

²¹⁷- Art.38 (1); *Martin v. Buret*, 1939 S.L.T.479.

²¹⁸ - [1973] 1 W.L.R.1066 at 1068.

²¹⁹- See, North, op.cit.(1977) p.175; Dicey & Morris, 11th-ed p.696; 12th-ed.p. 733; Cheshire & North, 11th-ed p. 654.

²²⁰- [1971] P.188.

²²¹- S.2 (b).

²²²- [1906] P.135.

effectiveness requirement.⁽²²³⁾ The requirement of effectiveness is certainly reasonable. It is consistent with the whole purpose which the Act aims to reach, namely to cure the mischief of limping marriages. It has also the effect of avoiding the undesirable result which might have arisen from the recognition of divorce during the period of ineffectiveness. It has also the effect of avoiding unnecessary conflict between the *lex fori* and the *lex causae* when the question of remarriage of the person concerned arises before the recognition court.⁽²²⁴⁾

Meaning of 'Country'

It has been seen that section 46 (1) requires that the divorce must be effective in the country where it is obtained. A question may arise 'what is the meaning of country in this context?' The 1986 Act does not define 'country' except to say that "it includes a colony or other dependent territory of the United Kingdom."⁽²²⁵⁾ There is no difficulty in defining a country in the case where the divorce has been obtained in a country with a single system of law. The difficulty however, is in the case where the divorce has been obtained in a country comprising territories in which separate systems of law are in force in matters of divorce, such as the United States.⁽²²⁶⁾ Does section 46 (1) mean that the divorce must be effective in the individual territory, say Nevada where it was obtained or in the United States as a whole? If the basis of the foreign court's jurisdiction was habitual residence or domicile, the divorce needs only to be effective under the law of the territory in which it was obtained⁽²²⁷⁾ thus, in the above example, a divorce obtained in Nevada on the ground

²²³- Law Com No.137 & Scot Law Com No.88 paras 6.13, 6.26-6, 30.

²²⁴- *Infra*, ch.6.

²²⁵ S.54 (2), but for the purpose of this Act a person shall be treated as a national of such a territory only if it has a law of citizenship or nationality separate from that of the United Kingdom and he is a citizen or national of that territory under the law; *Ibid*, See, also S.10 (3) of the 1971 Act.

²²⁶- Dicey & Morris, 11th-ed p.698, 12th-ed.p.736; Cheshire & North, 11th-ed p.655; Clive & Wilson, 2nd-ed p.654; Collier, *op.cit.*p.292; Jaffey, *op.cit.*p.64. The difficulties do not arise in relation to recognition of divorces obtained in federal countries which have uniform divorce laws, such as Canada (Divorce Act 1968) and Australia (Family Law Act 1975).

²²⁷ -S.49 (2); See also, S.3 (3) of the 1971 Act.

of habitual residence or domicile needs only to be effective under the law of Nevada.

What is the rule if the basis of the foreign court's jurisdiction was nationality? There was a problem with the 1971 Act in this case and views were divided on whether the divorce must be effective in the territory where it was obtained or must be effective under the law of the whole country. This problem came from the wording of section 3 (3) which provided that in relation to a country comprising territories in which different systems of law are in force in matters of divorce, the provisions of this section (those relating to habitual residence and domicile in the foreign sense)⁽²²⁸⁾ shall have effect as if each territory was a separate country except those relating to nationality.⁽²²⁹⁾ Thus, the 1971 Act left the question of effectiveness open where the foreign court assumed jurisdiction on the ground of nationality. One view suggested that divorce in these circumstances only needed to be effective in the territory where it was obtained.⁽²³⁰⁾ This approach was considered in *Cruse v. Chittum*,⁽²³¹⁾ where the Mississippi divorce was recognised in England although there was no evidence that it would be recognised under the whole law of the United States. Although this view put nationality in the same footing as domicile and habitual residence, it is not easy to follow, since it leads to an unacceptable result in that a divorce granted in e.g. one American State would be recognised here even if it would not be recognised in any other American State.

Dr.Morris suggested that no divorce could be recognised as an overseas divorce unless it was effective throughout the composite state.⁽²³²⁾ This view indeed helps to bring about a harmony of decisions between the courts of the recognition and the courts of nationality but at the price that the courts in England and Scotland must examine the law of

²²⁸- S.3(1) (a) and (2).

²²⁹ -S.3 (1) (b).

²³⁰- Clive & Wilson, 2nd-ed pp. 654-656; See, Art.13 of the 1970 Hague Convention.

²³¹ -[1974] 2 All.E.R.940.

²³²- Morris, *The Recognition of American Divorces in England*, (1975) 24 I.C.L.Q.641 at 639-641; Morris & North, *Cases and Materials on Private International Law*, 1984, p.306; Mc'lean, op.cit.p.83; Art.14 of the 1970 Hague Convention.

the composite state before giving recognition to a divorce obtained in an individual territory within that state.⁽²³³⁾

This problem has now been removed. Section 49 states clearly that when the basis of the foreign court's jurisdiction is nationality,⁽²³⁴⁾ the divorce must be effective throughout the country in which it was obtained and the effectiveness under the law of some territory within the composite state is not sufficient.⁽²³⁵⁾ Section 49 (3) (b) makes a similar provision with regard to the effectiveness of the conversion into a divorce of a legal separation⁽²³⁶⁾ obtained in a country of which one spouse was a national. This means that if a legal separation is converted into a divorce in a country comprising territories, the divorce resulting from the conversion must be effective throughout the country.⁽²³⁷⁾ On the other hand, if the basis of the foreign court's jurisdiction is habitual residence or domicile, the divorce resulting from the conversion needs only to be effective under the law of the territory in which it was obtained.⁽²³⁸⁾

d- Jurisdictional Bases

A divorce which satisfies the above requirements will be recognised if, 'at the date of the commencement of the proceedings',⁽²³⁹⁾ either party was habitually resident or domiciled in the country in which the divorce was obtained or was a national of that country.⁽²⁴⁰⁾ In contrast with the 1970 Hague Convention, the jurisdictional bases under the 1986 Act are simplified. The 1970 Hague Convention sets out the complex jurisdictional grounds which have to be satisfied by the parties to a divorce before it may be

²³³-Cf, David Gordon, *op.cit.*p. 81.

²³⁴-S.46 (1) (b) (iii).

²³⁵ -S.49 (3) (a); Law Com No.137 & Scot Law Com No.88 para6,16; Collier, *op.cit.*293; Dicey & Morris, 12th-ed.p.736; Cheshire & North, 11th-ed p. 657; Jaffey, *op.cit.*p. 64.

²³⁶ -S.47 (2); See, *infra*, 175.

²³⁷ -Cheshire & North, 11th-ed , p. 657.

²³⁸ -S.49 (2).

²³⁹- S.46 (3) (a).

²⁴⁰ -S.46 (1) (b).

recognised. Thus, while the habitual residence (domicile) of the respondent alone suffices,⁽²⁴¹⁾ the habitual residence (domicile) of the petitioner must be accompanied by reinforcing factors viz either that it should continue for not less than one year immediately prior to the date of the proceedings⁽²⁴²⁾ or that the parties last habitually resided (common domicile) together there.⁽²⁴³⁾

Again while the nationality of the respondent is never by itself a recognised ground of jurisdiction, the nationality of the petitioner suffices but only where there is a reinforcing factor of some kind.⁽²⁴⁴⁾ These are: either that he had his habitual residence within his national state at the date of institution of the proceedings,⁽²⁴⁵⁾ or that he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings,⁽²⁴⁶⁾ or that the respondent has the nationality of the state of origin at the time of the institution of the proceedings,⁽²⁴⁷⁾ or that he was present within his national state at the date of institution of the proceedings and the spouses last habitually resided together in a state whose law, at that date did not provide for divorce.⁽²⁴⁸⁾

The approach of the 1986 Act in rejecting the reinforcing factors is more realistic and easier to understand and apply. It has the effect of giving wider recognition. The distinction between the nationality of the petitioner and that of the respondent seems to be unacceptable. In many countries, for instance in Iraq,⁽²⁴⁹⁾ the nationality of the respondent is the main basis of divorce jurisdiction. The failure to recognise divorces

241- Art.2 (1).

242- Art. 2 (2) (a).

243- Art.2 (2) (b).

244 -Anton, (1968) 18 I.C.L.Q.630; 2nd-ed p. 470.

245- Art.2(4) (a).

246- Art.2 (4) (b).

247- Art.2 (3).

248- Art.2 (5) (a) (b).

249- Art.14 supra, 80.

granted on such a basis would lead to more limping marriages. Moreover, since *Indyka v. Indyka*,⁽²⁵⁰⁾ nationality of one spouse was a sufficient basis for recognition and therefore, the acceptance of such a distinction means a retrograde step and the depriving of recognition for divorces which would be entitled to recognition under the *Indyka* case.⁽²⁵¹⁾

In contrast with the domestic jurisdictional basis of habitual residence,⁽²⁵²⁾ no length of period of residence is specified or required under the 1986 Act. The habitual residence of either party at the time of the commencement of the proceedings suffices for recognition of overseas divorces.⁽²⁵³⁾ This means that habitual residence will always be a question of fact and degree. The Law Commissions justified the absence of a specific period for the recognition rules by arguing that the purpose of a period of one year in the domestic jurisdiction is to avoid forum-shopping, whereas at the stage of recognition the real problem is not to avoid forum-shopping, but to prevent limping marriages because at this stage the forum-shopping if any has already taken place.⁽²⁵⁴⁾

This formulation of words and sentiments may be specious to some extent. Why should forum-shopping be tolerated simply because it has taken place? On the other hand, if the Hague Convention and the Law Commissions genuinely seek a reduction in limping marriages, perhaps they should be prepared to grant recognition in a further case e.g. where jurisdiction has been assumed only on a few days residence, as in Iraqi law, but the choice of law adopted by the foreign court is acceptable to the recognition court.

Following the abolition of the two-fold distinction between 'overseas divorces' and

250- [1967] 2 All.E.R.689.

251- Law Com No.34 & Scot Law Com No.16 paras 27-30.

252- SS.5 (2) (b) and 7 (2) (b) of the Domicile and Matrimonial Proceedings Act 1973, supra ch.2.

253- S.46 (1) (a) (i); S.3 (1) (a) of the 1971 Act; *Cruse v. Chittum* [1974] 2 All.E.R.940; *Broit v. Broit*, 1972 (Note) 32; *Hack v. Hack* [1976] 6 Family Law 177; *Kendall v. Kendall* [1977] 1 W.L.R.251; Anton, 2nd-ed.p. 475; Cilve, op.cit.p. 623.

254- Law Com No.34 & Scot Law Com No.16 para 29.

'divorces obtained outside the British Isles' and the rule in *Armitage v. A G*,⁽²⁵⁵⁾ the 1986 Act provides that domicile of either party at the time of the proceedings is sufficient ground for recognition of overseas divorces.⁽²⁵⁶⁾ Hence, domicile has two alternative meanings i.e domicile in the United Kingdom sense and domicile in the foreign sense.⁽²⁵⁷⁾ When the domicile in the foreign sense has been adopted, the 1971 Act provided that an overseas divorce would only be recognised on this ground if the law of the country in which the divorce was obtained used this concept of domicile as a ground for divorce jurisdiction.⁽²⁵⁸⁾ The Law Commissions considered that this limitation was illogical and unnecessary on the ground that there was no such limitation on the recognition of divorces obtained in the countries of nationality or habitual residence of either party. Moreover, they argued that this limitation had no real effect in excluding the recognition of divorces obtained in countries with a very liberal concept of domicile e.g. 6 weeks residence (Nevada) if domicile is a jurisdictional basis there.⁽²⁵⁹⁾ This limitation has now been removed and there is no requirement under the 1986 Act that the foreign court should use domicile as a ground of jurisdiction.⁽²⁶⁰⁾ On the other hand, the Act restricted this concept of domicile to that in family matters because it is possible that a foreign country may have different concepts of domicile.⁽²⁶¹⁾

An overseas divorce will also be recognised if either party to the marriage at the date of the commencement of the proceedings was a national of a country in which the divorce was obtained.⁽²⁶²⁾ The Act does not define nationality.⁽²⁶³⁾ It leaves this to the accepted

²⁵⁵- [1906] P.135.

²⁵⁶- S.46 (1) (b) (ii).

²⁵⁷- S.46 (5); *Indyka v. Indyka* [1967] 2 All.E.R.689 at 730,731 *per* Lord Pearson; *Messina v. Smith* [1971] P.322 at 339 *per* Ormrod J.; *Lawrence v. Lawrence* [1985] 2 All.E.R 733.

²⁵⁸-S.3 (2); Anton, (1972) S.L.T.89.

²⁵⁹- Law Com No.137 & Scot Law Com No.88 para. 6, 18.

²⁶⁰- S.46 (1) (b) (ii) and (5); Dicey & Morris, 11th-ed p. 700; Anton, 2nd-ed p. 475.

²⁶¹- S.46 (5). The United Kingdom has special concept of domicile since the Civil Jurisdiction and Judgments Act 1982. for details See, Anton, Civil Jurisdiction in Scotland, 1984.

²⁶²-S.46 (1) (a) (iii); See also, S.3 (1) (b) of the 1971 Act.

²⁶³-But See, S.54 (2); See also, S.10 (3) of the 1971 Act.

view that a person's nationality is a matter for the law of any state which claims him as a national.⁽²⁶⁴⁾ The Act also contains no rules dealing with cases of dual and multiple nationality. It seems however, that recognition will be given even if the person concerned has more than one nationality at the time of the proceedings.⁽²⁶⁵⁾ It seems also recognition will be given even if the law of the second nationality does not permit divorce.

It is necessary for recognition of an overseas divorce that the connecting factor of domicile, habitual residence or nationality be in the country where the divorce was obtained.⁽²⁶⁶⁾ Section 3 (3) of the 1971 Act was not clear in the case where the foreign court in a composite state had assumed jurisdiction on the ground of nationality. In other words, would a divorce granted in an individual territory be recognised under section 3 (1) (b) of the 1971 Act on the ground of the composite state nationality? Dr.Morris⁽²⁶⁷⁾ and Dr.North⁽²⁶⁸⁾ had suggested that a divorce granted in an individual territory could not be recognised on the basis that either party was a national of the composite state, because each individual territory administers its own law and there is no nationality connecting the person concerned with the individual territory in which the divorce was granted. This view seems to be inconsistent with the purpose of the Act in a broadening of the recognition rules to reduce the danger of limping marriages. However, both Dr.Morris⁽²⁶⁹⁾ and Dr.North⁽²⁷⁰⁾ have modified their view and they agree with what Professor Anton said: "The nationality of either spouse remains a general ground of jurisdiction irrespective of the territory within a country where the divorce is obtained."⁽²⁷¹⁾ This view has been

²⁶⁴-Law Com No.34 & Scot Law Com No.16 para 9; *Oppenheimer v. Cattermole* [1976] A.C.249.

²⁶⁵- In *Torok v. Torok* [1973] 1 W.L.R.1066, although the recognition was refused, Ormrod J., admitted that the Hungarian court had jurisdiction within the meaning of section 3 (3) of the 1971 Act i.e.nationality, despite the fact that the parties also possessed British nationality at the time of the proceedings in Hungary.

²⁶⁶ -S.46 (1).

²⁶⁷- Dicey & Morris, 9th-ed p. 321.

²⁶⁸- Cheshire & North, 9th-ed , p. 379; See also, Eager, (1971) S.L.T.1 at 2.

²⁶⁹ -Morris, (1975) 24 I.C.L.Q. 638; 4th-ed.p. 193.

²⁷⁰- North, opcit (1977) p.181.

implemented in the 1986 Act (272)

An overseas divorce cannot be recognised unless the jurisdictional bases are satisfied' at the date of the commencement of the proceedings'.⁽²⁷³⁾ However, the 1986 Act makes two exceptions to this general rule. The first is to be found in section 47 (1) in the case of cross-proceedings.⁽²⁷⁴⁾ Under this section an overseas divorce obtained either in the original proceedings or in the cross-proceedings would be recognised if the jurisdictional bases in section 46 (1) (b) were satisfied at the date of the institution either of the original proceedings or of the cross-proceedings and therefore, it is immaterial which of them led to divorce.⁽²⁷⁵⁾ Thus, in the case where a husband petitioned an Iraqi court for divorce on the basis of nationality at the time when the proceedings were instituted, but before the petition was heard he left Iraq and acquired foreign nationality, and the wife who is a foreigner and who had no connection with Iraq raised cross-proceedings there and obtained a divorce, the divorce is entitled to recognition under section 47 (1) even if the requirements of jurisdictional bases were not satisfied at the time of the cross-proceedings. Similarly, if the requirements of section 46 (1) (b) are satisfied at the time of the cross-proceedings, but not at the time of the original proceedings, the divorce obtained by either proceedings will be recognised.

The second exception is to be found in section 47 (2). This talks about the recognition of divorce by conversion after a legal separation. In some countries a legal separation can be converted into a divorce after a certain time. Such a divorce is entitled to recognition

271- Anton, 1971 S.L.T.89 at 90; Clive & Wilson, 2nd-ed p. 606; Art. 14 of the Hague Convention.

272 S 49; Cheshire & North, 11th-ed p. 656; Jaffey, op.cit.p.64; Dicey & Morris, 11th-ed , p. 688, 12th-ed.p.736.

273 -S.46 (3) (a); See also, S.3 (1) of the 1970 Act; Art.2 and 5 of the 1970 Hague Convention, but see Arts.7,19, 20, 21 is that of the time where the divorce obtained; Anton, (1968) 18 I.C.L.Q.642; *Mansell v. Mansell* [1967] P.306 cf, *Blair v. Blair* (1968) 3 All.E.R. 639.

274 -See, in relation to the 1971 Act, S4 (1); Art.4 of the Hague Convention.

275- S.47 (1) (a); Cheshire & North,11th-ed p.654; Dicey & Morris, 11th-ed p. 697, 12th-ed.p. 732; Anton, 2nd-ed ,p. 478; Clive,3rd-ed.p. 624.

even if the jurisdictional bases at the time of the conversion were not satisfied.(276)

In order to recognise such a divorce several conditions must be satisfied:

(1) the legal separation itself must be entitled to recognition by virtue of sections 46 (1) and 47 (1). This means that it must be obtained in a country outside the British Islands by proceedings and at the date of the proceedings the jurisdictional bases are satisfied, or it was obtained by cross-proceedings and the jurisdictional bases are satisfied at the date of the institution either of the original proceedings or of the cross-proceedings.(277)

(2) the conversion must take place in the country in which the legal separation was obtained and the divorce must be effective under the law of that country.(278)

B- Recognition of Extra-Judicial Divorces

In the earlier cases concerning recognition of extra-judicial divorces, the courts departed from the principle that personal status and the validity of divorce are governed by the law of domicile. Accordingly, recognition was denied to such divorces either on the ground that the divorce was not granted by a court or that a marriage in the Christian sense could not be dissolved by a method of divorce which is unknown to the English or Scots concept. Later the position changed completely and the courts showed their willingness to recognise such divorces even if they were obtained in the British Isles so long as they were valid according to the law of the parties' domicile.(279)

After the enactment of the 1971 Act, the recognition of extra-judicial divorces was greatly complicated. One complication arose from the fact that this Act drew a distinction between "overseas divorces" and "divorces obtained outside the British Isles"(280) and required that the former must have been obtained by "means of judicial or other proceedings"(281) This phrase in its application to extra-judicial divorces was a source of

276- Anton, 2nd-ed p. 478; Clive, 3rd-ed.p. 624.

277 -S.47 (2).

278 S.49 (2) (3) (b).

279-This liberal position is represented by the decision in *Qureshi v. Qureshi* [1971] 1 All.E.R.325.

280 -S.10 (4).

some difficulties and judicial disagreement. The Domicile and Matrimonial Proceedings Act 1973 placed some limitations on the common law rules for recognition of extra-judicial divorces and made the law more complicated in introducing the word "proceeding"⁽²⁸²⁾ which also was a source of uncertainty.

In 1986, the Law Commissions⁽²⁸³⁾ recommended that an extra-judicial divorce which satisfies the requirement of being obtained by proceedings should be entitled to recognition. They also recommended that the phrase "judicial or other proceedings" contained in the 1971 Act should include "acts which constitute the means by which a divorce may be obtained in that country and are done in compliance with the procedure required by the law of that country."⁽²⁸⁴⁾ Although in particular cases the courts still have discretion to refuse recognition on public policy,⁽²⁸⁵⁾ it seems likely that any divorce however informal might qualify for recognition. This liberal approach has not been implemented. Instead, the Family Law Act 1986 expressly draws a distinction between two types of extra-judicial divorces (those which are obtained by proceedings and those obtained 'otherwise than by means of proceedings') and apply different rules for the recognition of each.⁽²⁸⁶⁾

While it cannot be ignored that the 1986 Act has made significant changes in the law of recognition of extra-judicial divorces, it appears that it has failed to remove all the uncertainties created under the previous law. It seems also likely that it has failed to fulfil its aim of reducing 'limping marriages' because of its excessive formalism. The points which will be discussed are: **1** - some types of extra-judicial divorces. **2** - common law recognition rules. **3** - statutory recognition rules.

281- S.2.

282- S.16.

283 -Law Com NO.137 Scots Law Com No.88.

284- Ibid, para.6, 11.

285- S.51 (3) (c).*infra*, ch.5.

286- Contrats S46 (1) with S46 (2).

1- Some Types of Extra-Judicial Divorces

In some legal systems, a divorce may be obtained merely by the agreement of the parties or by administrative process or unilaterally by one party to the marriage in accordance with a religious law. These divorces obtained by means other than from a court of law are referred to as extra-judicial divorces.⁽²⁸⁷⁾ The examples of extra-judicial divorces which have come most commonly before the English and Scottish courts are Jewish and Muslim divorces.

Under Jewish law,⁽²⁸⁸⁾ the husband may divorce his wife by delivering to her a bill of divorcement called a *gett*. The ceremony takes place before a Rabbinical court and two witnesses. The requirement of the Rabbinical court is to ensure that the grounds for divorce are available and that the parties consent to and understand the nature of the act. Such a divorce is effective under Israeli law whether obtained in Israel or elsewhere if the parties are domiciled in Israel.

Under Classical Islamic law, a valid marriage may be dissolved by extra-judicial divorce as well as by judicial process.⁽²⁸⁹⁾ The most usual forms of extra-judicial divorces are divorce by *talaq* and divorce by *khula*. It will be remembered that in the case of *talaq* the husband can divorce his wife by pronouncing the word *talaq*. The wife need not be present or aware of the proceedings and there is no formal necessity for witnesses. This form of Muslim divorce has come before the courts and is referred to by English judges as a 'bare *talaq*'.⁽²⁹⁰⁾

In modern times however, the civil authorities in many Muslim countries have required further formality designed either to protect wives or to make the act of divorce more public. In Pakistan, for instance, the Muslim Family Law Ordinance 1961 requires that the

²⁸⁷- North, (1975) 91 L.Q.Rev.36; David Gordon, op.cit p. 12.

²⁸⁸ Susan Maidment, *The Legal Effect of Religious Divorces*, (1974) 37 M.L.Rev.611; Berkovits, *Transnational Divorces: The Fatima Decision*, (1988) 104 L.Q.Rev.60; David Gordon, op.cit.36.

²⁸⁹- Supra, 17.

²⁹⁰- *Chaudhary v. Chaudhary* [1985] 3 All.E.R.1017, See, infra, 195.

husband must deliver a notice of pronouncement of *talaq* to the chairman of the union council with a copy of the notice to his wife. The chairman must constitute an Arbitration Council for the purpose of effecting a reconciliation. The *talaq* cannot be effective until the expiration of 90 days from the date of delivery of the notice to the chairman of the council.⁽²⁹¹⁾

In Iraq, although the 1959 Personal Status Code requires further formality than Islamic law,⁽²⁹²⁾ it is submitted that this formality is enacted for procedural and statistical purpose and therefore, it does not change the fact that *talaq* shall be recognised in Iraq even if the husband does not follow the requirement of the 1959 Code. Such a *talaq* (i.e. "bare" in the Western view) is effective under Iraqi law whether obtained in Iraq or elsewhere if the parties are Iraqi nationals and wherever they might be.⁽²⁹³⁾ In the case of dissolution of marriage by *khula*, the Iraqi law requires further formality than the dissolution of marriage by *talaq*. Article 46 requires that the parties must commence proceedings before the court. The court shall grant a decree dissolving the marriage if it is satisfied that all the conditions in article 46 are present. The parties must register the divorce in the court.⁽²⁹⁴⁾ In contrast with *talaq*, it seems that the dissolution of marriage by *khula* involves proceedings which do not amount to judicial investigation.

2- Common Law Recognition Rules

The difficulty and uncertainty over the state of recognition of extra-judicial divorces in common law was initiated by the decision of the Court of Appeal in *R v. Hammersmith Superintendent Registrar of Marriage, ex p-Mir-Anwaruddin*,⁽²⁹⁵⁾ in which a Muslim domiciled in India married a domiciled Englishwoman in England. Within 6 weeks of the

²⁹¹ -David Pearl, *A text book on Muslim Law*, London, 1979, p.96; *Qureshi v. Qureshi* [1971] 1 All.E.R.325; *Quazi v. Quazi* [1979] 3 All.E.R.897.

²⁹² - Art.39 supra, 19.

²⁹³ -Art.2 (1) of the 1959 Personal Status Code.

²⁹⁴ - Art.39 (1).

²⁹⁵ -[1917] 1 K.B.634; *Maher v. Maher* [1951] P.342; Carter, (1962) 38 B.Y.B.I.L.486.

marriage, the wife left the husband. From an Indian court, he obtained a decree of restitution of conjugal rights with which his wife declined to comply. Subsequently, on his return to England he made a unilateral declaration of divorce by *talaq*. There was no doubt that the *talaq* would be recognised as effective in India, i.e. *the lex domicilii*, because there is no method of divorce open to Muslims other than *talaq*.

The question which the Court of Appeal had to consider was whether the *talaq* was effective in England to dissolve a marriage celebrated with an Englishwoman in England. The court unanimously held it was not. The court justified its decision by arguing that the divorce was not granted by a court,⁽²⁹⁶⁾ and that a marriage in the Christian sense could not be dissolved by a method of divorce which is appropriate to a polygamous union.⁽²⁹⁷⁾ It is submitted that the decision of the Court of Appeal is inconsistent with the status theory and contrary to the common law rules. If it is accepted that the *lex domicilii* governs personal status, then it is necessary to follow that a divorce accepted as valid by the domiciliary law must also be recognised in English law. It is therefore immaterial whether the marriage is monogamous or polygamous. It is equally immaterial whether the foreign law required a judicial decree or not.⁽²⁹⁸⁾

Since judicial proceedings are by no means a universal method of divorce, there appears to be no reason why the courts should refuse to recognise foreign non-judicial divorces in preference to the principle that personal status is governed by the *lex domicilii*.⁽²⁹⁹⁾ Moreover, if divorce under Muslim law may be relatively easy to obtain for a man, this does not confirm the superior efficacy of divorce obtained by judicial

²⁹⁶ -Ibid, at 643, 653, 659.

²⁹⁷ -Ibid, at 649, 659, 661; *Maher v. Maher* [1951] P.342. The third reason for refusing recognition was that it was contrary to natural justice that a man should be judge in his own cause and be able to dissolve his marriage unilaterally without notice to his wife, will be discussed, infra, chapter Five.

²⁹⁸ -Cheshire, 6th-ed, p. 403; Morris, (1953) 66 Har.L.Rev.961 at 1003; Anton, *Non-Judicial Divorces*, (1965) S.L.T.1; Swaminathan, *Recognition of Foreign Unilateral Divorces in English Conflict of Laws*, (1965) 28 M.L.Rev. 540 at 542.

²⁹⁹ -*Maher v. Maher* [1951] P.342; *Qureshi v. Qureshi* [1971] 1 All.E.R.325

process over all other methods. But it does raise questions about fair treatment of wives. These doubts in modern days may not be well founded. Thus, social and economic circumstances produced pressure on the Iraqi legislature to place the wives to a *talaq* in a stronger position than wives to a judicial divorce in terms of financial relief.⁽³⁰⁰⁾

It is also submitted that the decision of the Court of Appeal confused ends and means, and resulted in a very narrow principle.⁽³⁰¹⁾ It created more limping marriages when the court treated the couple as still married in England while they were recognised as divorced in India.⁽³⁰²⁾ Too much should not be made of *Hammersmith*, because its ghost disappeared gradually. The courts came to treat it as not authority. Thus, in *Yousef v. Yousef*⁽³⁰³⁾ and *El-Riyami v. El-Riyami*,⁽³⁰⁴⁾ the English court without referring to the *Hammersmith* case recognised as valid a *talaq* pronounced by the husband to dissolve a marriage celebrated in England between an Englishwoman domiciled in England and a Muslim man. The key point for recognition of the *talaq* in these two cases was that the *talaq* took place before the court in the presence of both parties and two witnesses. It was registered in the court records and the expert evidence showed that it would be recognised as valid by the law of domicile.

It is submitted that these two decisions were those of a single judge, and they appeared to be in direct conflict with the decision of the Court of Appeal in the *Hammersmith* case. However, the decision of the *Hammersmith* case was expressly overruled by the Court of Appeal in *Russ v. Russ*,⁽³⁰⁵⁾ in which a Muslim domiciled in Egypt, married an Englishwoman domiciled in England in 1913. The marriage was celebrated in England but

³⁰⁰ -See, *infra*, 331.

³⁰¹ -Graveson, 7th-ed.p. 320.

³⁰² -Swaminathan ,(1965) 28 M.L.Rev.540 at 547.

³⁰³ - [1957] The Times, 1 August 1957.

³⁰⁴ - [1958] The Times, 1 April 1958.

³⁰⁵ - [1963] P.87; [1964] P.315; discussed Webb, *Further and Better Relegation of the Hammersmith Marriage Case*, (1963) 26 M.L.Rev.82; Swaminathan, (1965) 28 M.L.Rev.540 at 543; Carter, (1962) 38 B.Y.I.L.487.

was followed by a Muslim ceremony in Egypt. In 1932, the husband divorced his wife according to Muslim law by *talaq* in her presence and two witnesses. The *talaq* was recorded in the official court records. In 1936 the wife went through another muslim ceremony of marriage in Egypt with a man domiciled in Egypt but this union was also dissolved by *talaq* in the Cairo court in the presence of the wife and two witnesses. In 1942 the wife entered into a third marriage with R. at a church in Cairo in accordance with the rites and ceremonies of the church of Scotland. The question which the Court of Appeal had to decide in 1962 was whether the *talaq(s)* valid according to the Egyptian law where the husband was domiciled would be recognised in England.

Although the members of the Court of Appeal all conceded that the *Hammersmith* case was binding upon them as a Court of Appeal decision, they held that the *talaq(s)* was valid and the *Hammersmith* case must be distinguished.⁽³⁰⁶⁾ Willmer L.J. pointed out that the real ratio in *Hammersmith* case was the absence of any judicial proceedings. The *talaq* pronouncement was made privately in a room in London, in the absence of the wife and there was no suggestion of any judicial proceedings of any kind, but in *Russ v. Russ* the *talaq* was pronounced before the Egyptian court in the presence of the wife and two witnesses and it was recorded in the official records of the court. The fact of judicial recognition by the court of domicile seems to constitute an important element in the present case which wholly is lacking in the *Hammersmith* case. The Learned judge concluded that the decree in the *Hammersmith* case cannot be regarded as of universal application. Its application must be confined to cases where the facts are the same or similar.⁽³⁰⁷⁾

The result of the decision is certainly positively to be welcomed since it established that the requirement of judicial investigation was not necessary to give recognition to foreign divorces and that a monogamous marriage can be dissolved by a method appropriate to a polygamous marriage. It had the effect of regarding the *Hammersmith* case as a departure

306- Ibid, at pp.326, 333, 335.

307- Ibid, at 322-325.

from the principle that personal status and the validity of divorces are governed by the law of domicile. On the other hand, the decision of the Court of Appeal might be criticised in so far as it drew a distinction between a *talaq* which involves some formality and a *talaq* which does not, suggesting that recognition would only be given to the first type: the second type was not entitled to recognition because was contrary to natural justice. If the *talaq* is valid by the law of domicile, why do the courts emphasise that it must involve some formalities?(³⁰⁸) Moreover, since the courts have always held that the cause for divorce is immaterial for its recognition, it is hard then to see how the methods by which a divorce can be obtained under the *lex domicilii* should be material.(³⁰⁹)

In *Qureshi v. Qureshi*,(³¹⁰) which was the last case dealing with the recognition of Muslim *talaq* before the enactment of the 1971 Act, Sir Jocelyn Simon P. adopted a more liberal view in dealing with Muslim divorce when he held that the procedure and form of the divorce were irrelevant so long as the divorce was recognised by the law of domicile. In this case, the parties were married in England. They were both Muslim and domiciled in Pakistan. After the marriage in England they went through a Muslim ceremony. It was not a happy marriage and after a few months the couple separated. The husband then wrote a letter to the wife in the form of a *talaq*, a copy of which was sent to the office of the High Commissioner for Pakistan in London. The husband complied with the requirements of the law of Pakistan and the *talaq* then became absolute under that law. The wife claimed that the *talaq* was invalid.

Sir Jocelyn Simon P. found that he was confronted by two inconsistent decisions of the Court of Appeal in the *Hammersmith* case and *Russ v. Russ*, and he preferred the later one. Moreover, the Learned judge was satisfied that there is no general rule in English law that:

³⁰⁸- Swaminathan, (1965) 28 M.L.Rev.540 at 541, 545.

³⁰⁹- Morris, (1953) 66 Har.L.Rev.961 at 1003.

³¹⁰- [1971] 1 All.E.R.325.

"compels refusal of recognition to a divorce valid by the law of domicile, if it is not the creature of a judicial act or performed in judicial presence, either generally or if the marriage is celebrated in England, or if the purported divorce takes place in England, or both".⁽³¹¹⁾

The judge went on to say that:

"the fact that there has been no judicial intervention or even presence is irrelevant if the purported divorce is effective by the law of the domicile to terminate the marriage in question".⁽³¹²⁾

Although *Qureshi v. Qureshi*, was not dealing with informal divorces, it is submitted that the principle declared in this case clearly applied to all informal divorces which were effective as terminating marriage in the countries where the divorce occurred.⁽³¹³⁾

The principle, that recognition should be given to informal divorces which are valid by the law of domicile of the parties, applied also to other forms of extra-judicial divorces. In *Ratanachai v. Ratanachai*⁽³¹⁴⁾ and *Varanand v. Varanand*,⁽³¹⁵⁾ the English court recognised a divorce effective according to the law of Thailand by the mere agreement of the parties despite the fact the agreement had not been made in the presence of anybody.

In relation to Jewish divorces, the policy of the English law is in favour of recognition of Jewish divorce even if granted without judicial intervention so long as it is valid under the law of domicile.⁽³¹⁶⁾ The first decision in this line was the decision of the Privy Council in *Sasson v. Sasson*,⁽³¹⁷⁾ in which a declaration was granted that the divorce before the Grand Rabbi in Alexandria was effective to dissolve the marriage of two British subjects domiciled in Egypt. The decision was followed in *Har-Shefi v. Har-Shefi*,⁽³¹⁸⁾

311- At.344.

312- Ibid, at 345.

313- *Chaudhary v. Chaudhary* [1985] 3 All.E.R.1017 at 1029.

314- [1960] The Times, 4 June 1960.

315 -[1964] 108 Sol. Jo. 693; *Lee v. Lau* [1967] P.14 ; Webb, (1965) 28 M.L.Rev.109.

316- Cheshire, 6th-ed.p.403.

317 -[1924] A.C.1007.

in which the marriage between two members of the Jewish faith was entered into in Israel, the wife being domiciled before marriage in England and the husband in Israel. After a short residence together in England, the husband was deported from England but the wife remained. Before his departure, he delivered a *Gett* which was received by his wife at the Beth Din in London, the court of the chief Rabbi in London. The wife petitioned in England for a declaration that the *gett* had validly dissolved the marriage. Expert evidence was shown that the *Gett* would be recognised as valid by Israeli law. Pearce J., declaring that the divorce must be recognised as valid in England, said that:

"the marriage had been validly dissolved by the only form of divorce which is open to a Jew domiciled in Israel. To hold that such a marriage, which has been legally dissolved according to the law of the domicile, continues binding in this country is to create confusion and hardship and is, in my opinion, contrary to the principle laid down in *Le Mesurier v. Le Mesurier* and the principle of international law". (319)

In Scotland, there was considerable reluctance in the earlier cases to recognise extra-judicial divorces. (320) In *Warrender v. Warrender*, (321) Lord Brougham took the view that only a foreign divorce decree given by a court after judicial proceedings would be recognised. In *Luszczewska v. Luszczewska*, (322) it was suggested that divorce obtained by consent of the parties might be morally repugnant.

The attitude of the Scottish court was to change in favour of recognition of extra-judicial divorces and the courts followed the English cases that an extra-judicial divorce would be recognised if it was valid by the law of domicile. In *Makouipour v. Makouipour*, (323) a woman domiciled in Scotland, married in Scotland, an Iranian domiciled in Iran. They resided together in Iran for about 11 months. They then went

318 - (No.2) [1953] p.220; Graveson, *Judicial Interpretation of Divorce Jurisdiction in Conflict of Laws*, (1954) 17 M.L.Rev 501.

319- At, 224.

320-Anton, (1965) S.L.T.1.

321- (1835) 2 C1& Fin.488.

322- 1953 S.L.T.(Notes)73.

323- 1967 S.L.T.101; *Radoyevith v. Radoyevith*, 1930 S.C.619.

through a procedure of divorce according to the law of Iran and judicially recognised in that country. The wife returned to Scotland and subsequently brought an action of declaration that her marriage was validly dissolved by the Iranian divorce, and that by the law of Scotland she had the status of a divorced person.

Lord Thomson followed the English case of *Russ v. Russ*,⁽³²⁴⁾ holding that an act of dissolution of marriage in the country of the domicile and judicially recognised there should be recognised as valid in Scotland. Lord Thomson stressed that an extra-judicial divorce must involve some formality in order to be recognised in Scotland. In the case under discussion the parties went through a ceremony or procedure of divorce at the registry office following upon which a divorce deed was signed by the parties and witnesses and registered in the registry office.⁽³²⁵⁾

It appears that at common law the court had begun to accept extra-judicial divorces and that judicial intervention has no inherent virtue, neither is it universal, for the courts to insist on such a procedure in the case of a foreign divorce. The place of marriage and divorce are immaterial provided the divorce is valid by the law of domicile and the parties are not domiciled in England or Scotland.⁽³²⁶⁾ However, when statute intervened, it became impossible for an extra-judicial divorce to be granted validly in U.K.⁽³²⁷⁾

3- Statutory Recognition Rules

The liberal approach of the Law Commissions to assimilate divorces obtained otherwise than by proceedings to those obtained by proceedings has not been implemented by the Family Law Act 1986. Instead, the Act expressly draws a distinction between these two

³²⁴- [1964] P.315.

³²⁵- At, 102.

³²⁶-*Joseph v. Joseph* [1953] 1 W.L.R.1182; *Corbett v. Corbett* [1957] 1 W.L.R.486; *Preger v. Preger* [1926] 42 T.L.R.218; *Har-Shefi v. Har-Shefi* (No.2) [1953] p. 220; *Qureshi v. Qureshi* [1971] 1 All.E.R.325.

³²⁷- S.44 of the Family Law Act 1986.

types of extra-judicial divorces and provides a more restricted approach in relation to recognition of foreign divorces obtained otherwise than by judicial or other proceedings. This state of law is highly unsatisfactory because it would encourage the creation of limping marriages and produce confusion in the law. It attempts to impose British standards of justice on foreign spouses. The test of distinction depends upon whether or not the divorce was obtained by proceedings. Although 'proceedings' are defined as "judicial or other proceedings"⁽³²⁸⁾ it is submitted that the 1986 Act does not advance a clear criterion as to what constitute 'other proceedings'. Since the Act applies different rules for recognition of each, it becomes necessary to consider the meaning of 'proceedings' in order to classify whether or not the divorce in the question involves proceedings.

Since the 1986 Act provides that an extra-judicial divorce cannot be recognised unless it is effective in the country where it was obtained, it follows that a divorce obtained in the British Islands will be denied recognition because it does not form part of the British family law. This simple rule can give rise to difficulty in deciding where an extra-judicial divorce is obtained. The difficulty comes from the fact that it is sometimes not easy to identify the country in which an extra-judicial divorce is obtained because such a divorce may consist of a number of different elements each of which may occur in a different country. A further point to be discussed is the position of extra-judicial divorces obtained within the British Islands.

a- What are "Proceedings"?

At the Hague Conference the views of the delegates were conflicting on the scope of the application of the Convention to foreign divorces. Some states including the United Kingdom would have preferred the Convention to apply whatever the forms or method of divorce provided or permitted by the giving state on the view that the sole relevant question is whether the marriage has been effectively dissolved. This view was rejected by some

³²⁸- S.54 (1) of the Family Law Act 1986.

states which declared that the Convention must be limited to divorces emanating from official procedures.⁽³²⁹⁾ The result of these views is Article 1. Under this Article the Convention was declared to apply to "divorces.....obtained in another contracting state which follow judicial or other proceedings officially recognised in that state(the state of origin) and which are legally effective there."

The official report on the Convention defined the expression "other proceedings" in Article 1 as involving "a minimum of acts, steps or formalities lawfully prescribed and carried out by some authority, or at least with its approval or in its presence."⁽³³⁰⁾ The report indicated that the Convention intended to cover divorces resulting from legislative, administrative or religious acts. As to consensual divorces and repudiation, the report suggested that depending upon whether the particular divorce in question involved the intervention of the public or religious authorities such could be regarded as proceedings.⁽³³¹⁾ Thus, the Convention in relation to extra-judicial divorces was not clear and did not help definitively to ascertain the meaning of "proceedings".⁽³³²⁾

The 1971 Act was passed to enable the United Kingdom to ratify the Convention. Section 2 (a) provided for recognition in the United Kingdom of divorces which have been obtained by means of judicial or other proceedings in any country outside the British Isles. The 1971 Act does not define the term "other proceedings". However, during the Parliamentary debates, it was agreed that the term "other proceedings" was designed to include within the Act at least some kinds of extra-judicial divorces, including divorces by *talaq*.⁽³³³⁾ As to divorces by 'bare *talaq*' or by mutual consent, the Solicitor General made clear that the Act is not intended to afford recognition to divorces which do not have the nature or quality of an official act.⁽³³⁴⁾ Nevertheless such divorces could be

329 -Anton, (1968) 18 I.C.L.Q.627; 2nd-ed.p. 472.

330- See, Mc'lean, op.cit.p.75.

331 -See, Karsten, *Recognition of Non-Judicial Divorces*, (1980) 43 M.L.Rev. 202 at 204.

332- North, op.cit.(1977) p.227.

333 H.C.Deb.Vol, 821, Cols, 165-171.

recognised under section 6 of the 1971 Act.⁽³³⁵⁾

The meaning of "proceedings" became more complicated when the original section 6 was amended by the Domicile and Matrimonial Proceedings Act 1973.⁽³³⁶⁾ The new section 6 in providing for recognition of a divorce which is effective in the country or countries where the spouses were domiciled, states in subsection 4 that the material time at which domicile must be considered is "the time of the institution of the proceedings in the country in which the divorce was obtained". This raises the question whether "proceedings" in section 6 are the equivalent of "proceedings" in section 2.⁽³³⁷⁾ Further complication was introduced by section 16 of the Domicile and Matrimonial Proceedings Act 1973. This section provided, with regard to divorces obtained after 1974, that no proceedings in the British Isles are to be recognised as validly dissolving a marriage unless instituted in a court of law. This also raises the question whether "proceeding" in this section is the equivalent of "proceedings" in sections 2 and 6.⁽³³⁸⁾

Although the 1986 Act defines "proceedings" in section 54 (1) as meaning "judicial or other proceedings", it does not contain direct guidance on the meaning of this expression⁽³³⁹⁾. It seems difficult to reach a conclusion from the statutory provisions as to the meaning of "proceedings". It might be helpful to rely on the decisions of the courts. Although the courts had earlier dealt with the phrase "judicial or other proceedings", it was not specifically discussed. In *Broit v. Broit*,⁽³⁴⁰⁾ the Scottish court recognised divorce by *gett* obtained by the husband from the Rabbinical court in Haifa on the grounds that it was obtained in the country of the husband's residence, nationality and domicile.⁽³⁴¹⁾

³³⁴ -Ibid, Col, 169.

³³⁵- Ibid, Col, 170.

³³⁶- S.2.

³³⁷- David Gordon, (1986) 37 N.I.L.Q.151.

³³⁸- Stone, *The Recognition in England of Talaq Divorces*, (1985) 14 A.A.L.R.363; Smart, *The Recognition of Extra-Judicial Divorces*, (1985) 34 I.C.L.Q.395-397.

³³⁹- Dicey & Morris, 12th-ed, p. 743.

³⁴⁰- 1972, S.L.T.(Notes) 32.

Lord Fraser seems to have assumed that the delivery of the *gett* before the Rabbinical court satisfied the requirement of "judicial or other proceedings" in section 2. In *Radwan v. Radwan*,⁽³⁴²⁾ although the divorce was refused recognition, it was assumed by Cumming-Bruce J. that a *talaq* pronounced before witnesses and involving a 90 days reconciliation period satisfied the requirement of "other proceedings" within the meaning of section 2.

The leading case to offer an analysis of the phrase "judicial or other proceedings" is *Quazi v. Quazi*,⁽³⁴³⁾ in which the parties were Muslims and Pakistani nationals, married in India in 1963. The marriage was not a happy one. In 1973 the husband left Pakistan and came to England where he bought a house. In 1974 he went to Pakistan and there pronounced under the Pakistani Muslim Family Laws Ordinance 1961 a *talaq* from his wife by formally repeating before witnesses the word *talaq* three times. He gave notice of *talaq* to a public authority and supplied a copy of the notice to the wife. The *talaq* was effective under the law of Pakistan. In 1974 the wife instituted divorce proceedings in England. The husband claimed that the marriage had been dissolved either by a *khula* agreed between the parties at the instance of the wife in Bangkok on March 22, 1968 in accordance with the law of Thai, and where the parties were then domiciled and habitually resident or by *talaq* pronounced by him in Karachi on 30 July, 1974, when he was habitually resident in England and his wife habitually resident in Pakistan, and taking effect under the law of Pakistan 90 days thereafter, i.e on 28 November 1974, and so before the wife's proceedings for divorce in England had been started.

At first instance,⁽³⁴⁴⁾ Wood J. held that the marriage had been dissolved by *Khula* in

341- S.3 of the 1971 Act.

342- [1973] Fam.24; discussed Polonsky, (1973) 22 I.C.L.Q.343.

343- [1979] 3 All.E.R.897; Karsten, (1980) 43 M.L.Rev.202; Lucy Carroll, (1981) 97 L.Q.Rev.28; Stone, (1985) 14 A.A.L.R.363 at 364; Nott, "Judicial or other proceedings"(1985) 34 I.C.L.Q.838; Kenneth McK Norrie, *The Raven and the Writing Table: Recent English Decisions on Recognition of the Talaq*, (1986) J.L.S.S.31 n4 158

1968, but since the expert evidence of Thai law had been conflicting he also held that if, contrary to his view, the marriage was still subsisting in 1974, it was dissolved by the *talaq* not later than November 1974. The Court of Appeal⁽³⁴⁵⁾ reversed this judgment, holding that neither the *Khula* nor the *talaq* had dissolved the marriage. The court took a very strict view of the interpretation of the phrase "judicial or other proceedings". Ormrod L.J. argued that the requirement of "proceedings" implied that:

"the state or some official organization recognised by the state must play some part in the divorce process at least to the extent, in proper cases, that it can prevent the wishes of the parties or one of them, as the case may be, from dissolving the marriage ties as of right".⁽³⁴⁶⁾

The learned Judge expressly refused the recognition of the *Khula* or Ordinance *talaq* as neither of them qualified as proceedings under section 2. He submitted that *talaq* is a unilateral act of the husband over which there is no control. Therefore, on this approach for an extra-judicial divorce to be "proceeding" it must not only be obtained in accordance with rules laid down or carried out by a public or religious authority but that such authority must have a veto to be used in "proper cases" to prevent unilateral or consensual divorces being effective. It was the absence of such power of veto that led the Court of Appeal to hold that the procedure of the Muslim Family Law Ordinance 1961, does not make a divorce by *talaq* obtained in Pakistan, a divorce that has been obtained by means of judicial or other proceedings within the meaning of section 2.

It seems difficult to agree with such an attitude. It is submitted that section 2 is clearly designed to involve some types of extra-judicial divorces and the word "proceedings" is intended to cover some acts external to the parties such as registration, conciliation proceedings or other form of approval.⁽³⁴⁷⁾

344- [1978] 8 Fam. Law 203.

345- [1979] 3 All.E.R 424; [1980] A.C.744; Graveson, "Other proceedings" (1980) 96 L.Q.Rev.169.

346- [1980] A.C.744 at 789.

347- Polonsky, (1973) 22 I.C.L.Q.345; Morris, 3rd-ed.p. 204.

The House of Lords rejected the view of the Court of Appeal and unanimously held that the pronouncement of *talaq* and the giving notice of it to the wife and to the Chairman of the local union council with the prospect of conciliation proceedings constituted "other proceedings" within the meaning of section 2,⁽³⁴⁸⁾ and since the parties were nationals of Pakistan and the proceedings had taken place in Pakistan and the *talaq* was effective under the Pakistani law, the House of Lords held that the *talaq* was entitled to recognition under the 1971 Act.⁽³⁴⁹⁾ Lord Diplock interpreted the phrase "judicial or other proceedings" by reference to the 1971 Hague Convention.⁽³⁵⁰⁾ He pointed out that the 1971 Act was passed to implement the Convention. It was a legitimate aid to the construction of any provisions of the Act that are ambiguous or vague, to have recourse to the terms of the Convention in order to see what was the obligation in international law that Parliament intended that this country should be enabled to assume.⁽³⁵¹⁾ After explaining Article 1 his Lordship stated that the use of the phrase "obtained by means of judicial or other proceedings in any country outside the British Isles" was intended to provide for the recognition of all divorces to which the Convention applies, for to fail to do so would be a breach of that Convention by this country. Since the *talaq* had satisfied the requirement of the Pakistani law, he concluded that there were proceedings and the *talaq* was within this phrase.⁽³⁵²⁾

Lord Salmon, after saying that the words "other proceedings" cover "a very wide field in their context" construed section 2: "as applying, amongst other things, to overseas divorces obtained by proceedings other than judicial proceedings, if such divorces are effective under the law of the country in which they are obtained."⁽³⁵³⁾ This view might

³⁴⁸- Jaffy, op.cit.p.69; Stone, (1985) 14 A.A.L.R.363 at 365; Cheshire & North, 11th-ed p.665.

³⁴⁹- The case fell under S.3 of the 1971 Act because the parties were Pakistani nationals, domicile uncertain.

³⁵⁰- *Quazi v. Quazi* [1979] 3 All.E.R.897 at 903; See, also Lord Viscount Dilhorne, at 904; Lord Fraser, at 908; Lord Scarman, at 915.

³⁵¹- At, 903.

³⁵²- At 903.

be criticised on the ground that it does nothing to explain the language of the 1971 Act and which, in its use of the phrase "amongst other things" adds a strong element of uncertainty.⁽³⁵⁴⁾

Lord Fraser expressed the view that the only limitation on the scope of the "proceedings" was that they should be officially recognised and legally effective in the country where they have taken place and they must have some regular definite form.⁽³⁵⁵⁾ It is submitted that the liberal view of the interpretation of "judicial or other proceedings" was given by Lord Scarman. His Lordship construed section 2:

"as applying to any divorce which has been obtained by means of any proceedings, i.e. any act or acts, officially recognised as leading to a divorce in the country where the divorce was obtained, and which itself is recognised by the law of the country as an effective divorce".⁽³⁵⁶⁾

On this basis, Lord Scarman held that the *Khula*, which had been signed and witnessed in accordance with Thai law, constituted proceedings within section 2.⁽³⁵⁷⁾ It is clear that Lord Scarman's approach has the effect of applying to all types of extra-judicial divorces and it would probably help to reduce limping marriages.⁽³⁵⁸⁾ Lord Scarman was the only member of the House of Lords to consider the divorce by *Khula*, whereas other Lordships found it is unnecessary to consider it since the *talaq* was recognised.⁽³⁵⁹⁾ Moreover, the litigation was sufficiently lengthy and expensive without adding long consideration of a type of foreign divorce likely to be encountered less often than the *talaq*.⁽³⁶⁰⁾

353- At, 906.

354 -See, Mc'lean, op.cit.p. 91.

355- At, 908-909.

356- At, 916.

357- At, 916.

358- David Gordon, op.cit.p.93.

359- Lucy Carroll, (1981) 97 L.Q.Rev.28.

360 -[1979] 3 W.L.R.At, 850, *per* Lord Scarman; at 841 *per* Lord Viscount Dilhorne.

The decision of the House of Lords is welcomed so far as it established that some forms of extra-judicial divorces obtained in Pakistan or other countries, but by compliance with similar procedural rules to those of the Ordinance, are within the phrase "judicial or other proceedings". It is regrettable that the judges have only focused their analysis on the question whether the procedure required by the Pakistani Ordinance impressed the characteristic of proceedings on the means by which the divorce in that case was obtained, ignoring the other forms of extra-judicial divorces. In any event, the decision of the House of Lords indicated clearly that the phrase "judicial or other proceedings" cannot be construed so widely as to recognise all foreign divorces however obtained.⁽³⁶¹⁾

b- Is A Bare Talaq Proceedings?

Apart from the statement of Lord Scarman,⁽³⁶²⁾ it is submitted that the decision of the House of Lords in *Quazi v. Quazi* did not definitively settle all questions relating to the recognition of extra-judicial divorces, particularly bare *talaq*. However, since *Quazi v. Quazi* was decided there have been many cases on a bare *talaq* before English courts and after conflicting decisions at the first instance the question of bare *talaq* was settled by the decision of the Court of Appeal in *Chaudhary v. Chaudhary*.⁽³⁶³⁾

In *Sharif v. Sharif*,⁽³⁶⁴⁾ the wife was English and the husband was an Iraqi national. The parties lived together in Iraq and in England. In 1978 the husband divorced his wife by pronouncing *talaq* in Iraq, which is effective under Iraqi law. The wife sought a decree for the dissolution of the marriage on the fact of unreasonable behaviour under section 1 (2) (b) of the Matrimonial Causes Act 1973. The husband sought a declaration that the marriage was dissolved by *talaq* which should be recognised under the 1971 Act. Upon the first view of the expert evidence, Wood J. held that the *talaq* by the husband in 1978 was a bare *talaq* which could not be described as proceedings within section 2.⁽³⁶⁵⁾

³⁶¹ -Except Lord Scraman, at 916.

³⁶²- See, Supra, 193.

³⁶³- [1984] 3 All.E.R.1017.

³⁶⁴- [1980] 10 Fam.Law 216.

In *Zaal v. Zaal*,⁽³⁶⁶⁾ Bush J. came to the opposite conclusion in reliance on the words of Lord Scarman, holding that a bare *talaq* pronounced in Dubai, where it was recognised by the local law as effective to end the marriage, was a divorce obtained by "judicial or other proceedings".⁽³⁶⁷⁾ This view was endorsed by Taylor J. in *R v. Immigration Appeal Tribunal, exp, Secretary of State for the Home Department*.⁽³⁶⁸⁾

The Court of Appeal in *Chaudhary v. Chaudhary*,⁽³⁶⁹⁾ approved the judgment of Wood J at first instance⁽³⁷⁰⁾ holding that a bare *talaq* did not qualify for recognition under Sections 2-5 as it did not constitute a divorce obtained by means of "judicial or other proceedings". In this case the facts were: The parties, Pakistani Muslims, had married in Kashmir in 1954. The husband came to England in 1963 in pursuit of employment leaving the wife and the children in Kashmir. In 1965 he met another woman in England and thereafter they lived together as husband and wife. In 1976 he purported to divorce his wife by pronouncing *talaq* three times before two witnesses in London. In 1978 he went to Kashmir and again purported to divorce the wife by pronouncing *talaq* three times before two witnesses. Kashmir is a part of Pakistan but not subject to the Muslim Family Law Ordinance 1961, so that a *talaq* itself constitutes a valid divorce. In 1979 the wife petitioned for divorce in England, and the husband responded by seeking a declaration that the marriage had been dissolved by *talaq*.

All judges agreed with the view expressed by Ormrod L.J. in *Quazi v. Quazi*,⁽³⁷¹⁾ that the inclusion of the words "judicial or other proceedings" in section 2 must have been

³⁶⁵- Ibid, at 217.

³⁶⁶- [1983] 4 F.L.R.284.

³⁶⁷- Ibid, at 287.

³⁶⁸- [1984] 2 W.L.R.36; Keith Hodgkinson, (1984) J.S.W.L.46

³⁶⁹- [1984] 3 All.E.R.1017; Lucy Carroll, A "bare" *Talaq* is not a divorce obtained by other proceedings, (1985) 101 L.Q.Rev 170; Canton, (1985) 48 M.L.Rev.212; Smart, (1985) 34 I.C.L.Q.392; Nott, (1985) 34 I.C.L.Q.844; Kenneth Mck. Norrie, (1986) J.L.S.S.31.n4.159.

³⁷⁰- [1984] 3 All.E.R.1007 at 1023, 1024.

³⁷¹- [1980] A.C.744 at 788.

intended as a limitation on the scope of that section. If the words had been omitted the only question would be whether the divorce was effective under the law of the country where it was obtained, and section 2 (a) would be superfluous.⁽³⁷²⁾

Oliver L.J. was not prepared to recognise a bare *talaq* since in his opinion it lacks any formality other than ritual performance, it lacks any necessary element of publicity, it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. The learned judge expressed the view that the word "proceedings" must

"at least bear in the statute a meaning which the word would have in normal speech where, as it seems to me, no one would ordinarily refer to a private act conducted entirely by parties inter se or by one party alone even though the party performing it may give it an additional solemnity or even an efficacy by performing it in the presence of other persons whose only involvement is that they witness its performance."⁽³⁷³⁾

The Learned judge later went on to say that proceedings: "must import a decree of formality and at least the involvement of some agency, whether lay or religious, of or recognised by the state having a function that is more than simply probative".⁽³⁷⁴⁾

Balcombe L.J., after supporting the argument put forward by Counsel for the wife that the phrase "judicial or other proceedings" requires some form of state machinery to be involved in the divorce process or religious machinery recognised by the state as sufficient, concluded that the unilateral act of one party to a marriage, however formal in its nature, and whether or not performed in the presence of witnesses is not characterised as "proceedings".⁽³⁷⁵⁾

Cumming-Bruce L.J. although he respected the religious and cultural tradition upon

³⁷²- *Chaudhary v. Chaudhary* [1984] 3 All.E.R.1017 at 1027, 1034; Nott, (1985) 34 I.C.L.Q.844 at 845; Canton, (1985) 48 M.L.Rev.212.

³⁷³- Ibid, at 1030.

³⁷⁴- Ibid, at 1031.

³⁷⁵- Ibid, at 1034.

which the bare *talaq* was founded, stated that the *talaq* in Kashmir was not within section 2 because "there is no formality, no requirement of notification to anybody. No institution of the state, legal or administrative, is involved. No religious institution plays any part."⁽³⁷⁶⁾

It is regrettable that the Court of Appeal limited "judicial or other proceedings" to a narrower category of divorces than all divorces obtained by any means whatsoever which are effective by the law of the country in which the divorce was obtained. It is submitted that the decision of the court created an unsatisfactory distinction between two types of Muslim divorce. This distinction cannot be justified by the limited nature of the Pakistani reform.⁽³⁷⁷⁾ It is also submitted that such a distinction runs contrary to the policy of avoiding limping marriages.⁽³⁷⁸⁾

c- The Law Commissions' Proposals

The Law Commissions, following Lord Scarman's approach in *Quazi v. Quazi*, recommended that "judicial or other proceedings" in relation to a country outside the British Isles should "include acts which constitute the means by which a divorce may be obtained in that country and are done in compliance with the procedure required by the law of that country."⁽³⁷⁹⁾ The Law Commissions further recommended that there should be one set of rules governing recognition of all foreign divorces whether obtained by proceedings or not.⁽³⁸⁰⁾ This liberal approach was not implemented in the Family Law Act 1986. The Act maintains the law in *Quazi* and *Chaudhary* and draws a distinction between overseas divorces which are obtained by means of proceedings and those which are not.⁽³⁸¹⁾

³⁷⁶ -Ibid, at 1026, 1029.

³⁷⁷- Peral, D.*Family Law Act 2986, part III*, (1987) C.L.J.35v at 38.

³⁷⁸- David Gordon, (1986) 37 N.I.L.Q.151.

³⁷⁹- Law Com No.137 & Scots Law Com No.88,para.6,11.

³⁸⁰- Ibid, 6,11.

³⁸¹- Contrast S.46 (1) with S.46 (2); See, *infra*, 207.

The proposal of the Law Commissions was rejected for many reasons, explained by Lord Hailsham in the debates on the Family Law Bill. Lord Hailsham stated that

"the Law Commission recommended that such informal divorces should be recognised on the same basis as those divorces obtained by judicial or other proceedings. We cannot accept this wide recommendation. There are public policy elements here. Such divorces are informal, arbitrary and usually unilateral. More importantly, there is often no available proof that what is alleged to have taken place has taken place at all...these divorces are almost exclusively obtained by men and therefore discriminate against women...particularly where the wife is resident abroad, such divorces provide little or no financial protection for the wife and family."(382)

It seems hard to accept those arguments. While it cannot be denied that the right of *talaq* under Muslim law belongs to the husband, it is difficult to say that such a method of dissolution of marriage tends to discriminate against women. It is submitted that *talaq* is a matter of religion derived from the *Quran*. All Muslims agree that such a concept of dissolution of marriage does not carry with it any seeds of injustice against women because the wife can at any time obtain judicial decree when reason for divorce is available or she can terminate her marriage by *khula*. Moreover, the wife can terminate the marriage by pronouncing *talaq* if the husband delegates his own right to the wife herself in the marriage contract or thereafter. (383)

However, if one admits the argument of Lord Hailsham that a bare *talaq* tends to discriminate against women, it is submitted with respect that the requirement of notice to the wife and to the Chairman of Council in Pakistani *talaq* does not end the discrimination because the right of *talaq* remains in the hand of the Pakistani husband. The only effect of such further procedures is that they operate to delay the divorce coming into effect for some period and they prevent the wife from being divorced without her knowledge.

382- 475 H.C. debs, Col, 1082 (1986); See, Lilian Edwards, (1988) 18 Family Law 422; David Gordon, op.cit.p.76; (1986) 37 N.I.L.Q.296-297; Young, *The Recognition of Extra-judicial Divorces in the United Kingdom*, (1987) 7 LS 81-83; Cheshire & North, 11th-ed.p.661; North, op.cit (1993) p.78.

383- Arts.40-43 of the Iraqi Personal Status Code.

The argument that the informal divorces provide little or no financial protection for the wife and family is not always right. For instance, Iraqi law does not distinguish between women who are divorced by *talaq* and those who are divorced by judicial decree in relation to financial relief. Moreover, if the husband divorces his wife by *talaq* without reasonable cause and she applies to the court for compensation, the court shall order from her ex-husband the compensation deemed by the court to be fair, provided that it shall not be in excess of the equivalent of the maintenance due to her for two years; however, this shall not affect the other marital rights due to the divorced wife.⁽³⁸⁴⁾ The Matrimonial and Family Proceedings Act 1984 allows the courts in England and Scotland to grant financial relief in respect of foreign divorces.⁽³⁸⁵⁾ Thus, the major practical reason for a discriminatory treatment of informal overseas divorces was removed.

It should be noted that much public money was spent in the case of *Quazi* upon litigation the mainspring of which might be said to be the wife's desire to repudiate the *talaq* divorce in order that she might profit financially from an English divorce. The case (and all that it has provided in the way of discussion) might not have come about had the 1984 Act been in existence. In any event, the Family Law Act 1986 has lost the opportunity given by the Law Commissions to avoid the difficulties which might arise from the interpretation of the word "proceedings" and has maintained the law as stated in *Quazi* and *Chaudhary* which is highly unsatisfactory because it will encourage the creation of limping marriages and will produce confusion in the law. Indeed, although "proceedings" are defined as "judicial or other proceedings"⁽³⁸⁶⁾ it is submitted that the 1986 Act does not advance a clear criterion as to what constitute "other proceedings". Reference to the case law in this point is not conclusive because the court dealt only with some types of extra-judicial divorces and they have given no clear answer whether or not some other extra-judicial divorces are within the meaning of other "proceedings".

384- Art.39 (2); See, *infra*, 331.

385- *Infra* ch.7.

386- S.54 (1).

In the light of *Quazi* and *Chaudhary*, it seems not only 'bare *talaq*' but purely informal and consensual divorces will be treated as having been obtained "otherwise than by means of proceedings" within section 46 (2),⁽³⁸⁷⁾ as for example, a *khula* under Islamic law by consent based simply on agreement signed by the parties or a divorce by consent under Chinese law.⁽³⁸⁸⁾

d- Where is an Extra-Judicial Divorce Obtained?

The Family Law Act 1986 contains two general rules in relation to extra-judicial divorces. The first is that an extra-judicial divorce obtained overseas will be recognised if the requirements of recognition are satisfied.⁽³⁸⁹⁾ The second is that such a divorce will be denied recognition if obtained in the British Islands.⁽³⁹⁰⁾ This leads us to consider where an extra-judicial divorce is obtained in order to classify it as one obtained overseas or one obtained in the British Islands.

It is sometime not easy to identify the country in which an extra-judicial divorce is obtained because such a divorce may consist of a number of different elements each of which may occur in a different country. The difficulty arises typically in relation to Pakistani *talaq* when e.g a husband pronounced *talaq* in say England and has sent notice to a public authority and his wife in Pakistan. Clearly, in this example the proceedings took place neither wholly overseas nor wholly within the British Islands. Such an extra-judicial divorce is referred to as 'transnational divorce'.⁽³⁹¹⁾ Is such a divorce 'overseas' or one

387- See, David Gordon, *op.cit.* pp.106-120.

388- *Lee v. Lau* [1964] 2 All.E.R. 248.

389- SS.45 and 46.

390- S.44.

391- *R v. Secretary of State for the Home Department, exp. Fatima* [1984] 2 All.E.R.458 at 463,464; Pilkington, M.P.*Transnational Divorces under the Family Law Act 1986*, (1988) 37 I.C.L.Q.131; Berkovits, (1988) 104 L.Q.Rev.60; David Gordon, (1986) 37 N.I.L.Q.151, 293; *op.cit.*p.100; Carroll, *Talaq pronounced in England and perfected by post not recognised : Fatima in the House of Lords*, (1985) 101 L.Q. Rev.175; (1986) 49 M.L.Rev.776; Canton, (1985) 48 M.L.Rev. 212; Stone, (1984) 14 A.A.L.Q.363; David Pearl, (1987) C.L.J.35; Forsyth, *Recognition of Extra-judicial Divorces: The Transnational Divorce*, (1985) 34 I.C.L.Q.398; Kenneth Mck. Norrie, (1986) J.L.S.S.31.n5 209

obtained within the British Island?

In *R v. Registrar General of Births, Deaths and Marriage, ex Parte Minhas*,⁽³⁹²⁾ the husband pronounced *talaq* in England and sent a notice of the *talaq* to the Chairman of Council and a copy of that notice to his wife in Pakistan. Park J. held that the divorce was not an overseas divorce within the meaning of section 2 but one obtained in the British Isles and could not be recognised under the 1971 Act. The Learned judge justified his decision by arguing that the divorce was obtained by means of the pronouncement of the *talaq* only. The service of the copy of the notice on the wife and the Chairman, and the reconciliation period of 90 days, which took place in Pakistan were unnecessary or, in any event not proceedings by means of which the divorce was obtained. Park J.'s decision was considered by Lord Fraser in *Quazi v. Quazi*,⁽³⁹³⁾ to have been based on a misunderstanding of the effect of the Pakistani law.

However, when the question of transnational *talaq* arose in *R v. Secretary of State for the Home Department, exp, Fatima*,⁽³⁹⁴⁾ *Minhas* was ignored and the question was considered afresh in the light of the decision of the House of Lords in *Quazi v. Quazi*. The facts in the *Fatima* case were: The husband was a Pakistani national and had married in Pakistan prior to coming to England in 1968. The marriage had been dissolved by *talaq* pronounced in England by the husband in 1978. He sent notice of the *talaq* to the wife and the appropriate public authority in Pakistan as required by the Pakistani law. The *talaq* was not revoked and under the Pakistani law the marriage was declared dissolved 90 days later. In 1982 he wished to marry Ghulam Fatima, but she was refused entry to the United

³⁹²- [1976] 2 All.E.R.246; Canton, (1976) 25 I.C.L.Q.909; Gravells, *Recognition of Extra-judicial Divorces: Theoretical problems Realised*, (1976) 92 L.Q.Rev.347; Lucy Carroll, (1981) 97 L.Q.Rev. 28.

³⁹³ -[1979] 3 All.E.R.897 at 910; Forsyth, (1985) 34 I.C.L.Q.398 at 399; Stone, (1984) 14 A.A.L.Q.363 at 374.

³⁹⁴ -[1984] 1 All.E.R.488; [1984] 2 All.E.R.458; [1986] 2 All.E.R.32; *R v. Secretary of State for the Home Department, exp, BI* [1984] 2 All.E.R.458; *Bashir v. Zabu Nisar*, unreported, April 21, 1986 (C.A.).

Kingdom by the Immigration officer on the ground that the *talaq* would not be recognised under English law.

The Immigration officer's decision was approved by Taylor J., the Court of Appeal and the House of Lords. Taylor J. referred to the speeches of Lords Fraser and Scarman in *Quazi v. Quazi*,⁽³⁹⁵⁾ holding that "the pronouncement of *talaq* in England was part of the proceedings and indeed the institution of proceedings by means of which the divorce was obtained."⁽³⁹⁶⁾

Slade L.J. in the Court of Appeal, after rejecting the argument that the *talaq* pronouncement was not itself part of the proceedings involved in obtaining a Pakistani *talaq*, stated that :

"We find it difficult to see how one can properly isolate the first essential step in the chain of events that has to take place before a *talaq* divorce is effective under Pakistani law from the other steps and say that it does not itself form part of the relevant proceedings".⁽³⁹⁷⁾

All the judges agreed that the *talaq* in question was not an overseas divorce because the proceedings had taken place partly in Pakistan and partly in England.⁽³⁹⁸⁾ The judges then turned to consider whether the *talaq* in these circumstances could be recognised as one obtained within section 2.

Slade L.J. accepted that the words of section 2 (a), if read in isolation, were capable of more than one construction, but he said that they should be read in conjunction with the wording of section 3 (1). When read together, sections 2 and 3 (1) of the 1971 Act made it clear that in using the phrase "judicial or other proceedings" in the course of its definition of

³⁹⁵ -[1979] 3 All.E.R.897 at 911, 918.

³⁹⁶ -[1984] 1 All.E.R.488 at 495.

³⁹⁷- [1984] 2 All.E.R.458 at 463.

³⁹⁸- [1984] 2 All.E.R.458 at 463 *per* Slade L.J.; [1984] 2 All.E.R.32 at 35 *per* Lord Ackner in the House of Lords.

an overseas divorce, the legislature contemplated (a) one set of proceedings only, (b) a set of proceedings which had been instituted in the same country as that in which the relevant divorce was ultimately obtained. On any other footing the phrase 'at the date of the institution of the proceedings in the country in which it was obtained' in section 3 (1) would be inept.⁽³⁹⁹⁾ Since the country where the divorce was pronounced and the country where the divorce was obtained were not the same country, it followed that the divorce was not an overseas divorce and could not be recognised under sections 2-5.

It is submitted that the decision in *Fatima* case is socially undesirable, and morally dubious. It creates a situation where there is one law for the poor and another law for the wealthy⁽⁴⁰⁰⁾ because the rich husband can visit Pakistan and pronounce *talaq* there and his *talaq* will be recognised on the authority of the *Quazi* case. The emphasis that the whole proceedings must be instituted in one country leads to the result that the *talaq* will always be denied recognition if the proceedings take place in two countries even if all the elements of the *talaq* take place outside the British Islands, and even if the *talaq* is effective in each of the countries where some of the proceedings take place. There is no policy or principle requiring this result.⁽⁴⁰¹⁾

It is submitted that the decision in the *Fatima* case is difficult to reconcile with the view of the Court of Appeal in *Chaudhary*. In *Fatima* the pronouncement of *talaq* was considered part of the proceedings whereas in *Chaudhary* it was not considered as proceedings at all.⁽⁴⁰²⁾ This state of confusion reflects the fact that English courts attempt to impose their law, morals and culture on the law of foreign countries granting extra-judicial divorces. It is also submitted that the decision in *Fatima* indicates that the policy of

399 - [1984] 2 All.E.R.458 at 464 ; [1984] 2 All.E.R.32 at 36 *per* Lord Ackner in the House of Lords.

400- Canton, (1985) 48 M.L.Rev.212 at 215; David Pearl, (1987) C.L.J.35; Berkovits, (1988) 104 L.Q.Rev 60 at 92; Cf, Lucy Corral, (1986) 49 M.L.Rev. 778.

401- Forsyth, (1985) 34 I.C.L.Q.398 at 399 at 400; Stone, (1984) 14 A.A.L.Q.363 at 374; Kenneth Mck. Norrie, (1986) J.L.S.S.31.n5 209; Cheshire & North, 11th-ed p. 663.

402- David Pearl, *Note on Talaq Divorces*, (1984) L.A.147; (1984) C.L.J.249; Cf, Lucy Corral, (1985) 101 L.Q.Rev.179.

avoiding limping marriages is less important than the policy factor of subordinating all residents of England to a uniform municipal jurisdiction.⁽⁴⁰³⁾ In any event, the decision is not satisfactory and caused social and religious damage to many Muslims. It attempts to impose English law on all residents of England even if this conflicts with parties' personal or religious law.

e- Transnational Divorce in the 1986 Act

The Law Commissions recommended that no reform was required in the law relating to transnational divorce since the law had been clarified by the decision of the Court of Appeal in the *Fatima* case.⁽⁴⁰⁴⁾ The 1986 Act does not deal with this matter directly and it seems that the draftsmen had not intended to affect the law of transnational divorce.⁽⁴⁰⁵⁾ However, since the wording of the provisions of the 1986 Act was not drafted in identical terms with the wording of the corresponding sections of the 1971 Act, it is possible that the law relating to transnational divorce may have been affected.⁽⁴⁰⁶⁾

As has been mentioned earlier, a transnational divorce was denied recognition under the 1971 Act because the wording of sections 2 and 3 (1) required that the proceedings by means of which an overseas divorce was obtained must be a single set of proceedings which had to be instituted in the same country as that in which the relevant divorce was ultimately obtained. Since the pronouncement of the *talaq* was an essential part of the proceedings, if *talaq* was pronounced in England, then the requirements of sections 2 and 3 (1) were not satisfied. In other words, the 1971 Act focused upon the proceedings by means of which the divorce was obtained and looked to the place where these proceedings took place.⁽⁴⁰⁷⁾

⁴⁰³ -Berkovits, (1988) 104 L.Q.Rev 60 at 77; David Gorden, (1986) 37 N.I.L.Q.162 and 294.

⁴⁰⁴- Law Com No.137 & Scots Law Com No 88 para .6, 11.

⁴⁰⁵- Berkovits, (1988) 104 L.Q.Rev 60 at 79.

⁴⁰⁶- Pilkington, (1988) 37 I.C.L.Q.133; Dicey&Morris, 12th-ed.p. 744; Morris, 4th-ed.p. 196.

⁴⁰⁷- Ibid, at 133.

Section 45 of the 1986 Act defines an overseas divorce as one "obtained in a country outside the British Islands". Section 46 (1) requires that an overseas divorce obtained by means of proceedings shall be recognised if it is effective under the country in which it was obtained,⁽⁴⁰⁸⁾ and at the relevant date⁽⁴⁰⁹⁾ [the date of the commencement of the proceedings] either party was habitually resident or domiciled in or a national of the country in which the divorce was obtained.⁽⁴¹⁰⁾

If one looks carefully at the provisions of the 1986 Act, one will find that the wording of this Act is different from that in the 1971 Act. The 1986 Act does not refer to a divorce "obtained by means of judicial or other proceedings in any country outside the British Isles" as contained in section 2. The 1986 Act also does not refer to "the institution of the proceedings in a country in which [the divorce] was obtained" as contained in section 3 (1). The 1986 Act requires that the divorce be obtained in a country outside the British Islands and that it be obtained by means of proceedings and it must be effective in the country where it was obtained and at the relevant date one of the relevant jurisdictional links with that country is satisfied. Thus, the 1986 Act emphasises the place where the divorce was actually obtained and not where the proceedings took place.⁽⁴¹¹⁾ Thereupon, there is no limitation on the place in which the proceedings have to take place⁽⁴¹²⁾ and then it is not necessary that the whole of the proceedings must take place in the same country.⁽⁴¹³⁾

Section 46 (1) requires that the divorce must be effective in the country where it was obtained. The question, therefore is in which country is the transnational divorce obtained in order to regard it as effective in that country? In the *Minhas* case,⁽⁴¹⁴⁾ it was decided

⁴⁰⁸ -S.46 (1) (a).

⁴⁰⁹- S.46 (3) (a).

⁴¹⁰- S.46 (1) (b).

⁴¹¹-Pilkington, (1988) 37 I.C.L.Q.133; David Gordon, op.cit.p.103.

⁴¹²- Berkovits, (1988) 104 L.Q.Rev 60 at 79.

⁴¹³-Jaffey, op.cit.p.71.

⁴¹⁴- [1976] 2 All.E.R.246.

that the divorce was obtained by the pronouncement of the word *talaq* and not by the conciliation proceedings. However, this view was considered by Lord Fraser as one based on a misunderstanding of the Pakistani law.⁽⁴¹⁵⁾

It is submitted that the correct position was established by the House of Lords in *Quazi v. Quazi*, in which it was held that the divorce is not effective until the notices have been given to the wife and to the Chairman of the relevant union and until the expiry of 90 days from the day on which notice of it is delivered to the Chairman. This indicates clearly that the divorce is obtained in the place where the process is completed.⁽⁴¹⁶⁾ Accordingly, it is hoped that the interpretation of the wording of the 1986 Act in this way is correct and if so it leads to the result that the transnational divorce is entitled to recognition under the 1986 Act even if the proceedings take place in more than one country so long as the divorce is effective where it was obtained. Moreover, such a divorce, in principle is entitled to recognition even if the pronouncement of *talaq* takes place in the British Islands and the other proceedings take place abroad so long as it is effective where it was obtained

One may wonder whether transnational divorce pronounced in the British Islands and completed abroad can be denied recognition by virtue of section 44 (1). This section, which replaces section 61(1) of the Domicile and Matrimonial Proceedings Act 1973, states that "no divorce... 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". Thus, section 44 (1) refers not to proceedings, as in section 16 (1), but to divorce obtained in the British Islands. Since the transnational divorce in the above example is not one obtained in the British Islands but one obtained abroad where the process is completed, it follows that section 44 (1) is not applicable.⁽⁴¹⁷⁾ In the converse situation, that the pronouncement of *talaq* takes place abroad and the divorce completed in the British Islands, it is submitted

⁴¹⁵- *Quazi v. Quazi* [1979] 3 All.E.R. 897 at 910.

⁴¹⁶- David Gordon, op.cit.p.103; Pilkington, (1988) 37 I.C.L.Q.135.

⁴¹⁷ Subject to public policy, infra ; David Gordon, op.cit.p.104; cf, Collier, op.cit.p.291; David Pear, (1987) C.L.J.35.

that the divorce in these circumstances is not entitled to recognition because it is not effective where it is obtained and will be caught by section 44(1).

f- Jurisdictional Bases

As has been mentioned earlier, the Law Commissions' recommendation to have one set of rules governing recognition of all foreign divorces, coupled with a more liberal interpretation of the concept of 'proceedings' was not implemented by the 1986 Act. Section 46 draws clearly a distinction between divorces obtained by means of proceedings and those obtained otherwise than by means of proceedings. The grounds for recognition of an extra-judicial divorce obtained by proceedings which are contained in section 46 (1) are the same as those in relation to divorces obtained from a court. Hence, an extra-judicial divorce will be recognised if either party to the marriage at the date of the commencement of the proceedings was habitually resident or domiciled, either in the United Kingdom or foreign sense,⁽⁴¹⁸⁾ in or a national of, the country in which the divorce was obtained, provided it is effective under the law of that country. On the authority of *Quazi*, it seems that not only divorce under Muslim Family Laws Ordinance 1961 of Pakistan but also administrative divorces,⁽⁴¹⁹⁾ *khula* under Iraqi law and Jewish *gett*⁽⁴²⁰⁾ will be considered as being obtained by proceedings within section 46(1).

If the House of Lords in *Quazi* has failed to settle the question of informal divorces, it is now clear that such divorces are recognised under section 46 (2). This section runs contrary to the policy considerations which supported the Law Commissions' proposals. It adopts a more restrictive approach than section 46 (1). Lord Hailsham in the debates of the Family Law Bill justified the inclusion of section 46 (2) on the grounds that it is designed "to give greater protection to wives resident in the United Kingdom whose husbands have obtained an informal divorce abroad. It would be wrong to deny a wife living here the

⁴¹⁸ -S.46 (5).

⁴¹⁹- *Makouipour v. Makouipour*, 1967 S.L.T.101.

⁴²⁰- *Broit v. Broit* , 1972 S.L.T.(Notes) 32; *Maples v. Maples* [1987] 2 W.L.R.487.

protection of our own court."(421)

It is regrettable that the policy of protecting the British wife is to be considered a more important aim than avoiding "limping marriages".(422) There is a clear lack of sympathy between these views. On the one hand, Western lawyers tend to misunderstand the nature and consequences of the Muslim religious divorce, in the author's view. On the other hand, the "limping marriage", though undesirable in general, may be the lesser evil in the particular case. Moreover, one could postulate the situation of a divorce of two Iraqis, denied recognition in the U.K because the husband is resident in England or Scotland. It seems clearly that a bare *talaq*, Muslim *khula*, certain Hindu practices and divorce in Thailand(423) are within section 46 (2).

Section 46 (2) provides that "the validity of an overseas divorce... obtained otherwise than by means of proceedings shall be recognised if -(a) the divorce...is effective under the law of the country in which it was obtained; (b) at the relevant date-[the date on which it was obtained] (i) each party to the marriage was domiciled in that country; or (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce...is recognised as valid; and (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date".

Prior to the enactment of the 1986 Act there was controversy upon whether or not an extra-judicial divorce not obtained by proceedings should be recognised under section 6. One view suggested that section 6 should be read 'on its face' as requiring proceedings for recognition of extra-judicial divorces.(424) Clearly this view runs contrary to the policy of

421- 475 H.C.debs, Col, 1082 .

422 -David Gordon, op.cit.p. 77.

423- *Ratanachai v. Ratanachai* [1960] The Times, 4 June 1960; *Varanand v. Varanand* [1964] 108 Sol. Jo. 693.

424- *Viswalingham v. Viswalingham* [1980] F.L.R.15 at 19; *Chaudhary v. Chaudhary* [1984] 3 All.E.R. 1017; David Gordon, (1986) 37 N.I.L.Q.151.

avoiding limping marriages, since it would exclude informal divorces. It is submitted that section 6 did not require that an extra-judicial divorce must be obtained by proceedings.⁽⁴²⁵⁾ Such a divorce was entitled to recognition if the parties were domiciled in the United Kingdom sense in the country where it was obtained, or if it was recognised in the country or countries of their domicile. It is also submitted that section 6 did not require that such a divorce must be effective in the country where it was obtained, so a bare *talaq*, pronounced by an Iraqi national, in a country where it is not effective would be recognised under section 6 if recognised by the law of the domicile of the parties. However, the controversy over the state of extra-judicial divorces not obtained by proceedings has now been removed. Moreover, there is now no longer any scope for recognition if such a divorce is not effective in the country where it was obtained. To give effect to the requirement of effectiveness the 1986 Act states that the courts may refuse to recognise such a divorce if there is no official document certifying that the divorce is effective under the law of the country in which it was obtained.⁽⁴²⁶⁾

The requirement of effectiveness raises again the problem of deciding where an extra-judicial divorce not obtained by proceedings is obtained.⁽⁴²⁷⁾ It is submitted that there is no difficulty in identifying the country in which 'oral bare *talaq*' is obtained because such a divorce is regarded to be obtained in the country where the husband pronounced the word *talaq*. The difficulty seems to arise in the context of a 'written bare *talaq*' where the husband writes a letter, say, in Iraq and sends it to the wife who is at that moment in the United Kingdom. Is a divorce obtained in Iraq where the husband writes the letter or in the United Kingdom where the wife receives the letter?

Quazi and Fatima are authorities for the proposition that Ordinance *talaq* is obtained

425- Morris, 2nd-ed.p.205; North, op.cit.(1977) p. 233; Canton, (1985) 48 M.L.Rev. 212 at 216; Smart, (1985) 34 I.C.L.Q. 396 at 397; Palmer, (1980) J.S.W.L. 177; Lucy Carroll ,(1985) J.S.W.L. 151.

426 -S.51 (3) (b) (i) infra, 247..

427 -Cf, earlier comments about place of perfecting in 'proceedings' transnational divorce", supra, 201.

in the country in which the proceedings are completed, i.e. the country in which the Chairman receives the notice of *talaq* and not in the country from which it is sent, whereas under Iraqi law a written bare *talaq* takes effect as soon as it is written unless expressed to be conditional on receipt by the wife. If the *talaq* in the above example is considered to be obtained in the United Kingdom on the analogy of *Quazi* and *Fatima*, recognition will be denied because it is not effective where it was obtained.⁽⁴²⁸⁾ If, however it is considered to be obtained in Iraq where it is effective, it seems this divorce will be recognised if the requirements of the 1986 Act are satisfied. Section 44 (1) is not applicable because this section talks about divorces obtained in the British Islands.⁽⁴²⁹⁾ This highlights yet another, more specific, point of dispute between different legal systems. Iraq (being expert in these matters, and provided with many domestic cases) considers a written bare *talaq* to be effective where posted, thus affecting (their) view of where it has been "obtained". There are cases in Iraq upon where, when a *talaq* delivered by telephone is, completed, but there is no clear view.

Section 46 (2) adopts more restrictive jurisdictional bases than the repealed earlier legislation.⁽⁴³⁰⁾ There is now no longer any scope for recognition if the divorce was obtained in a country where neither spouse was domiciled even though recognised either in their common domicile or in the countries of their separate domiciles.⁽⁴³¹⁾

An extra-judicial divorce under section 46 (2) has to be obtained either in the country where both parties are domiciled or in the country where one of them is domiciled and recognised as valid under the law of domicile of the other party. It follows from this rule that if one spouse was domiciled in the United Kingdom, recognition will be denied because of the circular problem,⁽⁴³²⁾ whereas an extra-judicial divorce obtained by

428- S.44 (1).

429- It might, however, be denied recognition on the grounds of public policy. See, *infra*, 248.

430 -S.6 (3) (b) of the 1971 Act.

431- An extra-judicial divorce obtained before part II of the 1986 Act came into force and was recognised as valid under section 6 (3) (b) and was not affected by section 16 (2), will be continue to be recognised, S 52 (5) (b) (e).

432- Jaffey, *op.cit.*p.67.

proceedings within section 46 (1) can be recognised on the basis of domicile of either spouse even if the other was domiciled in the United Kingdom.⁽⁴³³⁾ Moreover, a divorce within section 46 (2) cannot be recognised on the grounds that either spouse was habitually resident in, or a national of, the country in which it was obtained. The adoption of more restrictive recognition rules in relation to divorces not obtained by proceedings indicates clearly that the 1986 Act does not accept the modern tendency towards universal recognition of foreign divorces. The proposal of the Law Commissions to have one set of rules governing recognition of all foreign divorces is highly to be recommended and a good movement towards respecting foreign religious or personal laws.

Domicile as a ground for recognition of extra-judicial divorces under section 46 is broader than that in section 6. Section 46 (5) states that domicile for the purpose of recognition of extra-judicial divorces means domicile in the United Kingdom sense or in the foreign law sense in family matters. It seems that domicile in family matters is unlikely to be of much significance in the case of recognition of extra-judicial divorces because most countries permitting such a divorce do not have this concept: they usually use the national law or religious principles.

It is also necessary for recognition under section 46 (2) that neither party to the marriage must have been habitually resident in the United Kingdom throughout the period of one year immediately preceding the date on which the divorce was obtained.⁽⁴³⁴⁾ This residence limitation is more restrictive (or protective to the British wife, according to one's point of view) ⁽⁴³⁵⁾ than was section 16 (2) of the earlier legislation.⁽⁴³⁶⁾ Under the previous section the divorce would only be denied recognition if both parties had been habitually resident for one year.

⁴³³ -S.46 (1) (b) (ii).

⁴³⁴ -S.46 (2) (c).

⁴³⁵ - Anton, 2nd-ed., p. 477.

⁴³⁶ - Lilian Edwards, (1988) 18 Family Law 424; David Pearl, (1987) C.L.J.36; James Young (1987) 7 L.S.84.

The policy behind this residence limitation is to prevent a person habitually resident in the United Kingdom from evading of section 44 (1) by simply leaving temporarily the United Kingdom to obtain an extra-judicial divorce. It seems that such a limitation is in conflict with the 1986 Act's major purpose, namely to cure the mischief of limping marriage. It attempts to impose on the persons the British system even though alien to their culture and religion. There is no reason why an Iraqi husband, who has no connection with the United Kingdom should be forced to raise an action before the U.K. court to divorce his wife. This limitation might cause hardship for many Muslims because *talaq* is seen as concerning religious rather than social matters.

It should be noted that the anti-evasion provision provided by the 1986 Act does not apply to an extra-judicial divorce obtained by proceedings under section 46 (1). Thus, recognition will be given to a divorce obtained in Pakistan by proceedings under the 1961 Ordinance even if the parties have both habitually resided in the United Kingdom for years and even if they are both domiciled here.⁽⁴³⁷⁾ There is no point in denying an Iraqi national the right to divorce under his personal law, while the Pakistani can rely on his personal law merely because his *talaq* involves some empty formalism. One might say that Pakistani *talaqs* should be re-classified so as to fall under section 46 (2), but the author's defence (general conclusion) is to have section 46 (2) removed from the Act, and permit safeguards in religious divorces to be provided by public policy.

Finally, it is interesting to note that the effect of the residence limitation under the present law is less important than it was under section 16. It will be remembered that an extra-judicial divorce obtained in a country where neither party was domiciled would be recognised under section 6 if it was recognised as valid by the law of the parties' domicile. Thus, in the case of a husband and wife, both Iraqi nationals domiciled in Iraq, but habitually resident in Scotland, who go to France where *talaq* is pronounced by the

437- S.46 (1): James, Young, (1987) 7 L.S.84.

husband, the divorce is recognised under the above rule, because it is valid under the Iraqi law despite the fact that it is not effective in France. Hence, section 16 (2) might be said to have been necessary to prevent the parties from obtaining divorce in such circumstances. The above rule in section 6 has now been abolished. The new rule requires that an extra-judicial divorce not obtained by proceedings has to be obtained in the country of the domicile at least of one party and be effective under the law in which it was obtained. Thus, the divorce in the above example cannot be recognised under the 1986 Act since it was not effective in the country where it was obtained. This fact makes the residence limitation under the present law less important and its purpose is less obvious.

4- Extra-Judicial Divorces Obtained in the British Islands

At common law an extra-judicial divorce obtained in the British Islands was entitled to recognition if recognised in the law of the domicile of the parties.⁽⁴³⁸⁾ When the 1971 Act came into force, it contained no express provision regulating the position of extra-judicial divorces obtained in the British Islands by parties domiciled elsewhere.

It was argued that the recognition of such divorces obtained after 1971 is outside the scope of the 1971 Act and could only be recognised under the common law rule in *Armitage v. A.G.*,⁽⁴³⁹⁾ if it was recognised as valid under the law of the parties' domicile.⁽⁴⁴⁰⁾ This view was based on the analysis of the provisions of the 1971 Act as follows: Section 1 cannot apply to such divorces because this section talks about the recognition in the United Kingdom of divorces "granted under the law of any part of the British Isles". An extra-judicial divorce is not one granted by a court under the law of any part of the British Isles. Sections 2-5 also cannot apply because those sections talk about the recognition in the United Kingdom of divorces "obtained outside the British Isles". An extra-judicial divorce in the question is not one obtained outside the British Isles.

⁴³⁸- *Qureshi v. Qureshi* [1971] 1 All.E.R.325.

⁴³⁹- [1906] P.135.

⁴⁴⁰- Morris, 2nd-ed.p.153; North, op.cit.p.223; Cf, Polonsky, (1973) 22 I.C.L.Q.348-349.

The state of extra-judicial divorces obtained in the British Islands was regulated by Section 16 (1) of the Domicile and Matrimonial Proceedings Act 1973. This provided that "no proceedings in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in a court of law of one of those countries". It is clear that the purpose of this section was to reverse the law as enunciated in *Qureshi* and to prevent recognition of extra-judicial divorces obtained in the British Islands after 1973. Nevertheless, there was doubt whether section 16 (1) would apply equally to all extra-judicial divorces obtained in the British Islands or if its application was confined only to those obtained where there are proceedings. This state of uncertainty came from the word "proceeding" in the section.

One view suggested that the word "proceeding" in section 16 (1) has the same meaning as "proceedings" in section 2.⁽⁴⁴¹⁾ This view renders the section easy to apply but it runs contrary to the policy consideration which section 16(1) aims to reach since it would exclude extra-judicial divorces not obtained by proceedings from being caught by this section. Thus, since a bare *talaq* is not within "proceedings" in section 2, then it is not "proceeding" within section 16 (1) and therefore, it would be recognised if recognised by the law of the domicile of the parties. The other view suggested that it is not a requirement that a divorce must be obtained by proceedings to fall within section 16 (1). It applies equally to all extra-judicial divorces obtained in the British Islands.⁽⁴⁴²⁾

This state of confusion has now been removed. Section 44 (1) states that "no divorce...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"⁽⁴⁴³⁾. This section does not affect the validity of an extra-judicial divorce obtained before 1974, which

441- Karsten, (1980) 43 M.L.Rev.202 at 207; Stone, (1985) 14 A.A.L.Q.366; Lucy Carroll, (1985) 101 L.Q.Rev.178.

442- *Chaudhary v. Chaudhary* [1984] 3 All.E.R.1017 at 1029 per Cumming-Bruce L.J; Kenneth Mck.Norrie, (1986) J.L.S.S.31.n5 210; Keith.Hodkinson, (1984) J.S.W.L.47-50.

443- *Maples v Maples*[1987] 2 W.L.R.487.

would be recognised as valid under the common law rules then applicable.⁽⁴⁴⁴⁾ Finally, it is interesting to note that section 44 (1) seems to be unnecessary in the context of the 1986 Act. For the purpose of recognition under this Act all divorces whether or not obtained by proceedings must be effective in the country where obtained. Since an extra-judicial divorce does not form part of the United Kingdom family law then this section appears redundant.⁽⁴⁴⁵⁾

II- Iraqi Rules Relating to the Recognition of Foreign Divorces

The law of Iraq contains no specific statutory provisions regulating recognition of foreign divorces. On the other hand, enforcement of civil and commercial judgments are subject to the Enforcement of Foreign Judgments Code 1928 and the Enforcement of Arab Judgments Treaty 1952. Academic authorities, however, have expressed different speculative views as to whether the 1928 Code and the 1952 Arab Treaty should be applied to the recognition of divorces. To understand whether a foreign divorce can be recognised by virtue of the 1928 Code and 1952 Treaty reference must be made to the relevant provisions.

A- Enforcement of Foreign Judgments Code 1928

A foreign judgment may, in accordance with the provisions of this Code, be executed in Iraq by the order of an Iraqi court, i.e. an order of execution. Article 3 provides that "any person desiring to execute a foreign judgment shall bring action in the court of first instance claiming the issue of an order for execution. The action shall be brought in the court having jurisdiction in the place in which the judgment debtor resides or, if he shall have no fixed residence in Iraq, in the place in which any property which it is proposed to attach is situated. The application shall be accompanied by a copy authenticated in the usual manner, of the foreign judgment and the reasons therefor." Article 6 provides that "every

⁴⁴⁴- S.52 (4) (5) (a); Morris, 4th-ed. p 188.

⁴⁴⁵- Lilian Edwards, (1988) 18 Family Law 424; James Young (1987) 7 L.S.84.

judgment in respect of which an order for execution is claimed must fulfil all the following conditions. The court shall examine the fulfilment of these conditions on its own motion whether the judgment debtor has in this respect raised the question in his defence or not: (a) That the judgment debtor has reasonable and sufficient notice of the action of the foreign court; (b) That the foreign court was competent within the meaning of article 7 hereof; (c) That the object of judgment is for debt or definite sum of money and, if pronounced in action, is by way of civil compensation only; (d) That the cause of action was not such as would be considered under Iraqi law as contrary to public policy; (e) That the judgment is executory in the foreign country."

Article 7 provides that the foreign court shall be deemed to be competent if one of the following conditions can be fulfilled: (a) That the action related to property movable or immovable in the foreign country; (b) That the cause of action arose from a contract entered into in the foreign country or intended to be there executed wholly or in part, to which the judgment related; (c) That the cause of action arose from acts which wholly or in part were done in the foreign court; (d) That the judgment debtor is ordinarily resident in the foreign country or was carrying on commercial business in that country at the date on which the action was instituted; (e) That the judgment debtor voluntarily appeared in the action; (f) That the judgment debtor agreed to submit to the jurisdiction of the foreign court in the case."⁽⁴⁴⁶⁾

One view has suggested that practical considerations such as avoiding limping marriages, require the application of the 1928 Code to cover Matrimonial judgments including judgments on recognition of foreign divorces. Two points may be made: the first is that the civil and commercial judgments cannot be executed according to the 1928 Code without an order of execution granted by Iraqi courts. This is because the object of those judgments is for debt or definite sum of money. Since the object of the decree of divorce is not for debt or a definite sum of money but affecting status, it follows that the foreign

⁴⁴⁶ -See, Amen, *The Legal System of Iraq*, (1989), p.337.

divorces are effective without an order of execution by the Iraqi court.⁽⁴⁴⁷⁾ The second alternative ground is that article 17 of the 1931 Personal Status Code for Foreigners gives the courts the right to recognise foreign judgments relating to succession and testaments without an order of execution. Since succession and testaments are treated as matters of personal status, it follows that there is no reason which prevents the courts from extending article 17 to cover all matters of personal status including foreign divorces. Accordingly, if the provisions of the 1928 Code are read together with article 17, the result should be that foreign divorces are recognised in Iraq without an order of execution.⁽⁴⁴⁸⁾ The other view defends the idea that foreign divorces must be treated in the same way as civil and commercial judgments in that an order of execution must be obtained according to the 1928 Code in order to recognise them as effective in Iraq.⁽⁴⁴⁹⁾

It is submitted that the existing views speculating upon the application of the 1928 Code are extremely doubtful and irreconcilable with any sound reasoning, for they assimilate divorce to a mere commercial judgment. It is also submitted that those views are inconsistent with the well established principle in Iraq that a statutory provision must be interpreted in every case in accordance with the object and intent of the Code in which it occurs. Looking at the relevant provisions as a whole, the 1928 Code deals only with civil and commercial judgments, and article 17 refers clearly to specific matters of succession and testaments. Since the nature of civil and commercial judgments is different from judgments affecting status, it is therefore, difficult to follow the view that the provisions of the 1928 Code and article 17 must be read together to cover foreign divorces.

It is also submitted that determination of the recognition of foreign divorces by reference to the 1928 Code runs contrary to the function of jurisdiction in matters affecting status. Under the 1928 Code a foreign judgment cannot be enforced in Iraq unless the

⁴⁴⁷-JaberJud Rahuman, *Arabic Private International Law*, Vol.4 Egypt. v.4 (1964) p.211 (In Arabic)

⁴⁴⁸- bid at 110, 111; Cf, All-Hadway, op.cit.p.268.

⁴⁴⁹-Abdul-Hamid Washy, *Private International Law in Iraq*, Baghdad (1940), p.510.(In Arabic).

foreign court assumed jurisdiction on one of the bases under article 7. The bases of jurisdiction under this article have nothing to do with judgments affecting status and they are completely different from those in articles 14 and 15 (1) of the 1951 Civil Code by virtue of which the Iraqi court can assume jurisdiction over divorce proceedings. The wording of article 7 indicates clearly that the government did not intend to afford recognition to foreign divorces by virtue of the 1928 Code. It is thought, therefore, that this is the less likely (and less desirable) interpretation.

However, if it is considered that the 1928 Code is applicable to foreign divorces, then it is necessary for recognition that the foreign divorce be obtained by judicial proceedings and presumably that the proceeding be effective under the law of the country in which it was obtained. A foreign divorce obtained otherwise than by means of judicial proceedings should be considered outside the scope of the 1928 Code because article 1 states clearly that "foreign judgment" means "a judgment granted by a court constituted outside Iraq".

It is also necessary for recognition that the foreign court must have jurisdiction to grant a decree of divorce according to Iraqi law. This appears from the wording of article 7 which states that the foreign court shall be deemed to be competent to grant a foreign judgment if one of the bases under this article is satisfied. Since the jurisdiction of the Iraqi courts to grant a decree of divorce is based on nationality and residence, one might have speculated that a foreign court shall be deemed to be competent to grant a decree of divorce, if at least one of the parties is a national of the foreign state, or if neither party is national of the foreign state but the respondent has his residence there.

B- Enforcement of Arab Judgments Treaty 1952

In 1953 Iraq signed a treaty of recognition and enforcement of Arab judgments with the Arab League States and ratified it by the Act No.35 of 1956.⁽⁴⁵⁰⁾ It is interesting to note

⁴⁵⁰- The system in Iraq does not require that the government should pass legislation to implement the treaties. A treaty becomes part of Iraq law as soon as it has been ratified and the courts apply it as a part of Iraqi internal law.

that the treaty consists of 12 articles most of them designed for procedure purpose and having nothing to do with the recognition and enforcement of Arab judgments.

However, article 1 provides that every final judgment which is granted by a Judicial Committee of one of the Arab League States, which determines civil or commercial rights, or has granted compensation by the criminal courts, or is related to personal status, is enforceable in all States of the Arab League according to the provisions of this treaty. It is argued that, although this article does not deal specifically with divorce cases, it certainly includes the question of recognition of personal status. This could be understood to mean that the treaty was designed to include within its scope the question of recognition of divorces within the contracting States. As a matter of policy the interpretation of "personal status" to include divorce recognition within the scope of the treaty is welcome and it would certainly have a positive effect on limping marriages. Nevertheless, since it is a general treaty it is difficult for a lawyer to find out in which circumstances a divorce is entitled to recognition and it remains doubtful whether its provisions are capable of solving the whole problem of recognition of divorces.

It is necessary for recognition under the Arab treaty that the divorce be obtained by judicial proceedings. However, it is interesting to note that the personal status law in the Arab States generally is derived from Islamic law, under which a marriage may be dissolved either by judicial process (*tafriq*) or *talaq* or *khula*. This approach to dissolution of marriage has been followed by the Arab States Codes with the exception of Tunisian Personal Status Code 1956 which provides "no divorce shall take place except before a court".⁽⁴⁵¹⁾ In some Arab States the classical method of *talaq* has been altered and statutory reforms were introduced requiring further formalities. Although such formalities do not amount to judicial investigation and, having regard to the fact that *talaq* is effective under Iraqi law, the present writer suggests that such divorces should also be governed by the Arab treaty.

451- Art.30; more details See, Nasir, *The Islamic Law of Personal Status*, London, (1986), p.102.

It is also necessary for recognition that the forum court must have jurisdiction in the international sense to grant a decree of divorce. It should be noted that the treaty is not clear in the matter of whether the jurisdiction of the forum court must be satisfied according to its own law or according to the law of the state where recognition is sought. This ambiguity comes from the wording of article 2 (a) which states merely that recognition will be denied if the forum court has no jurisdiction in the international sense.

Although this article has received criticism on the ground that it leads to different interpretations and it makes the law of recognition uncertain,⁽⁴⁵²⁾ it is submitted that this criticism is less important in practice because there are no considerable differences in relation to jurisdiction over divorce proceedings between the Arab League States. However, if the treaty intended to leave the question of jurisdiction to be decided by the internal laws of the contracting States when considering a question of recognition, then the Iraqi law alone will determine whether or not the forum court has jurisdiction to grant a decree of divorce. This might be justified by the analogy to the general rule in article 7 of the 1928 Code which states that the foreign court shall be deemed to be competent to grant a foreign judgment if one of the jurisdictional bases under this article is met. In any event, the forum court shall be deemed to be competent to pronounce a decree of divorce if at least one of the parties is a national of the foreign State, or neither party is a national of the foreign State but the respondent has his residence there.⁽⁴⁵³⁾ When the jurisdiction of the foreign court is established to the satisfaction of the Iraqi court, Iraqi courts need not consider the grounds upon which the divorce was granted because the general rule in Iraq is that the permissibility and the grounds for divorce are determined not by the Iraqi law but by the national law of the husband.⁽⁴⁵⁴⁾

It is also necessary for recognition that the divorce must be final and effective in the

⁴⁵²-JaberJud Rahuman, op.cit.p.201; Azzedeen Abdallah, op.cit.p.955.

⁴⁵³ Arts.14 and 15 (1) of the 1951 Civil Code.

⁴⁵⁴ -Subject to the possibility of public policy challenge, rarely encountered; See, Ch.3 and 5.

State where it was obtained. The finality and validity of the decree must be proved by a document or note which is authenticated by the granting court.⁽⁴⁵⁵⁾ The requirements of finality mean generally that the decree must be regarded as *Res Judicata*. Article 2 provides that a contracting State is not permitted to refuse enforcement of the judgment except in the following circumstances: (d) when a final judgment has been pronounced by one of the courts of the State which is required to enforce the judgment concerning the same case and the same subject-matter.

If a decree of divorce is subject to appeal, it is submitted that it will not be regarded as final and effective and will not receive recognition in Iraq. Article 2 goes further when it provides that the decree will not be final and effective and recognition must be refused if at the time when the decree is obtained there are proceedings between the same parties before the court of recognition, providing that those proceedings had been brought to this court before the same proceedings were raised in the court in which the divorce was granted.⁽⁴⁵⁶⁾ If, for example, the court in Jordan granted a decree of divorce to the wife and the husband had commenced proceedings to dissolve the same marriage in Iraq, the Jordanian decree will not be effective in the eyes of Iraqi law and the courts will continue to hear the husband's action. In the absence of rules of staying proceedings⁽⁴⁵⁷⁾ both in the Arab treaty and Iraqi law article 2 (d) would prolong proceedings and substantially increase expenses. Clearly this double process is wrong, inconsistent and unnecessary if the Jordanian divorce is worth of recognition.⁽⁴⁵⁸⁾

It has been seen that divorce by a court is not universally the rule, and the 1928 Code and Arab treaty are not applicable to non judicial divorces since they expressly provide that only judgments granted by a court are entitled to recognition and enforcement. However,

455- Art.5.

456- All-Hadway, op.cit.p. 265; JaberJud Rahuman, op.cit.p. 201; Azzedeen Abdallah, op.cit.pp. 955, 956.

457- See, English and Scottish rules, Supra, 83.

458- See, Infra, Chapter 5.

the recognition of divorces not obtained by a court is subject to the choice of law rule.⁽⁴⁵⁹⁾ Hence, the basic principle of recognition is that the validity of such a divorce shall be recognised in Iraq if it is valid by the national law of the husband. Residence, domicile of the parties and the place where divorce is obtained are irrelevant. Moreover, such a divorce is entitled to recognition even if it is not effective where it was obtained and even if it is not recognised as valid by the law of the other party so long as it is effective under the law of the husband's nationality.⁽⁴⁶⁰⁾ Applying this rule to the case of an Iraqi husband whose wife is Scottish, the *talaq* pronounced in Scotland will be recognised in Iraq even if it is not recognised as valid by the Scots law.⁽⁴⁶¹⁾

Finally, the validity of a *talaq* pronounced by a foreign national will be decided by Iraqi law *qua forum* if at the time of the marriage the wife was an Iraqi national even if she has acquired her husband's nationality.

⁴⁵⁹- Art.19 (3) of the 1951 Civil Code.

⁴⁶⁰- Contrast with the position in the Family Law Act 1986, S.46 (2).

⁴⁶¹- Contrast with the position in the Family Law Act 1986, S.44.

CHAPTER FIVE

Grounds for Non-Recognition of Foreign Divorces

Every legal system reserves to itself the power to limit the application of foreign law. Although this power is not the same in all legal systems, it is submitted that there is a degree of similarity, namely that a foreign law will not be applied if it would offend against the concept of justice and public policy of the state in which the foreign law is sought to be recognised or enforced. The application of this general rule to the field of divorce may lead to a refusal to recognise a foreign divorce if its recognition offends the ideas of justice and public policy of the state of recognition.

The rules of recognition in English, Scots and Iraqi laws contain within themselves all the conditions on which a foreign divorce will be recognised. These rules have already been discussed, and it has been seen that a foreign divorce will not be recognised if the requirements of recognition are not satisfied. Apart from these limitations (which pertain to jurisdiction) there are a number of grounds on which recognition to foreign divorces may be denied. So far as England and Scotland are concerned, the (public policy) grounds for non-recognition are now contained in section 51 of the Family Law Act 1986. In Iraq, there are no specific rules regulating this subject. The courts are bound to follow the general rules contained in the 1951 Civil Code and the 1969 Civil Procedure Code.

This chapter will consider the grounds of non-recognition of foreign divorces as follows:

- I- Grounds for Non-Recognition of Foreign Divorces in England and Scotland.**
- II- Grounds for Non-Recognition of Foreign Divorces in Iraq.**

I- Grounds for Non-Recognition of Foreign Divorces in England and Scotland.

At common law the English and Scottish judges had claimed a residual discretion to refuse recognition of foreign divorces which offended their sense of justice, and in a number of cases this discretion was used to refuse recognition to divorces obtained by fraud⁽¹⁾ or duress.⁽²⁾ There were also a number of dicta suggesting that the courts would refuse to recognise a foreign divorce where the foreign proceedings were contrary to natural justice⁽³⁾ or where the grounds of divorce were repugnant to morality.⁽⁴⁾

Since 1971 the grounds for non-recognition of foreign divorces have been codified in statutory provisions. Section 8 (1) of the 1971 Act provided that a divorce whether obtained within or outside the British Isles must be refused recognition if by the law of the part of the United Kingdom in which recognition is sought (including its rules of the conflict of laws) there was no subsisting marriage between the parties. Section 8 (2), which applied only to divorces obtained outside the British Isles, provided that such divorces may be refused recognition in three situations, namely where such a divorce was obtained by one spouse without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken,⁽⁵⁾ or without the other spouse having been given, for any other reason other than lack of notice, such opportunity to take part in the proceedings as, having regard to the nature of the proceedings and all the circumstances, he should reasonably have been given,⁽⁶⁾ or if its recognition would

1- *Bonaparte v. Bonaparte* (1892) P.402; *Middleton v. Middleton* [1967] P.62.

2- *Re Meyer* [1971] P.298.

3- *Shaw v. A. G* (1870) L.R.2 P & D.156; *Rudd v. Rudd* [1924] P.72; *Scott v. Scott*, 1973 S.L.T.632.

4- *Humphrey v. Humphrey Trustee's*, 1895 33 S.L.R.99; *Westergaard v. Westergaard*, 1914 S.C.977.

5- S.8 (2) (a) (i).

6- S.8 (2) (a) (ii).

manifestly be contrary to public policy.⁽⁷⁾

In 1984, the Law Commissions⁽⁸⁾ re-examined the grounds for non-recognition of foreign divorce contained in the 1971 Act. They recommended the continuation, in proposed legislation to replace the 1971 Act, of the grounds for non-recognition stated in section 8, but with some changes, namely they recommended that the ground for refusal of recognition contained in section 8 (1) should become discretionary rather than mandatory. They also recommended that the principle of *Res judicata* should become a ground for refusal of recognition in the new legislation to all divorces whether obtained within or outside the British Isles.⁽⁹⁾ Further recommendation was made by the Law Commissions that the grounds of want of notice and want of participation in the proceedings contained in section 8 should be extended also to the petitioner rather than only to respondent.⁽¹⁰⁾ These recommendations have been adopted by the Family Law Act 1986. Section 51 now contains an exclusive list of the grounds on which recognition may be denied both to other British and overseas divorces. This section also contains a special ground, not recommended by the Law Commissions, on which an extra-judicial divorce not obtained by means of proceedings may be refused recognition viz, if there is no official document certifying that the divorce is effective in the country of the domicile where it was obtained or is recognised in the country of the other spouse's domicile.⁽¹¹⁾ It should be noted that the grounds for non-recognition laid down in section 51 of the 1986 Act are subject to section 52 of this Act. This has been considered above.

A- Common Law Grounds for Non-Recognition of Foreign Divorces

The common law position reveals there are few cases in which a foreign divorce was denied recognition. This is because the courts limited the scope of the grounds on which a

7- S.8 (2) (b).

8- Law Com No. 137 & Scots Law Com No. 88 paras. 6.62-6. 68.

9- Ibid, 6. 66.

10- *kandall v. Kandall* [1977] Fam.Law.208.

11- S.51 (3) (c) and (4).

foreign divorce could be challenged. "There can be no doubt that this attitude is a wise one. To multiply the grounds of attack (many of which might be open to third parties)⁽¹²⁾ would introduce the gravest uncertainty into family relationships, because the parties might have remarried and have children after the foreign divorce".⁽¹³⁾

1- Natural Justice

Various dicta indicated that an English or Scottish court might refuse recognition of divorces which were obtained in a manner contrary to English or Scottish ideas of natural justice. The usual ground of challenge of foreign divorce in this area is that the respondent did not receive adequate notice to enable him to defend the proceedings or if he was not given a fair opportunity to present his case to the court.⁽¹⁴⁾ In *Crabtree v. Crabtree*,⁽¹⁵⁾ the Scottish court refused to recognise a Latvian divorce granted in proceedings in which the defender had no notice and in which she had no opportunity to be heard or to be represented.

In a number of English cases, it was held that the divorce was not entitled to recognition because the respondent had not received notice of the proceedings. It should be mentioned that in these cases the main reason for denial of recognition was not that the respondent had not received notice of the proceedings but that the divorce was not granted by the court of the husband's domicile.⁽¹⁶⁾ For instance, in *Show v. Att. Gen.*⁽¹⁷⁾ Lord Penzance, in giving judgment, said that the decree of the court "has, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and take place in the absence of the party affected by them".

12- *Pemberton v. Hughes* [899] 1 Ch 781 (A.C.).

13- Dicey & Morris, 8th ed., p. 371; Morris, 3rd ed., p. 201; 4th ed., p. 198.

14- Morris, *The Recognition of American Divorces in England*, (1952) 29 B.Y.I.L.283, 286-287; Anton, 1st ed., pp.330-331; Mc'lean, op.cit.p. 51.

15- 1929, S.L.T.675.

16- *Maher v. Maher* [1951] P. 342 at 344-345.

17- (1870) L.R.2 p & D.156 at 162; *Rudd v. Rudd* [1924] P.72; *Scott v. Scott*, 1937 S.L.T.632 at 633.

Apart from these cases, it was well settled that the mere fact that the respondent did not receive notice of the proceedings was not by itself a ground for refusal of recognition, provided that the foreign courts had acted in accordance with their own rules relating to substituted service or to the dispensing with service. In *Boettcher v. Boettcher*,⁽¹⁸⁾ it was decided that a decree of divorce in the state of Indiana was valid in the English conflict view, although the wife never received notice of the proceedings and did not learn of them until after the decree had been made. In giving this judgment, Wallington J. said "the requirements of the Indiana court as to service were so similar to certain provisions for constructive service in English practice that they could not be said to contrary to natural justice."⁽¹⁹⁾ In this case the Indiana court had applied its own rules for service in that the notice of divorce was published in a local newspaper and a copy was sent by the court to the wife's correct address in England.⁽²⁰⁾ On the other hand, the authorities established that if a failure to give respondent notice of the proceedings was due to the deliberately misleading conduct of the petitioner, the foreign divorce would not be recognised.⁽²¹⁾

The alleged defect in the procedure in the foreign proceedings falling short in the matter of want of notice would not justify denial of recognition of foreign divorce. In *Pemberton v. Hughes*⁽²²⁾ the question was whether a decree of divorce granted by the Florida court

18- [1949] W.N. 83; *Maher v. Maher* [1951] P.342.

19- At 83; Under the Family Proceedings Rules 1991 any petition may be served out of the jurisdiction without the leave of the court, personally, or by post, or by substituted service, rr.10 (3) (6); For Scotland See, the Act of Sederunt (Rules of Court Amendment No.4) (Miscellaneous) 1987 (S.1.1987) No.1206 rr.195, 197. The court has a discretionary power to dispense with service, but it used only in very special circumstances, Family Proceedings Rules 1991, rr.2.9 (9) (11), 10.(3). The court has made such an order where the respondent had already obtained a decree of foreign court purporting to dissolve the marriage or, where there was clear evidence that the spouse had knowledge, or must reasonably assume, that the proceedings have been instituted; *Paolantonio v. Paolantonio* [1950] 2 All.E.R.404.

20- *ee. Igra v. Igra* [1951] P.404 at 411; *Wood v. Wood* [1957] P.254; *Arnold v. Arnold* [1957] P.237; *Hornett v. Hornett* [1971] P.255.

21- *Macalpine v. Macalpine* [1950] P.35; *Scott v. Scott*, 1937S.L.T.632; *Crabtree v. Crabtree*, 1929 S.L.T.675.

22- [1899] 1Ch.781.

was to be regarded as invalid in England because the wife had not had the ten days' notice to appear as required by the Florida procedural rules, but only nine. Lindley M.R. was not satisfied that this defect rendered the divorce invalid in Florida. His Lordship said:

"assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice." (23)

Moreover, it is felt that it is unreasonable to expel British rules on service and notice to be mirrored in other systems. In addition, on occasion, it may be the case that the party to whom little notice was given may yet acquiesce in the outcome, and wish to act on the decree. (24)

2- Fraud

It is worth noting first that fraud in the foreign court as to the merits of the case upon which the decree of divorce had been granted need not bar recognition, as in the case where a foreign divorce had been obtained in a foreign court by false evidence about the matrimonial offence relied on. (25) In *Perin v. Perin*, (26) Lord Sorn held that:

"the trend of modern decisions has been more and more towards recognising the finality of the court of the domicile- if that decree has been obtained by fraud, other, that is, than fraud misleading the court with regard to its jurisdiction, the remedy of the party aggrieved must be to have it set aside in the country where it was pronounced."

On the other hand, the authorities established that fraud as to the jurisdiction of the

23- Ibid, at 790, 791.

24- *Igra v. Igra* [1951] P.404.

25- Dickey & Morris, 11th ed., p. 318, 12th ed., p. 755; Cheshire & North, 11th ed., p. 675; Graveson, 6th ed., p. 674; Mc'lean, op.cit. p. 51; Jaffey, op. cit. pp. 73-74; Anton, 1st ed., p. 331. Though Sec, later under the Acts S.8, 1971; S.51, 1986.

26- 1950 S.L.T.51 at 53; *Bater v. Bater* [1906] P.209, at 218, 239; *Vardy v. Smith*, 1932 48 T.L.R.661 at 663; *Crowe v. Crowe* [1937] 2 All.E.R.723; *Middleton v. Middleton* [1967] P.62.

foreign proceedings would result in recognition being refused.⁽²⁷⁾ Here fraud may take one of two forms: Either it rendered the foreign proceedings contrary to natural justice, or it vitiated the jurisdiction of the foreign court by inducing it to assume jurisdiction which otherwise it would not have done.⁽²⁸⁾

An example of the first form is *Macalpine v. Macalpine*.⁽²⁹⁾ It must be remembered that the mere fact that the respondent did not receive notice of the proceedings was not by itself a ground for challenging the foreign divorce,⁽³⁰⁾ but where the absence of notice was procured by the fraud, it was held that a foreign divorce obtained in such circumstances would be treated as invalid. The parties in *Macalpine v. Macalpine*, were domiciled in England. The husband acquired a domicile of choice in Wyoming, U.S.A. leaving his wife in England, and in 1948 obtained a divorce from a court in Wyoming. He falsely told the court that he did not know his wife's address and as a result the wife received no notice of the divorce proceedings until after the decree was pronounced. Sachs J. held:

"when a decree as to status of a foreign court, which has proper jurisdiction over the subject matter of the suit, is shown to have been procured by a fraud which prevented the respondent spouse having notice of the proceedings, that decree will be treated in this country as a nullity."⁽³¹⁾

The second form of the fraud as to the jurisdiction of the foreign court may be illustrated by *Bonaparte v. Bonaparte*,⁽³²⁾ and *Middleton v. Middleton*.⁽³³⁾ In the former case, the husband obtained a decree of divorce from the Court of Session following averments that he was domiciled in Scotland. These averments were untrue and had been

27- *Bonaparte v. Bonaparte* (1892) P. 402; *Macalpine v. Macalpine* [1950] P.35; *Middleton v. Middleton* [1967] P.62; *Perin v. Perin*, 1950 S.L.T.51.

28- Graveson, 6th ed., p. 674.

29- [1950] P. 35.

30- *Igra v. Igra* [1951] P. 404; *Wood v. Wood* [1957] P. 254; *Hornett v. Hornett* [1971] P. 255.

31- At, 41.

32- [1892] P. 402; *Shaw v. Gould* (1868) L.R. 3 H.L.55.

33- [1967] P. 62.

made by arrangement with the co-respondent. The truth was that the husband was only in Scotland for a few days. Gorell Barnes J. held:

"it is clear that in the present case a fraud was perpetrated on the Scottish court by allowing it to act on the assumption that the pursuer was domiciled in Scotland. It follows, therefore, that the Scottish court had no jurisdiction to pronounce a decree in this collusive suit, and the decree which it has pronounced is null and void."⁽³⁴⁾

In *Middleton v. Middleton*,⁽³⁵⁾ the husband was an American citizen domiciled in the State of Indiana and the wife was English. He petitioned for divorce in the state of Illinois, alleging both that he had been resident in Illinois and that his wife had deserted him. In taking the jurisdiction and granting the divorce the Illinois court had relied on the allegations of the husband which were untrue. Evidence was given that the divorce was granted in Illinois, and although obtained by fraud would be recognised in the State of Indiana where the parties were domiciled. The wife petitioned the English court for a declaration as to the validity of the Illinois divorce.

The validity of the Illinois divorce appeared to fall within the rule of *Armitage v. A. G.*,⁽³⁶⁾ and might have had to be recognised in England.⁽³⁷⁾ Cairns J. did not reach this conclusion. He made an exception to the rule in *Armitage v. A. G.*, since the decree of Illinois had been vitiated by fraud. The Judge said:

"the rule in *Armitage v. A. G.* is not an overriding principle but is subject to exception. One exception is that the decree was obtained by fraud going to the point of jurisdiction. If the rule is, as stated in some of the authorities, that the only exception is that the decree was made in circumstances which offend natural justice or substantial justice, the definition of what is contrary to natural justice or substantial justice is wide enough to cover such a fraud as was perpetrated by the husband in this case. I am, therefore, of the opinion that the Illinois decree must be regarded by this court as

34- *Bonaparte v. Bonaparte* (1892) P. 402 at 409, 410.

35- [1967] P. 62; Discussed Lipstein, (1966) C.L.J.181; Unger, *Recognition of Foreign Divorces and Substantial Justice*, (1966) 29 M.L.Rev.327.

36- [1906] P. 135.

37- Lipstein, (1966) C.L.J.181 at 182.

invalid. Alternatively, if this court has a discretion, I consider that the justice of the case demands that the discretion should be exercised by refusing to recognise the divorce."⁽³⁸⁾

The reason for the distinction between fraud going to the merit of the case and fraud going to the jurisdiction was that to allow reduction on the ground that false evidence had been given would be, in effect to reopen an issue which had already been before the previous court, namely the credibility of the evidence, whereas in the other cases, the issue is something that is extrinsic to the previous decision and which did not enter the proceedings at all.⁽³⁹⁾ It may be suggested further that averments as to jurisdiction may be presented in writing and therefore there may be no opportunity to examine the party. However, academic authorities pointed out that there is no substantive point in this distinction.⁽⁴⁰⁾ They agree that fraud is fraud whether going to the jurisdiction or to the merits of the case. The court should not allow the fraudulent person to reap the fruit of his fraud. It should be noted that now, under statute, fraudulent behavior in general (as opposed to the narrower fraud as to the jurisdiction) may give rise to non-recognition.⁽⁴¹⁾

3- Duress

It is submitted that the free consent of the parties themselves is essential to the validity of any contract, including that of marriage. If the parties entered into the marriage without such consent, that marriage will be regarded as invalid. Under English domestic law, a marriage shall be voidable if either party did not consent to it, whether in consequence of duress, mistake or otherwise.⁽⁴²⁾ Can this general principle apply to a refusal to

38- At, 76.

39- *Perin v. Perin*, 1950 S.L.T. 51 at 52.

40- Dicey & Morris, 8th ed., p. 318; Unger, (1966) 29 M.L.Rev.327 at 329; Jaffey, op.cit.p. 74.

41-S.51 of the Family Law Act and See also, under the superseded 1971 Act, S.8; *kendall v. Kendall* [1977] Fam.Law.208; See, infra, 249.

42- S.12 (c) of the Matrimonial Causes Act 1973; While in Scotland the lack of consent one of the parties would be a ground for declaring the marriage void *ab initio*, See, Anton, 2nd ed., p. 440; Thomson, *Family Law in Scotland*, 2nd ed (1991), pp. 30-36; In Iraq the general rule is that the lack of consent renders a marriage void, Art.9 of the 1959 Personal Status Code.

recognise foreign divorces if the institution of the proceedings was against the will of the parties?

In *Re Meyer*,⁽⁴³⁾ the parties were married in 1932, in Germany, both being German nationals, the husband, but not the wife, being Jewish. In 1938 the husband escaped from Germany as a refugee from antisemitic persecution and went to England. The wife found herself subject to discrimination by virtue of the fact that she was married to a Jew. Fearing that her position would become intolerable she agreed with her husband before he left to dissolve the marriage. The marriage was dissolved by a German court at the suit of the wife in 1939. In 1949 the wife arrived in England and the parties lived together until the husband died in 1955. In 1971 the wife applied to the English court for a declaration that the German decree was void for duress.

Bagnall J. granted a declaration that the divorce was not recognised in England, because it had been obtained by duress since "the will of the party seeking the decree was overborne by a genuine and reasonably held fear caused by present and continuing danger to life, limb or liberty arising from external circumstances for which that party was not responsible."⁽⁴⁴⁾ 'Danger' to 'limb' included serious danger to physical or mental health, and 'danger' included, at least danger to a parent or child of the party.⁽⁴⁵⁾

The degree of duress i.e. whether it is sufficient to avoid the decree of divorce is dependent on the discretion of the court. In exercising its discretion the court should have regard to all the facts of the case. In general, the duress must be such as to cause the person seeking the divorce to fear for his life or liberty in the event of his doing so,⁽⁴⁶⁾ the degree of fear must be sufficient to vitiate consent, the fear must have been reasonably

43- [1971] P. 298; discussed Hartley, *Foreign Divorces and Estoppel by Conduct in the English Conflict of Laws*, (1971) 34 M.L.Rev.45; Graveson, 7th-ed., p. 304; *Borland v. Borland*, 1947 S.C.432.

44- At, 307.

45- Hartley, (1971) 34 M.L.Rev.455 at 456.

46- *Burke v. Burke*, The Times, March 17, 1955.

entertained and have arisen from some external circumstances for which the petitioner himself is not responsible.⁽⁴⁷⁾ In the case under discussion the wife obtained the divorce under pressure: her employers told her that she would be dismissed if she did not divorce her husband. She also feared that she might lose her flat and that she and her daughter would not survive. Bagnall J. held that this constituted sufficient evidence of duress and the wife would not have sought to obtain the divorce if her will had not been overborne by those fears.⁽⁴⁸⁾

In *Igra v. Igra*,⁽⁴⁹⁾ the facts were very similar to those in *Re Meyer*. The wife obtained a divorce from the German court without her being willing. The court found that the degree of duress was not sufficient to invalidate the German decree because the parties accepted the divorce as valid after the war was over and lived together until the husband remarried. The situation in *Re Meyer* was different.

4- Grounds of Divorce are Repugnant to Morality

It is well settled at common law that the main principle in the recognition of divorces is essentially one of examining the jurisdiction of the court which granted the decree. The grounds on which the foreign divorce was granted are largely irrelevant.⁽⁵⁰⁾ In many cases the courts in England⁽⁵¹⁾ and Scotland⁽⁵²⁾ recognised a foreign divorce despite the fact that the grounds for which the decree had been granted were unknown to English and Scottish law. Nevertheless, it has been suggested that a foreign divorce will be denied recognition if the grounds of divorce are repugnant to morality. In a Scottish case *Humphrey v. Humphrey's trustees*,⁽⁵³⁾ Lord Moncrieff suggested that the Scottish court

47- *H v. H* [1954] P.258.

48- *Re Meyer* [1971] P.298 at 307.

49 [1951] P.404.

50- Wastlake, op.cit.p. 97; Anton, 1st ed., pp. 329-330; North, op.cit.p. (1977) 158; Webb, (1967) 16 I.C.L.Q.1004.

51- *Bater v. Bater* [1906] P.209; *Harvey v. Farnie* (1882) 8 A.P.P. Cas 43; *Metzger v. Metzger* [1936] 3 All.E.R.130.

52- *Humphrey v. Humphrey's T R* (1895) 33 S.L.R.99; *Perin v. Perin*, 1950 S.L.T.51.

would refuse to recognise a foreign divorce when its ground is "repugnant to the standard of morality recognised by a civilised and Christian state". Similarly in *Westergaard v. Westergaard*,⁽⁵⁴⁾ it was suggested that the Scottish court would refuse to recognise foreign divorces which are a violation of "the moral code that obtains in this country"⁽⁵⁵⁾

In England, there is no reported case in which the English courts refused to recognise a foreign divorce on the ground that its recognition was repugnant to English morality. In *Igra v Igra*,⁽⁵⁶⁾ a German divorce obtained at the instance of the Gestapo on what were suspected to be racial grounds was recognised. Nevertheless in this case Pearce.J. said: "The fact that the proceedings were suggested by the Gestapo and that the decree may well have been granted on predominantly racial grounds cannot be disregarded in determining whether the decree was contrary to natural justice."⁽⁵⁷⁾ The concept of morality is very wide and "there is a danger from its uncertainty of its being too widely applied."⁽⁵⁸⁾ "It is difficult to envisage what grounds of divorce would be contrary to morality."⁽⁵⁹⁾ In *Middleton v Middleton*,⁽⁶⁰⁾ Pearce J. recognised that some difficulty arises over the expression 'substantial justice' and he defined it by saying "what strikes an English judge as being fundamentally unfair is contrary to substantial justice". Reference may be made here by analogy to the non-recognition by English courts of Maltese nullities granted on the ground of failure of English civil marriage ceremonies to comply with Roman Catholic forms.⁽⁶¹⁾

53- (1895) 33 S.L.R.99 at 101.

54- 1914, S.C.977.

55 Ibid at 980.

56 -[1951] P.404.

57- Ibid at 412.

58- North, op.cit.(1977) p. 187.

59- Anton., 1st ed., p. 330.

60 -[1967] P.62 at 70.

61- *Chappelle v. Chappelle* [1950] P.134; *Gray v. Formosa* [1963] P.259; *Lepre v. Lepre* [1965] P.52.

5- Evasion of Law

It will be remembered that before the Matrimonial Causes Act 1857, a judicial divorce was not permitted to English subjects. The parties crossed the border to Scotland in order to obtain a divorce.⁽⁶²⁾ On the question of the validity of these divorces, the English courts had never refused recognition of such divorces on the ground that the parties evaded English law. In cases of this period, divorce was refused recognition on the ground that the husband had not established domicile in Scotland.⁽⁶³⁾ The approach of the courts to the recognition of foreign divorce was essentially one of examining the jurisdiction of the foreign court which granted the divorce. If the jurisdictional requirements were satisfied the courts would recognise the divorce even if the motive of the acquisition of a domicile was for the purpose of instituting divorce proceedings.⁽⁶⁴⁾

Against this background there was, however, considerable judicial concern that divorces obtained abroad after a short period of residence should not be recognised.⁽⁶⁵⁾ In *Shaw v Gould*,⁽⁶⁶⁾ Lord Westbury said:

"no nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgement so obtained, the tribunals of the domicile are entitled or even bound to reject such judgement, as having no extra-territorial force or validity."

When the basis of recognition of foreign divorces extended beyond the principle of domicile, the doctrine of evasion was given more consideration. Thus, in *Indyka v Indyka*,⁽⁶⁷⁾ this doctrine was mentioned by Lord Pearce. His Lordship said:

"I think, however, that our courts should reserve to themselves the right to refuse a recognition of those decrees which offend our notions of genuine divorce. They have

62- Compare, Ch 2, supra

63- *Shaw v. Gould* (1868) L.R.3 H.L.55

64 -See, cases in chapter 2

65- Fawcett, (1990) C.L.J.44 at 46, 47.

66- (1868) L.R.3 H.L.55 at 82.

67 -[1967] 3W.L.R.510.

done so when decrees offend against substantial justice, and this of course, includes a decree obtained by Fraud. But I think it also includes or should include decrees where a wife has gone abroad in order to obtain a divorce and where a divorce can be said not to be genuine according to our notions of divorce".⁽⁶⁸⁾

Lord Pearce's proposition might be justified on the ground that *Indyka v Indyka*, established "a real and substantial connection" as a basis for the recognition of foreign divorces.⁽⁶⁹⁾ This test of recognition required that the connection between the parties and the foreign court must be a genuine connection not a spurious one designed for the purpose of easy divorce.⁽⁷⁰⁾

The doctrine of evasion of the law has now found a place in the Family Law Act 1986, albeit in a minority area. In this Act there is specific anti- evasion provision in the context of extra- judicial divorce not obtained by means of proceedings. Section 46 (2) (c) provides that an extra-judicial divorce not obtained by means of proceedings cannot be recognised if either party had been habitually resident in the United Kingdom for one year before the divorce was obtained. However, in general, given that motive is no bar to acquisition of domicile and that, in any event, habitual residence of either party for one year will suffice to found jurisdiction in the Scottish or English court, and that recognition rules are broadly consistent with this, it is hard to make out a strong case in the presence of an anti-evasion factor in the Scots and English rules.

B- Statutory Grounds for Non-Recognition of Foreign Divorces.

The Family Law Act 1986 contains an exclusive list of the grounds on which recognition may be denied to divorces.⁽⁷¹⁾ These depend upon whether the divorce was obtained within the British Islands or overseas, and upon whether the overseas divorce was obtained by means of proceeding or otherwise than by means of proceedings. An overseas

⁶⁸- Ibid at 544.

⁶⁹- See, Supra, 143.

⁷⁰-See, Mc'lean, op.cit.p. 52.

⁷¹- S.51.

divorce obtained by means of proceedings may be denied recognition on the grounds of *Res judicata*, no subsisting marriage between the parties, want of notice of, or opportunity to take part in, the proceedings and when its recognition would be manifestly contrary to public policy. A divorce obtained within the British Islands may only be denied recognition on the grounds of *Res judicata* and no subsisting marriage between the parties. The last three grounds above are inapplicable to British divorces. It has been said to justify this approach that it is not appropriate to refuse recognition in one part of the United Kingdom to a divorce obtained elsewhere in the British Islands on these grounds, because the public policy is generally the same throughout the British Islands and if there is any breach of natural justice, that should be best dealt with by the court in which the original proceedings are brought.^(7 2) The grounds of want of notice and want of opportunity to take part in the proceedings are also inapplicable to overseas divorces obtained otherwise than by means of proceedings. Instead, the 1986 Act provides that such divorces may be denied recognition on the ground of want of documentation.

These are the only grounds on which the court has now discretionary power to refuse recognition to divorces. Although the 1986 Act does not define the factors which a court may consider when deciding whether or not to exercise its discretion under section 51, it is submitted that the court should have regard to all the surrounding circumstances which would include a full investigation of the facts.^(7 3)

1- *Res Judicata*

Article 9 of the 1970 Hague Convention provided that "contracting states may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the state in which recognition is sought, or is recognised, or fulfils the conditions required

7 2- Law Com No. 137 & Scots Law Com No. 88 para. 6. 67; See also, the discussion in chapter 4 and contrast earlier position, as seen in *Shaw v. Gould* (1868) L.R 3 H.L 55.

7 3- *Newmarch v. Newmarch* [1978] Fam.Law 79 at 95.

for recognition, in that state."

Section 8 (1) of the 1971 Act, which was intended to give effect to article 9, was enacted in narrower terms than article 9 and there was nothing in this section which enabled the courts to refuse recognition of divorces on the ground of *Res Judicata*. In 1984 the Law Commissions recommended that specific statutory provisions should be made to govern the recognition of nullity decrees and to extend refusal of recognition to divorce decrees on the ground of *Res judicata*.⁽⁷⁴⁾ There are two main reasons behind the introduction of *Res judicata*. The first reason is that section 8 (1) is not appropriate to annulments whose purpose is to declare that the marriage is invalid. The second reason is that there is common law authority that a foreign nullity may be denied recognition on *Res judicata*.⁽⁷⁵⁾ In *Vervaeke v Smith*,⁽⁷⁶⁾ the wife brought proceedings in the English court for annulment of her marriage. The court however dismissed the petition, holding the marriage valid. The wife then obtained a nullity decree from a Belgian court on a variant of the ground which in the earlier English proceedings had been insufficient to annul the marriage. When the wife sought a declaration in the English court that the Belgian decree should be recognised, recognition was refused. Among the various reasons for refusing recognition that of *Res Judicata* because the Belgian decree would be incompatible with the prior English decision. This case is a clear application of the principle of article 9. Thereupon section 51(1) of the 1986 Act was enacted to give effect to it, according to which recognition may be refused to a divorce or annulment whether granted elsewhere in the British Islands or obtained overseas if, at the time when it was obtained, it was irreconcilable with a previous decision of a court in the part of the United Kingdom in which recognition is sought, as to the subsistence or validity of the marriage.

This ground for non recognition extended also to cover the situation when the previous

⁷⁴ -Law Com No. 137 & Scots Law Com No. 88 para. 6. 64-6. 66.

⁷⁵- Cheshire & North, 12 th ed , p. 677; Dicey & Morris, 12th ed., p. 751.

⁷⁶- [1983] 1 A.C.145; Carter, (1982) 53 B.Y.B.I.L.302; Jaffey, *Matrimonial Judgments as Defences in Conflict of Laws*, (1986) 5 C.J.Q. 35.

decision was obtained in a country other than that in which recognition is sought, but which is recognised or entitled to be recognised in that country. This means that a Scottish court has now a discretion to refuse to recognise a divorce granted in England or overseas, if its recognition would be irreconcilable with a decision relating to the subsistence or validity of the marriage which has been previously made or recognised by the Scottish courts provided that the previous decision is one obtained by a court of law. If, however, the previous decision is not one obtained by a court, the Act states clearly that the principle of *Res judicata* will not apply.⁽⁷⁷⁾

It has been argued that when the conflict rules of status are in question, the policy of avoiding 'limping marriages' should prevail. A decision of the United Kingdom court dismissing a divorce petition, or deciding an issue in a particular way, should not preclude the recognition of a subsequent decree in a different court.⁽⁷⁸⁾ Although this argument is welcome since it would have a positive effect on 'limping marriages', it is submitted that one must also have regard to the interest of the state which required that there should be an end of litigation and that the individual should not be vexed twice for the same cause.⁽⁷⁹⁾ However, it seems unlikely that this ground will be of much practical importance in the matter of recognition of foreign divorces since its application is limited to cases in which the previous decision must be obtained by a court and must be one relating to the "subsistence or validity" of marriage.

2- No Subsisting Marriage

Although much of the substance of this ground is covered by the *Res Judicata*, it is thought that there are other cases for which this ground is required, as in the case where the marriage is treated by English or Scots law, including its rule of private international law, as void *ab initio*, but no nullity decree has ever been pronounced; or in the case where the

77- S.51 (1); Cheshire & North, 12th ed., p. 678; Anton, 2nd ed., p. 480; Morris, 4th ed., p. 198.

78- Jaffey, (1986) 5 C.J.Q 35 at 49.

79- *Lockyer v. Ferryman* (1877) 2 App.Cas 519 at 530.

previous decree was not one granted by a court, because the principle of *Res Judicata* does not apply where the previous decision is extra-judicial.⁽⁸⁰⁾ Section 51 (2) of the 1986 Act gives the court a discretionary power to refuse to recognise a divorce, whether granted elsewhere in the British Islands or obtained overseas, if it was obtained at a time when, according to its law, there was no subsisting marriage.

This ground was also to be found in the 1971 Act, but it was a mandatory one. Because of the clear overlap with the *Res Judicata*, the Law Commissions thought it would be more appropriate for it to be discretionary.⁽⁸¹⁾ This discretionary power has been criticised on the ground that a divorce cannot effectively dissolve a marriage which is void or has already been annulled or dissolved and therefore, to give the courts the power to recognise the foreign divorce in such a case would contradict the fact that under English or Scottish conflict rules there was or remains no subsisting marriage to be dissolved.⁽⁸²⁾ This argument seems to be consistent with the concept of divorce as a method of dissolution of valid marriage and with the domestic rule that if the court considered a marriage had already been dissolved or had never existed, it would not have granted a divorce. However, it also seems unlikely that this ground will be of much practical importance in the matter of recognition of foreign divorces. This view might be justified by the fact that there are no reported cases in which the non-recognition of a divorce was considered under this ground.⁽⁸³⁾ Moreover, there is a common law authority supporting the view that a foreign divorce would be recognised without deciding whether the marriage dissolved was valid or not.⁽⁸⁴⁾

80- Law Com No. 137 & Scots Law Com No. 88 para. 6. 66; Cheshire & North, 12th -ed , p. 678; Dicey & Morris, 12th ed., p. 751; Anton, 2nd ed., p. 480; Parry, *Denying Recognition to Foreign Divorces*, (1978) 8 Family Law 29.

81- Law Com No. 137 & Scots Law Com No. 88 para. 6. 66.

82 -Jaffey, (1986) 5 C.J.Q 35 at 47.

83 -David Gordon, op.cit.p. 121.

84-*Lee v. Lau* [1967] P.14 at 22, 23.

3- Want of Notice of the Proceedings

This ground for non-recognition applies only to overseas divorces obtained by means of proceedings, i.e. divorces whose recognition is within Section 46(1). By virtue of Section 51 (3) (a) (i) such a divorce may be refused recognition if it was obtained without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken.⁽⁸⁵⁾

Since the nature of the proceedings in extra-judicial divorces obtained by means of proceedings is different from those in an ordinary court of law, the court then must have regard to this nature in deciding whether the steps taken to give notice of the proceedings were reasonable. Hence, it is submitted that further information and perhaps a different standard may be required where the court of recognition is dealing with a religious proceedings divorce than when it is dealing with a judicial decree. It is interesting to note that in most cases of religious proceedings divorces, such as Ordinance *talaq* and Jewish *gett* there is no need to rely on this ground to refuse recognition, simply because a valid Ordinance *talaq* or Jewish *gett* cannot be obtained without the knowledge of the party pronouncing divorce and the notification of the other spouse. This means that an Ordinance *talaq* obtained without giving notice to the wife will not be effective and therefore, will not be within section 46 (1).⁽⁸⁶⁾

However, in exercising its discretion the court will also have regard to all the circumstances of the case, including whether a failure to give notice resulted from external events⁽⁸⁷⁾ or whether one spouse had already decided not to participate in the

⁸⁵- Collier, op.cit.p. 295; Jaffey, op.cit.pp. 72-73; Cheshire & North, 12th ed., pp. 678-679; Dicey & Morris, 12th ed., p. 752; Morris, 4th ed., p. 199; Anton, 2nd ed., pp. 480-481; S.8 (2) (a) (i) of the 1971 Act; Graveson, 7th ed., pp. 300-301; Mc'lean, op.cit.p. 87; Parry, (1978) 8 Family Law 29; David Gordon, op.cit. p.121.

⁸⁶-David Gordon, op.cit.p. 123.

⁸⁷- *Igra v. Igra* [1951] P.404.

proceedings.⁽⁸⁸⁾ The court may refuse recognition if in its view such steps for giving notice have not been taken as reasonably should have been. Since this ground is similar to the common law ground based on natural justice, the court may take into account the common law decisions as a guidance in its discretion. As has been seen, the mere fact that the respondent did not receive notice is not enough to challenge a foreign divorce,⁽⁸⁹⁾ but recognition is likely to be refused when want of notice resulted from fraud.⁽⁹⁰⁾

As regards the extra-Judicial divorces obtained otherwise than by means of proceedings, i.e. divorces whose recognition is within section 46 (2), it will be remembered that in *R.v.Hammersmith Superintendent Registrar of Marriage, exp-Mir-Anwar uldin*,⁽⁹¹⁾ the Court of Appeal refused to recognise the *talaq* obtained in India. Among the various reasons for refusing recognition was that the *talaq* involved a denial of natural justice. Lawrence.J, in giving judgement, said "it is contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure without his wife's consent and without any notice to her."⁽⁹²⁾

In *Zaal .v. Zaal*,⁽⁹³⁾ Bush J. followed this view when he refused to recognise a *talaq* obtained in Dubai. The judge said that he came to the conclusion that what had been done was done in secrecy. The first time the wife knew about the *talaq* was when she was irrevocably divorced. Some notice more than informal notice should have been given. There had been no notice for reconciliation or notice to enable her to enlist the aid of her husband's relative. The lack of justice offended one's sense of justice and jarred one's

88- *Sabbagh v. Sabbagh* [1985] F.L.R.29.

89- *Igra v. Igra* [1951] P.404; *Wood v. Wood* [1957] P.254; *Arnold v. Arnold* [1957] P.237; *Hornett v. Hornett* [1971] P.255.

90- *Macalpine v. Macalpine* [1958] P.35; *Perin v. Perin*, 1950 S.L.T. 51.

91- [1917] 1 K.B.634 (i.e. at the time when British courts first were called upon to consider such divorces).

92- *Ibid* at 662.

93 - [1983] 4 F.L.R.284 at 289; *Sharif v. Sharif* [1980] 10 Fam.Law 216; *Viswalingham v. Viswalingham* [1980] 1 F.L.R.15.

conscience.

It is submitted that the want of notice is an inadequate and unsatisfactory reason for refusing recognition to the bare *talaq* because the nature of *talaq* makes such a notice unnecessary. Under Islamic Law, the husband can divorce his wife merely by pronouncing the word *talaq*. The wife need not be present and there is no formal necessity for witnesses. How can one imagine, therefore, that notice of the proceeding is necessary? Dr. Morris has rightly suggested that in the case of bare *talaq* and other divorces which are obtained where there are no proceedings, such a notice need not be given because "no amount of notice would enable the wife successfully to contest the husband's unilateral declaration of divorce, and therefore it would be pointless to insist on an empty formality."⁽⁹⁴⁾ Under section 51 (3) (a) (i) an extra-judicial divorce obtained where there are no proceedings will not be refused recognition on the ground that no notice was given to the wife of the husband's intention to divorce her. But, of course, the general 'public policy' challenge remains.

4- Want of Opportunity to Take Part

Even if the parties to the marriage received sufficient notice to take part in the proceedings, the court still has a discretion to refuse an overseas divorce obtained by means of proceedings if one of the parties was not given a fair opportunity to present his case before the court. Section 51 (3) (a) (ii) provides that an overseas divorce obtained by means of proceedings may be refused recognition if it was obtained without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given.⁽⁹⁵⁾

⁹⁴ Dicey & Morris, 11th ed., p. 713; *Maher v. Maher* [1951] P.342 at 345; *Chaudhery v. Chaudhery* [1984] 3 All.E.R.1017 at 1035.

⁹⁵ Cheshire & North, 12th ed., p. 679; Dicey & Morris, 12th ed., p. 753; Morris, 4th ed., p. 200; Anton, 2nd ed., p. 481; Jaffey, op.cit.pp. 72-73; Collier, op.cit.p. 295; S.8 (2) (a) (ii) of the 1971 Act; Graveson, 7th-ed., pp. 300-301; Mc'lean, op.cit.pp. 88-89; Parry, (1978) 8 Family Law 29.

The exercise of the discretion under this head of non-recognition was considered in a number of cases in the context of the 1971 Act which provide a valuable guide to the likely application of section 51 (3) (a) (ii). In *Joyce v. Joyce*,⁽⁹⁶⁾ the English court exercised its discretion to refuse recognition to the Quebec divorce because the wife had not been given reasonable opportunity to take part in the proceedings. Lane J. considered a variety of matters relating to the issue including the availability of legal aid, whether the wife had taken reasonable steps to put forward her case, what remedies were available to the wife in the foreign jurisdiction, the methods of enforcing any judgement that might be given by the foreign court, particularly in relation to financial matters, and the public interest in ensuring that a wife and children were adequately maintained, so they did not become a charge on the United Kingdom community. Lane J.'s refusal of recognition to the Quebec divorce was based mainly on the ground that the result of recognition would to deprive the wife of the opportunity of obtaining financial relief from the English court.

In *Mamdani v. Mamdani*,⁽⁹⁷⁾ the English court found that the wife had not had the opportunity to take part in the Nevada proceedings because she did not have sufficient money to defend them and it granted a declaration that the Nevada decree was invalid. Cumming-Bruce L.J. in his judgment stated:

"the question whether, in all the circumstances, the respondent to foreign proceedings was given an opportunity to take part in the proceedings must be answered in an appropriate case by reference to the question whether she had the money to go to the foreign court and obtain legal representation. It is one of the circumstances relevant to being given an opportunity to take part."⁽⁹⁸⁾

The wife's inability to attend foreign proceedings as a result of the lack of money was also considered by Wood J. in *Sharif v. Sharif*,⁽⁹⁹⁾ as a relevant reason for refusing recognition to the Iraqi divorce. On the other hand, in *Sabbagh v. Sabbagh*,⁽¹⁰⁰⁾ the

⁹⁶ -[1979] Fam.Law 93 at 111-113.

⁹⁷ - [1984] 3 F.L.R.699.

⁹⁸ -Ibid, at 704, 705.

⁹⁹ -[1980] 10 Fam.Law.216 at 217.

English court rejected the wife's argument that she was prevented from taking part in the Brazilian proceedings by lack of money, because there was evidence that there was legal aid available in Brazil and she had not attempted to apply.

In *Newmarch v. Newmarch*,⁽¹⁰¹⁾ although the English court was satisfied that the wife had not been given reasonable opportunity to take part in the proceedings because of the failure of the Australian solicitors to file an answer in the husband's divorce suit in Australia, though she had given clear instructions through her English agents that she wished a robust defence to be made, so that it went undefended, it nevertheless exercised its discretion to recognise the divorce. Rees J. based his decision on the fact that the wife's main concern in these proceedings was to obtain maintenance and in all the circumstances she could obtain that maintenance despite the foreign divorce and therefore, no one's interests would be served by refusing recognition.⁽¹⁰²⁾ Moreover, Australia was on the point of going over to a 'no fault' divorce system. A similar approach had been previously adopted in *Hack v. Hack*,⁽¹⁰³⁾ in which the wife petitioned the English court for a declaration that the Missouri decree was invalid on the ground that she was denied a reasonable opportunity to take part in the proceedings. Although, Arnold J considered that all the circumstances and the facts of the case were relevant, he paid particular attention to the availability of financial relief, holding that the Missouri divorce should be recognised because its recognition would not prevent the wife obtaining ancillary relief from the English court.

Thus, the mere fact that the parties to the marriage had inadequate opportunity to take part in the foreign proceedings is not by itself sufficient a ground for denial of recognition. On the other hand, the mere ability to take part in the foreign proceedings did not constitute

100- [1985] F.L.R.29 at 34; *Hack v. Hack* [1976] 6 Fam Law 177.

101- [1978] Fam.Law 79; Dickson, *The Realistic Approach to the Recognition of Foreign Divorces*, (1979) 28 I.C.L.Q.132.

102 -Ibid at 90-95.

103-[1976] 6 Fam Law 177.

such an opportunity. The opportunity must be adequate and effective to place views before the court.⁽¹⁰⁴⁾ The courts should have regard to all the surrounding circumstances which would include a full investigation of the facts relied upon to support a refusal of recognition.⁽¹⁰⁵⁾ Since the problem of financial relief has now been removed by the Matrimonial and Family Proceedings Act 1984, it seems unlikely that when considering the exercise of the discretion under this head of non-recognition the court will follow the decisions in *Joyce* and *Sharif* to refuse recognition to foreign divorces.

Again since the nature of the proceedings in extra-judicial divorces obtained by means of proceedings is different from those in an ordinary court of law, it is submitted that the court will have regard to this different nature in deciding whether the opportunity to take part in the proceedings was reasonable. If the courts consider that the procedures under the Pakistani law are satisfied, namely that the husband gives notice of the *taluq* to the Chairman of the Council and supplies a copy to the wife and the Chairman constitutes an arbitration Council for the purpose of bringing about a reconciliation between the parties, recognition should not be refused even if the wife does not take part in the conciliation proceedings, because under Pakistani law itself, there is no rule to compel either party to take part in the conciliation proceedings before the arbitration council.⁽¹⁰⁶⁾

5- Want of Documentation

This new ground of non-recognition, which applies only to extra-judicial divorces obtained where there are no proceedings, was not recommended by the Law Commissions because they did not consider specific provision for the recognition of such divorces. However, section 51 (3) (b) gives the courts discretion to refuse recognition to such divorces where there is no official document certifying that the divorce is effective under

104 -*Joyce v. Joyce* [1979] Fam.Law 93.

105- *Newmarch v. Newmarch* [1978] Fam.Law 79; *Joyce v. Joyce* [1979] Fam.Law 93; *Mamdani v. Mamdani* [1984]3F.L.R 699.

106- *Quazi v. Quazi* 1979] 3 All.E.R.897 at 902.

the law of the country in which it was obtained;⁽¹⁰⁷⁾ or where either party to the marriage was domiciled in another country at the relevant date,⁽¹⁰⁸⁾ there is no official document certifying that the divorce is recognised as valid under the law of that other country.⁽¹⁰⁹⁾ "Official document" means one "issued by a person or body appointed or recognised for the purpose under" the law of the country in which the divorce was obtained or recognised as valid.⁽¹¹⁰⁾

Having regard to the fact that in some countries such a certificate may not be easily obtained, particularly in countries where the divorce was not obtained,⁽¹¹¹⁾ it seems that this new ground is intended to provide more discretion to the court to refuse recognition to informal divorces qualifying for recognition under section 46 (2). If it is so, it would be contrary to the whole purpose which the 1986 Act aims to reach, namely to cure the mischief of 'limping marriages'.⁽¹¹²⁾ The provision may, on the other hand, simply be a cross-cultural misunderstanding. The British court reasonably desires the information but the West does not fully appreciate the difficulties in obtaining such documentation. The area of law is complex, and the recognition by certificate may be hard to obtain and expensive. If one looks at what is required under section 51 (3) (b) one will find that is not a document saying that a person is divorced; it is a document certifying that the divorce in question is recognised as valid under the law of that country.⁽¹¹³⁾ If this is correct, then the purpose of official documents is not clear and confuses, because official documents are not necessary for the recognition of divorces in an English or Scottish court, since section 51 (3) (b) only comes into play when the court is satisfied that there is an informal divorce

¹⁰⁷- S.51 (3) (b) (i).

¹⁰⁸- The "relevant date" means the date on which the divorce was obtained; S.51 (4) and 46 (3) (b).

¹⁰⁹- S.51 (3) (b) (ii); Cheshire & North, 12th ed., p. 685; Dicey & Morris, 12th ed., p. 754; Anton, 2nd-ed., p. 481; David Gordon, op.cit.p. 132.

¹¹⁰-S.51 (4).

¹¹¹- *Zaal v. Zaal* [1983] 4 F.L.R.284 at 289.

¹¹² -David Pearl, (1987) C.L.J.36; Sebastian Poulter, *Recognition of Foreign Divorces-The New Law*, (1987) Vol.84 L.S.Gaz 253 at 256; 475 H.L.Debs, Col, 1093 (22 April, 1986) *per* Lord Meston.

¹¹³- 475 H.L.Debs, Col, 1094 (22 April, 1986) *per* Lord Meston.

which qualifies for recognition under section 46 (2).⁽¹¹⁴⁾ Surely one of the qualifications under section 46 (2) is (the pre-requisite) that the divorce is valid where obtained. The further requirement [S.51 (3) (b)] is evidential. However, so far as Iraqi law is concerned, the court will issue such a certificate to Iraqis if the *talaq* is obtained in Iraq.⁽¹¹⁵⁾ The law also authorises the Iraqi Consul in foreign countries to issue such a certificate where the *talaq* is obtained abroad.⁽¹¹⁶⁾

6- Public Policy

This ground probably embodies the substance of what, at common law, fell within denial of recognition if the divorce was contrary to substantial justice or was regarded as contrary to morality. Under section 51 the court has a discretion to refuse recognition to an overseas divorce whether or not obtained by means of proceedings if "its recognition would manifestly be contrary to public policy"⁽¹¹⁷⁾ The 1986 Act does not define this term. The court will seek guidance from the common law decisions and from those which were decided in the context of the 1971 Act in defining its extent and in deciding whether recognition would be contrary to public policy. The 1986 Act requires that only overseas divorces which are 'manifestly' contrary to public policy be denied recognition. The word "manifestly" was inserted to conform with article 10 of the 1970 Hague Convention which provided that "contracting States may refuse to recognise a divorce... if such recognition is manifestly incompatible with their public policy ('ordre public').

Some contracting States use 'ordre public', which is much wider than that of public policy in England and Scotland, to refuse recognition to divorces granted upon grounds unknown to their own law. This would have damaged the Convention. To avoid this result, the word 'manifestly' was inserted in article 10 to restrict the discretion of the courts in this respect.⁽¹¹⁸⁾ Since the position at common law revealed that the discretion is one

¹¹⁴ Young, (1987) L.S.78 at 89.

¹¹⁵ Art.39 of the 1959 Personal Status Code.

¹¹⁶ -Art.20 of the Law No. 15 of 1936.

¹¹⁷ S.51 (3) (c); See also, S.8 (2) (b) of the 1971 Act.

to be exercised sparingly,⁽¹¹⁹⁾ it seems, therefore, the word 'manifestly' in section 51 (3) (b) is redundant because it is no more than confirmation of the attitude of the courts at common law.⁽¹²⁰⁾ Wood J. in *Chaudhary v. Chaudhary*,⁽¹²¹⁾ has this to say: "I do not believe that the word 'manifestly' adds anything to sub-section, [S.8 (2) (b)] for I do not believe that any judge would invoke the doctrine of public policy unless he felt that it was clearly right and just so to do".

There is no requirement that recognition may be refused on public policy. The courts should have regard to all the circumstances which would include a full investigation of the facts relied upon to support a refusal of recognition. The mere fact that the husband was evading his responsibilities so that the wife had to turn to social security benefits,⁽¹²²⁾ or that the foreign decree has a different effect from an English decree is not sufficient to support the application of public policy.⁽¹²³⁾

A clear case for the application of this ground is *Kendall v. Kendall*,⁽¹²⁴⁾ in which Holling J. declined to recognise a divorce granted to the wife by the Bolivian court because its recognition would be manifestly contrary to public policy. In this case, the parties were domiciled in England. In 1972 the husband was posted by his employers to Bolivia. The wife joined him there in 1973. In 1974 the wife decided to leave Bolivia with the children. Before she left she was induced by the husband to sign documents in Spanish, which she did not understand, asking for a divorce which she did not want. The husband told her that the documents were to enable her to take the children out of Bolivia. In 1975 the Bolivian

118- Anton, (1972) S.L.T.90.

119- *Varanand v. Varanand* [1964] 108 Sol Jo 693; *Qureshi v. Qureshi* [1971] 1 All.E.R.325.

120 -Cheshire & North, 12th ed, p. 683; Dicey & Morris, 12th ed., p. 754; Morris, 4th ed., p.201; *Sharif v. Sharif* [1980] 10 Fam Law 216 at 217; *Chaudhery v. Chaudhery* [1984] 3 All.E.R.1017 at 1024.

121- [1985] 2 W.L.R.359 at 359.

122 -*Joyce v. Joyce* [1979] Fam.Law 93 at 96.

123- Social Security Decision, No.R (G) 1, 85.

124 [1977] Fam.Law 208; Parry, (1978)8 Family Law 29; Morris & North, op.cit.p .307.

court granted a decree of divorce. The decree stated several things which were not true, namely that there were no children, that the wife worked and that neither party owned any property. The wife then petitioned the English court for a declaration that the decree of divorce granted to her by the court in Bolivia was invalid.

Hollings J. referred to the common law decisions.⁽¹²⁵⁾ Although he pointed out that fraud as to the merits of the case was not a ground for denial of recognition, he found here that the fraud is more fundamental even than fraud as to the merits or the jurisdiction. The Bolivian court was deceived not just as to the facts alleged in the petition when the husband falsely told the court that there were no children of the marriage, that the wife worked and that neither party owned any property, but as to the fundamental issue of whether the wife was petitioning at all. Hollings J. was satisfied that if the Bolivian court was apprised of the full circumstances, it would without hesitation take steps effectually to invalidate the decree. Accordingly, the recognition of the Bolivian decree in those circumstances would be manifestly contrary to public policy.

It is interesting to note that in a case before the enactment of the 1986 Act, it was suggested that the mere fact that a divorce is informal and without proceedings is contrary to public policy.⁽¹²⁶⁾ This suggestion is unsound because there is no general rule either in English or in Scottish law requiring the refusal of recognition to informal divorce because it was not the creature of proceedings.⁽¹²⁷⁾ Moreover, this suggestion seems to be inconsistent with the established view at common law where informality was not a bar to recognition.⁽¹²⁸⁾ Although the judges at common law had residuary discretion to refuse recognition to divorces which offended their sense of justice,⁽¹²⁹⁾ it had been held by

¹²⁵- *Bater v. Bater* [1906] P.209; *Macapline v. Macapline* [1958] P.35; *Middleton v. Middleton* [1967] P.62.

¹²⁶- *Zaal v. Zaal* [1983] 4 F.L.R. 284 at 289; 445 H.L.Col.76 (21.11.1983) *per* Lord Roskill.

¹²⁷- *Quazi v. Quazi* [1980] A.C.744 at 782.

¹²⁸- *Qureshi v. Qureshi* [1971] 1 All.E.R.325..

¹²⁹- *Russ v. Russ* [1963] P.87; *Makouipour v. Makouipour* 1967 S.L.T.101.

Scarman J. in *Varanand v. Varanand*,⁽¹³⁰⁾ that the residual discretion is one to be most sparingly exercised. The judges in fact did not establish general rules for the use of this power. Instead, they preferred to use it in particular cases.⁽¹³¹⁾ In any event the judges did not use this power to create a general rule that recognition of informal divorces as such is contrary to public policy. Moreover, this kind of argument cannot be raised now because the 1986 Act provides specific provision for the recognition of extra-judicial divorces obtained where there are no proceedings.⁽¹³²⁾

One of the facets of public policy on which recognition was refused to the *talaq* in *Sherif v. Sherif*,⁽¹³³⁾ was that "the wife has never taken the Muslim faith". This element of public policy seeks to establish the rule that a divorce is less likely to be recognised if the parties to the marriage are of different religions than is a divorce between parties of the same faith. If this is so, it would be contrary to the common law authorities.⁽¹³⁴⁾ Moreover, if the marriage which is celebrated between parties of different religions is not of itself a bar and contrary to the English and Scottish public policy, why should the methods of dissolution of such marriages be considered as contrary to public policy? Such a ground certainly would harm relations between religious communities. The Western feeling surely must lie in the thought that the method is unknown in the culture of one party, and that may put (her) at a disadvantage. It is unlikely, however, that an English or Scottish court would rely on this factor of public policy without other supporting considerations to deny recognition to foreign divorces. This view is supported by the fact that the recognition of informal divorces is now governed by section 46 (2). Moreover, since the case of *Sharif* has been decided there are no reported cases in which this ground of public policy was considered.

¹³⁰ - [1964] 108 Sol Jo 693.

¹³¹ - *Qureshi v. Qureshi* [1971] 1 All.E.R.325 at 345; *Makouipour v. Makouipour*, 1967 S.L.T.101 at 116.

¹³² - S.46 (2) (b).

¹³³ - [1980] 10 Fam Law 216 at 217.

¹³⁴ - *Yousef v. Yousef* [1957] The Times, 1 August, 1957; *Russ v. Russ* [1964] P.315.

Another factor of public policy on which recognition was refused to foreign divorces was that the wife had begun divorce proceedings in England prior to the foreign divorce.⁽¹³⁵⁾ However, after the enactment of the principle of *Res Judicata*, it is unlikely that an English or Scottish court would refuse recognition to foreign divorces merely because proceedings had been instituted before the foreign proceedings. Under the principle of *Res Judicata*, the English or Scottish court may refuse to recognise a foreign divorce if at the time when it was granted it was irreconcilable with a decision previously given by its court. Moreover, if the proceedings are still continuing in both countries, the English or Scottish court may exercise its discretion to stay its proceedings.⁽¹³⁶⁾

The main argument of public policy in favour of refusal of recognition of foreign divorces before the enactment of the Matrimonial and Family Proceedings Act 1984 was that the result of recognition would often be to prevent a divorced spouse from obtaining the financial relief to which she or he would be entitled under English or Scots law. In *Chaudhary v. Chaudhary*,⁽¹³⁷⁾ Wood J. and the judges of the Court of Appeal decided that even if the bare *talaq* fell within the meaning of proceedings in section 2 of the 1971 Act, it would be contrary to public policy to recognise it because the husband had obtained the divorce with the sole purpose of depriving the wife of the opportunity of obtaining financial relief from the English court. Similarly, in *Joyce v. Joyce*,⁽¹³⁸⁾ Lane J. refused to recognise the divorce because the Canadian court had no jurisdiction over the jointly owned home in England.

The mere fact that the recognition of a foreign divorce would deprive the divorced spouse from obtaining financial relief was not by itself sufficient to refuse recognition on the ground of public policy.⁽¹³⁹⁾ The parties' connection with the forum of recognition

135- *Sharif v. Sharif* [1980] 10 Fam.Law 216 at 217.

136- See, *Supra*, 83.

137 -[1984] 3 All.E.R.1017 at 1025, 1029, 1033, 1035, 1036; *Sharif v. Sharif* [1980] 10 Fam.Law 216; *Zaal v. Zaal* [1983] 4 F.L.R.284.

138 [1979] Fam.Law 93.

was relevant to the exercise of the court's discretion in this context. This can be seen by a comparison of *Chaudhary v. Chaudhary*⁽¹⁴⁰⁾ with *Quazi v. Quazi*,⁽¹⁴¹⁾ In the former case recognition was refused because the parties were domiciled and habitually resident in England at the time of *talaq*. Ormrod L.J. stated:

"It must plainly be contrary to the policy of the law in a case where both parties to a marriage are domiciled in this country to permit one of them, whilst continuing his English domicile, to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favourable to him"⁽¹⁴²⁾

Whereas in *Quazi*, recognition was given, although the husband was habitually resident in England when he obtained the *talaq*, the wife having no connections with England apart from a short stay. It should be noted that if the facts of the *Chaudhary* case recurred in a case considered under the 1986 Act, recognition still would be refused even with the Matrimonial and Family Proceedings Act in force, because section 46 (2) (c) provides clearly that no informal divorce will be recognised if at least one of the two parties was habitually resident in the United Kingdom for at least one year before the divorce was obtained.

The availability of financial relief in the foreign court was also relevant to the exercise of the court's discretion. If the wife had already obtained financial benefits substantially similar to those she would probably have obtained in an English or Scottish divorce, recognition might not be refused.⁽¹⁴³⁾ In *Qureshi v. Qureshi*,⁽¹⁴⁴⁾ Sir Jocelyn Simon P. held that the recognition of *talaq* would not cause injustice to the wife because she had

¹³⁹ -Stone, (1985) 14 A.A.L.R.363 at 372, 373; Pilkington, (1988) 37 I.C.L.Q.131 at 137,138.

¹⁴⁰ -[1984] 3 All.E.R. 1017; *Sharif v. Sharif* [1980] 10 Fam.Law 216; *Zaal v. Zaal* [1983] 4 F.L.R.284; *R v. Secretary for the Home Department, exp. Fatima* [1986] 2 All.E.R. 32.

¹⁴¹ - [1980] A.C.744.

¹⁴² -*Chaudhery v. Chaudhery* [1984] 3 All.E.R.1017 at 1033.?

¹⁴³ -Stone, (1985) 14 A.A.L.R. 363 at 373.

¹⁴⁴ -[1971] 1 All.E.R.325 at 373.

already obtained a maintenance order from the magistrates court before the *talaq* and the deferred dower became payable to her. Another factor relevant to the court's discretion was that the wife should not consent to the divorce or accept it, e.g. by remarrying. This factor was mentioned by Oliver L.J. when he pointed out that the wife in *Chaudhary* learned of the *talaq* some months later and she had never sought or agreed to the divorce or accepted it as an effective divorce, whereas in *Quazi* the wife had required the earlier divorce.⁽¹⁴⁵⁾

The problem of financial relief has been resolved by the Matrimonial and Family Proceedings Act 1984, which gives the English and Scottish courts power to make an order for financial relief after recognition of a foreign divorce. It follows that the rule that public policy can be invoked where the motive of the husband is to deprive the wife of her right, is no longer law and it is unlikely that the court will refuse recognition under section 51 (3) (c) of the 1986 Act because the husband had obtained the divorce with the sole purpose of depriving the wife of her rights. In the recent Scottish case of *Tahir v. Tahir*,⁽¹⁴⁶⁾ the wife argued that the *talaq*, which took place in Glasgow and was completed by formal proceedings in Pakistan, was contrary to public policy under section 51 (3) (c) of the 1986 Act because the motive of the husband was to prevent her from obtaining her rights in financial claims. Lord Sutherland rejected this argument when he held that recognition is not contrary to public policy because section 28 of the Matrimonial and Family Proceedings Act 1984 allows the Scottish courts to order financial relief after recognition of foreign divorces.

It should be noted, although the matter will be discussed more later, that it is not clear whether English part III of the 1984 Act applies to all foreign divorces or only to those obtained by proceedings. This uncertainty comes from the wording of section 12(1) which provides "where -(a) a marriage has been dissolved...by means of judicial or other

¹⁴⁵- *Chaudhery v. Chaudhery* [1984] 3 All.E.R 1017 at 1033.

¹⁴⁶- 1993, S.L.T.194.

proceedings in an overseas country, and (b) the divorce...is entitled to be recognised as valid in England...either party to the marriage may apply to the court...for an order for financial relief".⁽¹⁴⁷⁾

Thus, if section 12(a) is limited in scope to divorces obtained by "means of judicial or other proceedings" then the argument of public policy on the ground of financial relief remains an important factor to the exercise of the court's discretion to refuse recognition to informal divorces. Since the 1986 Act makes specific provision for recognition of informal divorces,⁽¹⁴⁸⁾ the logical result should be that the parties to such divorces have also sufficient financial protection by means of the 1984 Act equally with those divorced by proceedings, otherwise it might increase the problems of 'limping marriages'.⁽¹⁴⁹⁾

II- Grounds for Non-Recognition of Foreign Divorces in Iraq

It is generally agreed in Iraq that in the absence of specific rules upon which a foreign divorce may not be recognised, the courts are bound to follow the general rules contained in the Civil Code 1951 and the Civil Procedure Code 1969. The judges must bear in mind, in applying the general rules, that the function of decrees of divorce is different from decrees relating to commercial and civil judgments. The refusal of recognition of foreign divorces without reasonable reasons lead to limping marriages. This has a serious consequence not only for the parties themselves but also for the children.

The general rules reveal that the courts must decline recognition of foreign laws if they are against Iraqi public policy.⁽¹⁵⁰⁾ Where the recognition of foreign divorce is concerned, this would be the case when the national law of the husband does not permit dissolution of a marriage during the lifetime of the spouses.⁽¹⁵¹⁾ If, for instance, a

¹⁴⁷- Contrast with Part IV of the 1984 Act which gives the Scottish courts power to grant financial relief after recognition of all divorces whether or not obtained by proceedings. *infra*. chapter 7.

¹⁴⁸- .46 (2).

¹⁴⁹- Sebastian Poulter, (1987) Vol.84 L.S Gaz 253 at 255; Jaffey, *op.cit.*p. 75.

¹⁵⁰- Art.32 of the Civil Code of 1951.

Brazilian husband obtained a divorce from the English court, such a divorce cannot be recognised in Iraq, because the husband's national law forbids it, whereas if a Brazilian wife was married to an English subject, divorce can be recognised, because the English law as the law of the husband permits divorce. It is hard to understand this discriminatory rule. Moreover, why does the Iraqi public policy intervene with respect to foreigners whose connection with Iraq is not close enough to warrant disregarding the foreign divorce? Public policy must be invoked only when the foreign divorce is thought to be grossly offensive or repugnant to Iraqi standards of justice or morality. In the first example above, it might be thought that there is nothing in Iraqi public policy which should result in failure to recognise such a divorce. However, Iraqi law is seeking to be consistent with its own conflict rule, and is seeking to respect the national law of the husband, the Iraqi choice of the personal law. This is an interesting area, and a difficult one.⁽¹⁵²⁾ There are two aims, or two evils. Unless the parties intend to remain in a legal system where their status is undisputed, it is probably more important to avoid limping marriages. It is understandable and meritorious that Iraqi law should seek to support the substantive law of its chosen *lex causae* (*lex patriae*, the personal law): the problem lies in the different treatment of the husband and wife.

The rule that the recognition of foreign divorce would be contrary to public policy if the marriage to which it related was indissoluble according to the personal law of the parties seeking a divorce is not to be found in England and Scotland.⁽¹⁵³⁾ The 1986 Act provides in section 51 an exclusive list of the grounds on which recognition may be denied and it makes no provision for excepting from recognition a divorce obtained by a party whose marriage, according to his or her personal law, was indissoluble. In addition, section 50

¹⁵¹ -Art.19 (3).

¹⁵² -Cf, difficulties in England and Scotland, e.g. *Breen v. Breen* [1964] P. 144; *Zanelli v. Zanelli* 1948] P.381; See, S.50 of the 1986 Act and chapter 6 (The effect of recognition of foreign divorces on capacity to re-marry).

¹⁵³ - Though Cf. generally S.50 of the 1986 Act (and, earlier, S.7 of the 1971 Act).

places the recognition rules above the 'capacity to marry' rule.⁽¹⁵⁴⁾ Public policy can be invoked when a divorce is obtained as a result of fraud, as in a case when the parties change their personal law from one which does not permit divorce to one which does, and the only purpose of so doing is to obtain divorce.⁽¹⁵⁵⁾ But the conversion of religion to Islam even in order to obtain divorce does not make the recognition of such a divorce contrary to public policy. This is because Muslims always have the right to divorce irrespective of where they are domiciled, and depriving a Muslim of the right to divorce or to recognition of his divorce is contrary to public policy.⁽¹⁵⁶⁾ It should be noted that, this rule does not mean that the Iraqi courts can recognise any divorce whatever obtained by Muslims. The divorce must satisfy the requirements of Iraqi law. If for instance, a Muslim pronounces a *talaq* in Scotland, such a *talaq* can be recognised in Iraq even if his personal law, Scots law, does not permit it, provided that he has the capacity to pronounce *talaq* according to Iraqi law (qua nationality: on our hypothesis, the husband is of Scots domicile, but Iraqi nationality). The Arab treaty states also that a divorce granted in one contracting State must be refused recognition if its recognition would be contrary to the public policy of the recognition court.⁽¹⁵⁷⁾ Since the law of divorce is generally the same throughout the Arab League States, it is thought that it is seldom that the courts will invoke public policy.

Neither the 1959 Civil Code nor the Arab treaty defines public policy. They left it to the discretion of the court to decide whether the recognition would be contrary to public policy in the circumstances of the particular case.⁽¹⁵⁸⁾ If the court is satisfied that the recognition of foreign divorce in question is contrary to public policy, then it must refuse recognition, because this ground is mandatory not discretionary as under the 1986 Act.

¹⁵⁴ -See, Ch.6

¹⁵⁵ -All-Hadway, op.cit.p. 119; Contrast 'British' position which does not regard a change of domicile for such a purpose as fraudulent. *Sellars v. Sellars* [1942] S.C.206.

¹⁵⁶ -Ibid, p.99.

¹⁵⁷- Art.19 (c).

¹⁵⁸- Abdul Whahed.Karam, op.cit.p. 40.

A foreign divorce must be denied recognition if it was obtained in a manner contrary to Iraqi ideas of natural justice. Article 19 (2) of the Arab treaty states that a divorce granted in one contracting State must be denied recognition if the parties had not been given notice of the proceedings. This means that a divorce against an Iraqi respondent who was not represented in court will not be recognised unless he was served either in the forum State or in Iraq by Iraqi judicial assistance. The requirements of the Arab treaty as to service are very similar to the Iraqi Civil Procedure Code 1969. This Code requires that adequate notice must be given to the parties concerned either personally, or by post, or by the publication in a newspaper in a case where the address is unknown.⁽¹⁵⁹⁾ The presence of the spouses during the divorce proceedings is not strictly necessary for recognition,⁽¹⁶⁰⁾ but it is submitted that recognition may be refused if in the court's view the respondent had not been given a reasonable opportunity to take part in the proceedings, because for example, of the petitioner's fraud.

Since the dissolution of marriage by *talaq* is part of Iraqi internal law, it seems unlikely that recognition would be refused because notice was not given to the wife of the husband's intention to divorce her. This is consistent with the view of the nature of *talaq* as a purely unilateral act under Iraqi law. Unlike the 1986 Act, there is no ground under Iraqi law stating that such a divorce must not be recognised if there is no official document certifying that the divorce is effective under the law of the country where it was obtained.

According to the Arab treaty, a divorce must also be denied recognition if at the time when it is obtained there are proceedings between the same parties before an Iraqi court, providing that these proceedings had been brought to the Iraqi court before the same proceedings were raised in the court in which the divorce was granted even if the result of the foreign divorce is compatible with the Iraqi decree.⁽¹⁶¹⁾ This is a very interesting

¹⁵⁹- Arts. 14, 21; All-Hadway, op.cit.pp. 167-180.

¹⁶⁰- Art.56 of the Civil Procedure Code 1969.

¹⁶¹- Art.2 (d).

situation results. Thus, if both decrees emanate from an Arab League country, neither will recognise the other (as a result of the *Res Judicata*), and yet the marriage is the same, the outcome the same, the substance of the divorce law and the consequence the same and, had there been no clash of proceedings, a divorce granted in either state would be recognised by the other. We see, though, to have intra-territorial effect of a consistorial decree (at least as far as the two legal systems involved are concerned); in practice, the potentialities of distress and uncertainty which usually attend 'limping marriages' seem to be small. Hence, there would be no true 'limping marriage' unless the Iraqi court should dismiss the action on the merits. Nevertheless, the situation cannot be regarded as entirely satisfactory.

CHAPTER SIX

The Effect of Recognition of Foreign Divorces on Capacity to Marry

The recognition of foreign divorces is governed by the law of the state in which recognition is sought, i.e. the *lex fori*, whereas capacity or essential validity of marriage is decided by the personal law of the parties, i.e. the *lex causae*. Since the essential function of the divorce is to terminate the validity of marriage between the parties and leave each of them free to remarry, a conflict may arise if the laws concerned take different views as to whether the divorced person in question has capacity to remarry. This conflict arises where the previous marriage was dissolved according to one law but not according to another.

Prior to the Family Law Act 1986, the courts had adopted different views to solve the clash between the rules governing the recognition of foreign divorces, and those governing validity of marriage. Section 50 of the Family Law Act 1986 has resolved part of the problem and left the other part to be decided by the courts.

The Iraqi conflict rules have completely ignored this subject. The courts must find out the solution by reference to the general rules in the Civil Code 1951 and the Personal Status Code 1959. Although the main aim of this chapter is to discuss the effect of recognition of foreign divorces on capacity to marry, it is interesting to discuss also the effect of non-recognition of foreign divorces, and divorces granted in the court of the forum, on capacity to marry. A further point which will be considered, which relates to foreign divorces and capacity to marry, is where foreign divorces impose prohibitions or restrictions on the right of one or both parties to marry. We shall find out whether they are to be accorded extraterritorial effect, or to be rejected on the ground of public policy. This chapter will be divided as follows:

I- The Effect in English and Scots Law of Recognition of Foreign Divorces on Capacity to Marry.

II- The Effect of Recognition in Iraqi Law of Foreign Divorces on Capacity to Marry.

I- The Effect in English and Scots law of Recognition of Foreign Divorces on Capacity to Marry

A- Capacity to Marry in General

The conflict rules governing the capacity or essential validity of marriage are based on two different principles reflecting the fundamental opposition between territoriality and extra-territoriality in the conflict of laws. According to one system, the matter is in principle subject to the *lex loci celebrationis*. According to another, the personal law of the parties applies. The adherence to the *lex loci* represents an early position, it is submitted, encapsulated in the maximum, *locus regit actum*. In early days, a marriage used to be judged in its entirety according to the *lex loci celebrationis* (i.e both as to essentials and form). Later, it was recognised that the tool of classification of elements of the problem offered an effective solution to the difficulty of ensuring that more fundamental matters were referred to the personal law. It may be that the rule in a particular legal system (as Scotland: Marriage (Scotland) Act 1977), requires capacity both by the personal law and the *lex loci celebrationis*. The Scots and English view of the importance of satisfying a foreign *lex loci* as to capacity is a matter of argument.⁽¹⁾ However, the personal law system is divided into two tests, according as to whether domicile or nationality is adopted. While domicile is used as the most appropriate test to determine the personal law in common law countries, nationality is preferred in the civil law countries.

As regards English and Scots laws, the original view was that the choice of law rule relating to the validity of marriage in all its aspects was governed by the *lex loci celebrationis*.⁽²⁾ However, about 1860 a distinction was drawn between two classes as to the validity of marriage: those concerned with formal validity and those concerned with

1- Cf. *Reed v. Reed* (1969) 6 D.L.R (3d) 617; See, Law Com.W.P.No.89; Scots Law Com. No.64, para. 3.44 (Recommendation that capacity by foreign *lex loci* be required). Contra, See, Cheshire & North, 12th ed., p. 598. See, *infra*, 265.

2- *Scrimshire v. Scrimshire* (1752) 2 Hag. Con 395, 161 E.R 782; *Dalrymple v. Dalrymple* 1811) 2 Hag.Con 54, 161 E.R.665; *Simonin v. Mallac* (1860) 2 Sw & Tr.67.

capacity or essential validity. While the former remained subject to the *lex loci*, the latter was held to be decided by the parties' personal law.⁽³⁾

The leading case in this context is *Brook v. Brook*,⁽⁴⁾ in which a man married his deceased wife's sister in Denmark, under whose law the marriage was valid. Both were domiciled in England. In applying English law, the House of Lords held that the marriage was void. Lord Campbell L.C. drew the following distinction:

"There can be no doubt of the general rule, that 'a foreign marriage valid according to the law of a country where it is celebrated is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon 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."⁽⁵⁾

This decision is inconclusive, a matter which has caused some controversy over the years as to whether the *lex domicilii* in this context means the domicile of the parties at the time of marriage or the matrimonial domicile. Two theories have been advocated as to the law which should govern capacity to marry.

(1) The Dual or Ante-Nuptial Domicile Theory: According to this theory, capacity to marry is a matter to be governed by the parties' ante-nuptial domiciliary laws. For the marriage to be valid, each party must have capacity to marry (in general and in particular) by the law of his or her domicile. Professor Dicey formulated this theory as follows:

"Capacity to marry is governed by the law of each party's ante-nuptial domicile... A marriage is valid as regards capacity when each of the parties has, according to the law of his or her ante-nuptial domicile, the capacity to marry the other...A marriage is (normally) invalid when either of the parties lacks, according to the law of his or her ante-nuptial domicile, the capacity to marry the other."⁽⁶⁾

3- See, Cheshire & North, 12th ed., p. 590; Dicey & Morris, 11th ed., p. 623; 12th ed., p. 664; Anton, 2nd ed., p. 419; Collier, op.cit., p. 260; North, (1990) I Hague Recueil.49.

4- (1861) 9 H.L. Cas 193; *Mette v. Mette* (1859) 1 Sw & Tr.416.

5- *Brook v. Brook* (1861) 9 H.L.C.193 at 207.

6- Dicey & Morris, 12th ed., pp. 663-664; 11th ed., p. 622-623; Jaffey, op.cit, pp .24-26; Collier, op.cit, pp .260-262; Cheshire & North, 12th-ed, p. 589.

(2) The Intended Matrimonial Theory: According to this view, capacity to marry is a matter to be determined not by the parties' ante-nuptial domiciliary laws, but by the law of their intended matrimonial home. The theory was advocated by Dr. Cheshire. In his view

"The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time."⁽⁷⁾

The arguments for and against the two theories have been frequently rehearsed,⁽⁸⁾ and therefore, it is not proposed to repeat them here. Although the weight of authority, both judicial and academic, in England and Scotland, is in favour of the dual domicile theory,⁽⁹⁾ there is a certain support for the intended matrimonial home theory in some recent cases.⁽¹⁰⁾ In the light of these conflicting authorities, the matter cannot be regarded as conclusively settled.

7- Cheshire & North, 12th ed, p. 587; 7th ed., p. 279.

8- Dicey & Morris, 7th ed, pp. 251-253; 9th ed, p. 261; 11th ed, pp. 625-626; 12th ed., pp. 664-668; Cheshire & North, 10th ed, p. 331; 12th ed, p. 586; Graveson, 7th ed, p. 263; Anton, 2n ed, p. 428; Morris, 3th ed, pp. 159-160; 4th ed., pp. 664-668; North, (1990) 1 Hague Recueil, 53; Jaffey, op.cit., p. 24; Wolff, op.cit., p. 335-336; *Lawrence v. Lawrence* [1985] 1 ALL.E.R. 505. A recent important discussion in this area is "*Private International Law. Choice of Law Ruls in Marriage*" Law.Com. W.P. N° 89 & Scots Law.Com. N° 64, (1984) See now Law Com. N° 165 & Scots Law Com. N° 105, *Private International Law, Choice of Law Rules in Marriage*, (1987).

9- *Repaine*, [1940] CH. 46; *Pugh v. Pugh* [1951] P. 482; *R v. Brentwood Superintendent Registrar of marriage, ex parte Arias* [1968] P. 314; *Padolecchia v. Padolecchia* [1968] P. 314; *Szechter v. Szechter* [1971] P. 286. In Scotland See, *Lendrum v. Chakravarti*, 1929, S.L.T. 96, 103; *MacDougall v. Chitnavis*, 1937 S.C 390-406; *Bliersbach v. MacEwen*, 1959 S.C 43-52; *Rojas, Petr*, 1967 S.L.T. 24 (sh.ct); See also, Marriage (Enobling Act) 1960, S.1 (3) and the Matrimonial Causes Act 1973, S.11(d); Marriage (Scotland Act) 1977, SS.1 (1), 2 (1) and 5 (4) (f). This theory is also favoured by Scottish academic, Anton, 2n ed., p. 431; Clive, 3rd ed, p. 133.

10- *De Reneville v. De Reneville* [1948] P. 100-114 [per Lord Greene M.R.] 121-122 [per Lord Bucknill L.J.]; *Kenward v. Kenward* [1951] P. 124 [per Denning L.J.]; *Radwan v. Radwan* [N° 2] [1973] Fam 35; *Lawrence v. Lawrence* [1985] 1 ALL.E.R 505, [per, Anthony Lincoln J.] at 506.

In recent years, consideration has been given to other approaches to determining the law governing capacity to marry. Thus, it has been suggested that the law of the country "with which the marriage has the most real and substantial connection should govern the validity of marriage".⁽¹¹⁾ It has also been suggested that in cases other than those such as a minimum age or impotence, where the purpose of the rule is to protect the parties, the marriage should be regarded as valid if either the dual domicile or the intended matrimonial home theory is satisfied, i.e rule of alternative reference.⁽¹²⁾ Again, one might have an elective dual domicile test, but although prima facie attractive, Dr. North notes⁽¹³⁾ that limping marriages would result. However, the Law Commissions have reviewed the choice of law rules for marriage. They rejected all these approaches⁽¹⁴⁾ when they recommended that "All issues of legal capacity to marry should be governed by the law of each party's ante-nuptial domicile (the dual domicile test)".⁽¹⁵⁾

There are a number of exceptions to the general rule that capacity to marry is a question for the parties' *lex domicilii*. These are as follows:

B- The Rule in *Sottomayer v. De Barros*(No.2)

As a result of the decision of the English court in *Sottomayer v. De Barros* (Nº 2),⁽¹⁶⁾ in which it was decided that where one of the parties is domiciled in England and the marriage takes place in England, the courts will not take account of any incapacity imposed by the *lex domicilii* of the other party which is not recognised by English law. Professor Dicey made an exception to his general rule on capacity to marry which he

11- *Vervaeke v. Smith* [1983] 1 A.C. 145 at 165, 166, *per* Lord Simon of Glasidale; *Lawrence v. Lawrence* [1985] 1 ALL.E.R. 501 at 512 *per* Anthony Lincoln J. This approach has received some academic support: Sykes, *The Essential Validity of Marriage*, (1955) 41 I. C.L.Q. 159-168; Fentiman, *The Validity of Marriage and the Proper Law*, (1985) C.L.J. 256.

12- Jaffey, (1978) 41 M.L.Rev.38; See, *Ibid.*, pp. 26-32-39; Royal Commission on Marriage and Divorce (1956) cmd. 9678, para. 891; *Lawrence v. Lawrence* [1985] 2 ALL.E.R. 733 at 746.

13- Cheshire & North, 12th ed, p. 603.

14- Law Com.Nº 89 and Scot Law Com.Nº 64, paras. 3.20-27.

15- *Ibid.*, para. 3.36; See also, Scot Law Com. Discussion Paper No 85. *Family Law. Pre-Consolidation Reforms* (1990), para.9.5.

16- (1879) 5 P.D. 94.

formulated as follows:

"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."⁽¹⁷⁾

The rationale behind this rule is to protect the English party. This decision found favour with the Court of Appeal in *Ogden v. Ogden*⁽¹⁸⁾ and was followed in *Chetti v. Chetti*.⁽¹⁹⁾ In Scotland, the precise nature of this exception is a matter of some doubt.⁽²⁰⁾ Professor Clive suggested that the decision in *MacDougall v. Chimavis*,⁽²¹⁾ supported this rule in Scots law. In this case Lord president Normand cited *Chetti v. Chetti* and said that "the law of Scotland is in conformity with it".⁽²²⁾ However, *Chetti* and *Macdougall* [overruling *Lendrum v. Chakravarti*]⁽²³⁾ may be viewed as cases in a special category, where the issue was a consideration of foreign rules on restriction upon marriage, the restriction being based on religious grounds, e.g. a ban on "mixed marriages" and marriages out of caste. This exception has been strongly criticized as being nationalistic and unprincipled⁽²⁴⁾ and the view of the Law Commissions is that the rule in *Sitomayer v. De Barros* should be abolished.⁽²⁵⁾

C- Capacity and the *Lex Loci Celebrationis*

There is some uncertainty as to whether the parties must have capacity to marry by the *lex loci* as well as by their domiciliary laws. So far as foreign marriages are concerned, there is no direct authority in England and Scotland on the point. Nevertheless, it has been

17- Dicey & Morris, 11th ed., pp. 638-639; 12th ed., pp. 679-680.

18- [1908] P. 46 at 74-77.

19- [1909] P. 67 at 81-88.

20- See, Anton, 2nd ed., pp. 432-433; Clive, 3rd ed., pp. 153-154.

21- 1937 S.C.390.

22- Ibid, at 404

23- 1929 S.L.T. 96.

24- Anton, 2nd ed., pp. 431-432; Clive, 3rd ed., p. 139; Cheshire & North, 21th ed., pp. 595-597.

25- Law Com No.89 and Scot Law com No.64 para. 3.48; Scots Law Com Discussion paper, No 85 (1990), para. 9.14.

argued that *Breen v. Breen*⁽²⁶⁾ is authority for this proposition when Karminski J was prepared to hold that incapacity by the *lex loci* was fatal to the validity of marriage.⁽²⁷⁾ However, since the learned judge did not examine the effect of a party's incapacity by the *lex loci* on the marriage's validity, the *Breen* case should be considered insufficient authority on this point.⁽²⁸⁾ So far as marriages celebrated in England and Scotland are concerned, it has been suggested that the parties must have capacity not only by their personal laws but also by the English or Scottish law on the ground that the court could hardly disregard its own law on such vital matters as the minimum age or prohibited degrees of marriages even if it was valid by the law of the parties' domicile.⁽²⁹⁾

The point under discussion has been considered by the Law Commissions. A recommendation has been made to the effect 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 (including its choice of law rules), under incapacity to marry the other."⁽³⁰⁾

It is hard to see why validity by the *lex loci* should be required where neither the parties nor the marriage have connection with that country. If there is policy justification for applying this rule in the case of marriages celebrated locally, it is submitted that there is no policy for applying this rule in the case of marriages celebrated abroad because this would create an additional obstacle to the validity of marriage.⁽³¹⁾

26- [1964] P. 144; See also, *Berthiaume v. Dastous* [1930] A.C. 79 per Viscount Dunedin, p. 83

27- Morris, 3th ed, p. 168.

28- Bradshaw, *Capacity to Marry and the Relevance of the Lex Loci Celebrationis in Commonwealth Law*, (1986) 15 Ang-Amer.L.R. 112 at 116-117; Cheshire & North, 11th ed, p. 586; See further discussion of *Breen*, *infra*. Consider *Reed v. Reed* (1969) 6 D.L.R.(3d) 617.

29- Morris, 3rd ed, p. 164; Graveson, 7th ed, p. 238; Jaffey, *op.cit.*, 39; Dicey & Morris, 11th ed., p. 637; 12th ed., p. 677; Cheshire & North, 12th ed., p. 597; See also, the Marriage (Scotland) Act 1977, SS.1 (2), 2 (1) (a) which provide that a marriage celebrated in Scotland is void if the requirements as to age or consanguinity and affinity are not satisfied; See, Anton, 2nd ed, p. 434.

30- Law Com. No. 89 and Scot Law Com No. 64, para. 3.44.

31- See, Hartley, *The Policy Basis of the English Conflict of Marriage* (1972) 35 M.L.Rev 571, 576-

D- Public Policy

Since the rule is accepted in England and Scotland that the courts will refuse to apply a foreign law if its application would be contrary to public policy, it follows that the court will not recognise a capacity or incapacity imposed by the parties' personal law or even by the law of the country of celebration if to do so would be contrary to public policy.⁽³²⁾ Thus, the courts will not recognise a foreign incapacity of a penal or discriminatory nature,⁽³³⁾ such as an incapacity which is based on grounds of religion,⁽³⁴⁾ as under Iraqi law when a Muslim woman is prevented from marrying a non-Muslim man,⁽³⁵⁾ or caste ⁽³⁶⁾ or race.⁽³⁷⁾

E- Capacity to Marry After Divorce

This point will be discussed fully to find out what is the effect of recognition of foreign divorces on the general rule of capacity to marry which has been summarized above. Although the main aim is to discuss the effect of recognition of foreign divorces on capacity to marry, it is interesting to consider also the effect of non-recognition of foreign divorces, and English or Scottish divorces, on capacity to marry. A further point to be considered, which relates to foreign divorces and capacity to marry, is where foreign divorces impose prohibitions or restrictions on the right of one or both parties to marry. We shall find out whether they are to be accorded extraterritorial effect, or to be rejected on the ground of public policy.

It is well settled in countries, which adopted the concept of monogamous marriage that a married person lacks capacity to enter into a valid union with a third party whilst his or

577; Jaffey, op.cit.p. 39; cf. *Reed v. Reed* [1969] 6 D.L.R (3d) 617.

32- *Cheni v. Cheni* [1965] P.85; See, Anton, 2nd ed., p. 439; Cheshire & North, 12th ed., pp. 599; Collier, op.cit., p. 269.

33- *Scott v. A.G.*, (1886) 11 P.D.128,infra.

34- *Sottomayer v. De Barros* (N.2) (1879) 5 P.D 94 at 104; *Padadopoulos v. padadopoulos* [1930] P.55; *Macdougall v. Chitnavis*, 1937 S.C 390.

35- Art.17 of the 1959 Iraqi Personal Status Code, supra.

36- *Chetti v. Chetti* [1909] P.67.

37- *Sottomayer v. De Barros* (N0.2) (1879) 5 P.D.94 at 104.

her first marriage is still subsisting under the parties' personal law or; probably, the *lex loci celebrationis*. Thus, under English and Scots law, a domiciled English or Scottish person who is bound by a prior, valid and subsisting marriage cannot contract another until the first marriage is ended by death or is annulled or dissolved. If such a marriage has been celebrated nevertheless, it is submitted that the courts must declare it void *ab initio* for bigamy.⁽³⁸⁾

It is submitted the the issue of a bigamy cannot give rise to difficulties in cases where both questions (of the validity of the prior marriage and capacity to marry of the parties concerned) are subject to the *lex fori*. But where the capacity to marry is subject to a foreign law or laws, the issue can give rise to some difficulties, because the laws concerned may take different views as to whether or not the prior marriage was dissolved validly, with the result that the second marriage may be regarded as bigamy according to one law but not according to the other. Here there is a conflict between the choice of law rules to determine the validity of the second marriage, i.e. *lex causae*, and those relating to divorce, i.e. *lex fori*.

The problem may be illustrated by the following example: H and W¹ are French nationals domiciled in France. H obtained a divorce from W¹ in France and then came to Scotland and acquired Scots domicile. H wished to marry W² in Scotland. There is no doubt that the question as to the validity of the French divorce and H's capacity to marry W² is determined decisively by Scots law, with the result that the proposed marriage will be permitted and held valid if the French divorce is recognised under the Scottish recognition rules. Suppose now that H did not acquire Scots domicile but one in Spain, according to which the French divorce is not recognised. Here the conflict will arise because the Scottish law as the *lex fori* indicates that H is single with the result that he

38- *Shaw v. Gould* (1868) L.R 3 H.L. 55; *Baindail v. Baindail* [1946].P. 122; *Padolecchia v. Padolecchia* [1968] P.314; S.11 (b) of the Matrimonial Causes Act 1973; S.5 (4) (b) of the Marriage (Scotland) Act 1977; Law. Com. No.89 and Scot.Law. Com. No. 64, paras. 3.8-3.40-3.42; Scot.Law Com. No. 85, para. 9.6; Clive, 3rd ed., p. 136.

ought to be free to marry: the Spanish law as the *lex causae* indicates that the prior marriage is still valid and subsisting with the result that H lacks capacity to marry. The converse situation has also occurred where the prior marriage has been validly dissolved according to the *lex causae* but not according to *lex fori*. These situations can give rise to the general problem known in private international law as the "incidental question".⁽³⁹⁾

The question therefore, is whether the validity of divorce, as a preliminary question, should be decided by the *lex fori*, including its choice of law rules or, by the conflict rules of the country whose law governs the main question of capacity to marry. In other words, which rules should prevail to solve the problem, that is to say the rules relating to divorce or to capacity? Several views have been advanced to solve the problem of the incidental question. One view supports the *lex fori* method,⁽⁴⁰⁾ the second supports the *lex causae* method⁽⁴¹⁾ and the third is that the solution should depend on the nature of the individual case and the policy of the forum thereon.⁽⁴²⁾

The main argument for the *lex fori* is that this method would achieve the internal harmony within the forum's legal system which would otherwise be lacking. Moreover, this method would avoid an anomalous result for the parties. For them a divorce automatically carries with it the right to remarry at least in that country and to deny this will defeat the reasonable expectations of the parties.⁽⁴³⁾

39- The term is used by Wolff, 2nd ed., p. 206, and is considered the most suitable English expression. For discussion of this problem See, Wengler, (1987) In. Enc. Com. L., Vol. III, ch. 7; Gottlieb, (1977) 26 I.C.L.Q. 334; (1955) 33 Can Bar. Rev. 523; Dickey & Morris, 11th ed., p. 49; 12th ed., p. 48; Morris, 4th ed., p. 424; Cheshire & North, 12th ed., p. 53; Anton, 2nd ed., p. 85; Hartely, (1967) 16 I.C.L.Q. 680; Jaffey, op.cit., p. 264; Collier, op.cit., p. 29. The problem of the incidental question cannot arise unless first, the main question must be governed by the law of the relevant foreign country and secondly, the conflict of laws of that country lead to a different result from the forum conflict laws upon the incidental (or preliminary) question.

40- Falconbridge, "Renvoi" Characterization and Acquired Rights (1939) 17 Can. Bar. Rev. 377-378.

41- Wolff, 2nd ed., p. 206; Lipstein (1972) C.L.J. 67, 90-96; Wengler, (1987) Enc-Com. L., Vol. III, ch. 7, pp. 16-18.

42- Dickey & Morris, 11th ed., p. 50; 12th ed., p. 49; Cheshire & North, 12th ed., p. 55; Anton, 2nd ed., p. 88; Gottlieb, *The Incidental Question Revisited-Theory and Practice in Conflict of Laws*, (1977) 26 I.C.L.Q. 734.

Against this argument, it has been suggested that the *lex causae* method should prevail. The reasons behind this argument are that the application of the *lex causae* to govern the incidental question would prevent limping marriages and achieve uniformity of decision between courts in different countries. The second is that this method is consistent with the choice of law rule that capacity to marry is governed by the law of the parties' domicile. The main purpose of this rule is to ensure that the marriage will be recognised in the country to which each party belongs by domicile or nationality. The purpose would be frustrated if the relevant foreign laws were to be disregarded on this vital point.⁽⁴⁴⁾

The arguments in favour of the *lex fori* method seem stronger for some reasons. First, it is impossible to achieve international harmony of decision under the *lex causae* in cases where the relevant laws of the foreign countries to which the parties belong give conflicting solutions. Let us take the following example to illustrate the point: H and W are both Brazilian nationals and married in Brazil. H obtained a decree of divorce from the courts in France. Later H married a French woman domiciled in France. This marriage according to French law is valid but not according to Brazilian law where the divorce is not recognised. How can uniformity of view be achieved between Brazilian and French laws? It cannot. What should be the aim of a British forum, assuming it has a role to play (as *lex loci celebrationis*). There is no reason in such a case " why England should try to reach conformity with one rather than the other legal system".⁽⁴⁵⁾

One might argue that the achievement of international harmony of decisions remains possible in this context by reference to the parties' matrimonial home at the time when the issue arises. This kind of argument does not always support the *lex causae* method, as in the case when the parties did not set up their matrimonial home at that time.⁽⁴⁶⁾

43- Hartley, (1967) 16 I.C.L.Q. 680, 690, 691; Jaffey, *The Incidental Question and Capacity to Remarry*, (1985) 48 M.L.Rev. 465, 469, See also, op.cit., p. 266; Palsson, op.cit., p. 96.

44- Wolff, 2nd ed., pp. 208, 209; Hartley, (1967) 16 I.C.L.Q. at 690.

45- Hartley, (1967) 16 I.C.L.Q. 680 at 690.

46- This is often found to be a defect of intended matrimonial home reasoning. Cf. *Re v. Egerton's Will Trusts* [1956] C.H.593.

Secondly, the choice of law rule on capacity to marry has not been settled yet. Although the dual domicile theory has now been widely supported, it is submitted that some judges have apparently preferred the intended matrimonial home theory. This uncertainty of choice of law rule may lead to different solutions according to which theory the courts apply to the cases of remarriage after divorce. Moreover, it has been recently suggested⁽⁴⁷⁾ that the traditional approach of capacity to marry as a single category with a single connecting factor should be abandoned. Instead, there should be a separate connecting factor for each category designed to achieve policy. If this approach is right,⁽⁴⁸⁾ then the policy requires that capacity to marry after divorce is a matter which belongs to the *lex fori* in order to achieve unity of decisions within the forum court and to avoid the anomalous result arising from the *lex causae* method, as we shall see later.

Before the enactment of the Family Law Act 1986, which solves part of the problem, the courts were called upon to deal with this problem in some cases. These indicated that both methods had been adopted. Two situations must be examined separately.

1 - Divorce Granted or Recognised by English or Scots Law But not by Relevant Foreign Law: This case concerns a remarriage after a divorce validly granted or recognised by English or Scots law but not so recognised in a country whose law governs capacity to marry of the parties as being the *lex causae* according to English or Scots conflict law. Must the person concerned be taken to possess capacity to remarry in the eyes of English or Scots law even if he lacks such a capacity according to his law? It is interesting to note that the answer would differ according to which method is applied to determine the validity of divorce. Applying the *lex causae* method would lead to the result that a person who is single in the eyes of English or Scots law has no capacity to marry, whereas under the *lex fori* method the proposed marriage would be valid although the divorce was not valid in the view of the personal law.

47- Downes, (1986) 35 I.C.L.Q.170, 173-76; *Radwan v. Radwan* [1973] Fam 35.

48- This approach has been rejected; Law.Com. No. 89 and Scot.Law Com. No.64, para 3. 27.

Until the enactment of the 1971 Act the prevailing view was that a divorce granted or recognised by the English or Scottish court was not sufficient ground for conferring capacity to marry on persons unless the divorce was recognised as valid by the relevant law which governs the capacity to marry.⁽⁴⁹⁾ In other words, the court took the view that the validity of divorce as a preliminary question should be determined by *the lex causae*.

Breen v. Breen,⁽⁵⁰⁾ although a case which does not involve an incidental question and cannot be considered a conclusive authority in favour of the application of the *lex causae*, does lend weight to that view. In this case, the parties at all times domiciled in England, married in the Republic of Ireland. The wife petitioned the English court for annulment of the marriage on the ground that the divorce which had been granted by the English court in respect of the husband's previous marriage, would not be recognised in Ireland and the marriage was therefore bigamous by Irish law. Karminski J. dismissed the petition on the ground that the English divorce would be recognised in Ireland (by general conflict of laws principles recognised in Ireland). However, the Learned judge was prepared to hold that a marriage is invalid under the English conflict laws if either party lacks capacity by the *lex loci celebrationis* despite the valid English divorce. Although the judge's approach in referring the question of capacity to marry to the *lex loci* was criticised,⁽⁵¹⁾ it was said that his judgment seems to imply that the parties' incapacity to marry by the *lex loci celebrationis* is fatal to the validity of their marriage. The judge therefore was interested in the attitude of the Irish *lex loci* to the English divorce. He dismissed the wife's petition because by the Irish conflict of laws the English divorce must be recognised.⁽⁵²⁾

The problem of the incidental question arose clearly before the English court in the case

49- Dicey & Morris, 11th ed., p. 51; 12th ed., p. 53; Morris, 4th ed., p. 161; Hartley, (1967) 16 I.C.L.Q. 687; Collier, op.cit. p. 31; North, (1990) 1 Hague Recueil, 91; Jaffey, op.cit., p. 34; Clive, 3rd ed., pp. 136-137; Halsbury's, Laws of England, Vol. 8, p. 344.

50- [1964] P.144.

51- Cheshire & North, 12th ed., p. 598.

52- North, op.cit., (1977), p. 194; Hartley, (1967) 16 I.C.L.Q. 687.

of *R v. Brentwood Superintendent Registrar of Marriage, ex p Arias*,⁽⁵³⁾ in which the problem was complicated by the introduction of *renvoi*. In this case the court adopted the *lex causae* method and held that a marriage in England following a Swiss divorce is invalid if it is invalid under the law of the party's ante-nuptial domicile on the ground that the divorce was invalid by the Swiss personal law (i.e. in its conflict sense) even if such a divorce was entitled to recognition in England because the Swiss law referred the matter of capacity to the Italian law of the husband's nationality, and in so doing had to deny its own decree.

The facts in this case were: That the husband was an Italian national, domiciled in Switzerland, married a Swiss national in 1946. The marriage was dissolved by a Swiss court in 1967. His former wife remarried within a few months after the divorce. He wished to marry a Spanish national who was also domiciled in Switzerland but he could not do this in Switzerland because the law of his nationality, Italy, did not recognise the Swiss divorce. He and his fiancée then came to England to get married but the registrar refused to marry them on the ground that the husband lacked capacity to marry by Swiss law as well as Italian law, being the *lex patrie* referred to by Swiss conflict rules, under which the Swiss divorce was not recognised. The couple then applied for an order of mandamus to compel the issue of the licence enabling the marriage to be solemnised. The petition was rejected by the court on the ground that the Swiss divorce, although validly granted by a court of the husband's domicile, Switzerland, and recognised in England, was invalid by Italian law, the law governing capacity to marry. Thus, the English court concentrated on the issue of capacity to marry and decided that the incidental question (validity of divorce) should be determined by the conflict rules of the law governing the main question (capacity to marry), which itself referred the matter on to a third law, that of the nationality.

Although the English court by applying the *lex causae* achieved uniformity of decision

53- [1968] 3 ALL.E.R. 279.

and status in England with countries of the husband's domicile and nationality, the decision on the other hand left the husband "in a state of matrimonial limbo: his first marriage was no longer subsisting under either English or Swiss conflict rules but it nevertheless prevented him from remarrying".⁽⁵⁴⁾ Thus, a person single in the eyes of English law was not free to marry. This is an unfair result since his wife was able to remarry and had done so, simply, because she was a Swiss national. This decision is inconsistent with a fundamental human right and with the growing international trend towards the promotion of the validity of marriages.

In Scotland the problem arose in *Rojas* case⁽⁵⁵⁾ in which the Scottish court applied the *lex causae* method and held that a remarriage after divorce in Scotland is invalid if the relevant personal law of the parties did not recognise that their previous marriage had been validly ended by divorce even if such a divorce was entitled to recognition in Scotland. In this case, the wife, who was an Italian national domiciled in Italy, had been divorced in Mexico. She wished to marry in Scotland a man domiciled in Venezuela. The couple then applied to the Sheriff court for a licence to enable the marriage to be solemnised. The court dismissed the petition on the ground that there was a legal impediment to her going through a form of marriage with another man because Italian law, as being her ante-nuptial domiciliary law, did not recognise the Mexican divorce as valid.

The common law position as to the effect on capacity to remarry of the recognition of a divorce was changed by section 7 of the 1971 Act,⁽⁵⁶⁾ which gave effect to article 11 of the 1970 Hague Convention.⁽⁵⁷⁾ This section provided 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 by section 6 (5) of this Act,

⁵⁴- Dicey & Morris, 11th ed., p. 54; 12th ed., p. 52; Collier, op.cit., p. 13; Jaffey, op.cit., p. 34.

⁵⁵- 1967, S.L.T.24.

⁵⁶- As amended by S.15 (2) of the Domicile and Matrimonial Proceedings Act 1973.

⁵⁷- This article provides that "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"

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 section 7 was to reverse the decision of the English court in *Rv. Brentwood* and the Scottish court in *Rojas* case⁽⁵⁸⁾ and to abandon the *lex causae* method. Under this section the effect is that in this context the incidental question must be decided by the English or Scottish conflict rules and not by those of the country of domicile.⁽⁵⁹⁾ This means that, if the foreign divorce is recognised in England or Scotland, the parties are free to remarry here, notwithstanding any incapacity based on non-recognition of the divorce in the country of the domicile.⁽⁶⁰⁾ Thus section 7 makes it clear that primacy is given to the divorce recognition rule of the forum to determine the validity of the divorce before dealing with the issue of capacity to remarry governed by the foreign law. Section 7 indicated that the recognition of foreign divorce automatically carried with it the right to remarry at least in the United Kingdom. Moreover, it avoided the serious consequence of the *lex causae* method and achieved uniformity of internal decision. On the other hand, section 7 in its context creates a state of uncertainty in this area of law because its scope is limited only to remarriage in the United Kingdom after a recognition of foreign divorce⁽⁶¹⁾ and did not cover cases where remarriage had taken place abroad or cases where remarriage followed an English or Scots divorce or a foreign annulment. If, e.g. a French domiciliary was divorced in Germany by a divorce which was not recognised in France and remarried in Germany a second spouse, section 7 would not cover this situation because the remarriage had taken place abroad; the rule in *R v. Brentwood* would apply and the remarriage would be held to be invalid.

58- See, Law Com No.137 and Scot. Law Com. No.88, para. 6.51; Dicey & Morris, 11th ed., p. 54; North, op.cit., (1977), pp. 192,193; Jaffey, op.cit., p. 35. Section 7 did not extend to cover remarriage in the United Kingdom after a foreign annulment entitled to recognition under the common law rules, but see, *Perrini v. Perrini* [1979] Fam 84; See now S. 50 of the Family Law Act 1986.

59- Dicey & Morris, 11th ed., p. 54.

60- Law Com.No. 137 and Scot. Law Com., No. 88, para .6.54.

61- The draft clause 7 proposed by the Law Commissions was not limited to remarriage in the United Kingdom, it contained no reference to where the second marriage took place. See, Law Com.No. 34 and Scot. Law Com. No. 16, para. 40.

This situation was considered in *Lawrence v. Lawrence*,⁽⁶²⁾ in which the English court disregarded the geographical limitation of section 7 and held that if a divorce was recognised the parties must be regarded in English law as free to remarry anywhere.⁽⁶³⁾ The facts in this case were that the wife, a Brazilian national, was married in Brazil in 1944. That marriage broke down and in Switzerland she met Mr. Lawrence who would marry her if she were free and they agreed that their future matrimonial home would be in England. By Brazilian law no divorce was possible in Brazil and any decree of divorce granted by another jurisdiction to a Brazilian national would be recognised only as a decree of separation. In 1970 the parties went to Nevada and there she obtained a divorce. The following day they married in Nevada and shortly afterwards returned to England to live according to their agreed plans. In 1972 the marriage broke down and the wife returned to Brazil. The husband petitioned for divorce and sought a declaration that the Nevada marriage following the wife's divorce in that state was valid. The wife sought a declaration that the marriage was null and void, contending that under English law capacity to contract a marriage was governed by the law of the parties' ante-nuptial domicile. Since she was at all material times domiciled in Brazil and Brazilian law did not recognise the divorce, she lacked the legal capacity to enter into a second marriage.

The question before the court was whether the wife had capacity to marry in Nevada even though she was still a married woman according to her domiciliary law, simply because the Nevada divorce was entitled to recognition in England.⁽⁶⁴⁾ At first instance,

62- [1985] 1 All.E.R 506; [1985] 2 All.E.R 733; discussed, Carter, *Capacity to Remarry after a Foreign Divorce*, (1985), 101 L.Q.Rev.496; Collier, *Foreign Divorces and Capacity to Marry: Judiciary and Jurists*, (1985) C.L.J. 378; Jaffey, (1985) 48 M.L.Rev. 465; Downes, *Recognition of Foreign Divorces and Capacity to Remarry*, (1986) 35 I.C.L.Q. 170; Lipstein, *Recognition of Divorces and Capacity to Remarry*, (1986) 35 I.C.L.Q. 178; Nott, *Capacity to Marry Following Foreign Divorce or Nullity*, (1985) 15 Family law 199; Hill, *Remarriage After an Overseas Divorce*, (1985) 36 N.I.L.Q. 251.

63- Collier, op.cit, p. 267.

64- The Nevada divorce was recognised in England under section 3 of the 1971 Act, either on the ground of the first husband's United State nationality, or on the ground of the wife's domicile as defined by the law of Nevada at the time of marriage.

Anthony Lincoln.J. after reviewing the relevant authorities,⁽⁶⁵⁾ concluded that while the dual domicile test had been frequently applied there had been no case relating to foreign divorce and subsequent marriage in which the courts had been confronted with a choice between the competing doctrines of dual domicile or intending matrimonial home, i.e the law of the country with which the marriage had the most real and substantial connection.⁽⁶⁶⁾ On balance, the learned judge was in the view that the test of the intended matrimonial home should determine the question of capacity to marry. Accordingly, since the parties intended matrimonial home was England and under English law both parties were free to marry, the judge held that the second marriage was valid.

Although the learned judge avoided the problem of the incidental question by holding that the validity of marriage was governed by the intended matrimonial home, with the result that the *lex causae* concided with the *lex fori*,⁽⁶⁷⁾ it is submitted that the judge's view was in favour of the application of the *lex fori* to the incidental question since he was attracted by the view that if a divorce was recognised under English law, the result must be that the parties are free to marry.⁽⁶⁸⁾ One can conclude from Anthony Lincoln's decision that he concentrated only on the facts of the case and did not attempt to find a solution to the whole problem of remarriage after divorce. Thus, the use of the intended matrimonial home to test the wife's capacity will not help him in a case where such a matrimonial home has not been settled yet. Again, the judge did not give a clear answer to the question where the parties set up their matrimonial home in a country whose law does not recognise the divorce ⁽⁶⁹⁾

The Court of Appeal affirmed the decision that the marriage was valid, but not on the

65- *R v. Brentwood Superintendent Registrar of marriage, exp Arias* [1968] 3 ALL.E.R. 279; *Padolecchia v. Padolecchia* [1968] P.314.

66- *Lawrence v. Lawrence* [1985] 1 ALL.E.R. 505 at 511.

67- Downes, (1986) 35 I.C.L.Q. 170, 171; Carter, (1985) 101 L.Q.Rev. 496, 499.

68- Lipstein, (1986) 35 I.C.L.Q. 178, 180; Jaffey, (1985) 48 M.L.Rev. 465, 466.

69- *Lawrence v. Lawrence* [1985] 1 ALL.E.R. 505, 512; See, Nott, (1985) 15 Family Law, 199, 201; Carter, (1985) 101 L.Q.Rev. 496, 502.

same reasoning. Ackner L.J. rejected the view that the case involved the general question of what law governed the capacity to marry, since the case was concerned with one and only one species of alleged incapacity to remarry which arose out of the continued existence of the wife's first marriage contracted in Brazil.⁽⁷⁰⁾ In his view, the recognition of the divorce carried with it the right to marry. Therefore, the fact that the divorce was not recognised by the country in which one party was domiciled could not affect the validity of the marriage. His Lordship then said:

"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 is purported to dissolve still continues in existence. Such a recognition would be a hollow and empty gesture."⁽⁷¹⁾

Thus, his Lordship managed to cope with difficulties arising from the use of the matrimonial home test by upholding the validity of the Nevada marriage on the ground that the inevitable consequence of the court recognising the Nevada divorce under the 1971 Act, was to recognise that it brought in its train the capacity to remarry and as a consequence of that, that it must be taken to dissolve the Brazilian marriage. Ackner L.J.'s judgment seems to suggest that the incidental question is to be decided by the *lex fori*.⁽⁷²⁾

Purchas L.J. accepted that the issue raised an incidental question. His approach was that the validity of a divorce for the purpose of a remarriage was to be determined by the law which governs the capacity to marry.⁽⁷³⁾ According to him, if a foreign divorce is recognised on the basis that it was obtained in the country of the domicile, determined in the foreign rather than the English sense, then this domiciliary law and not that of the domicile determined by English law governed the issue of capacity to remarry.⁽⁷⁴⁾

70- *Lawrence v. Lawrence* [1985] 2 ALL.E.R.733, 741.

71- *Ibid.* at 741.

72- Jaffey, (1985) 48 M.L.Rev. 465, 466; Downes, (1986) 35 I.C.L.Q. 170, 172.

73- Jaffey, (1985) 4 M.L.Rev. 465, 468; Downes, (1986) 35 I.C.L.Q. 170, 173.

74- Cheshire & North, 12th ed., p.604; Carter (1985) 101 L.Q.Rev. 496, 500-501.

This means that his Lordship suggested that the question of capacity to remarry after 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.^(7 5) In reaching this conclusion, the learned judge point out that the wife at the time of the proceedings in the Nevada court had acquired a domicile in Nevada (in the Nevada view) on the basis of six weeks' residence and could not have had any other domicile according to English common law. Then the wife, in the eyes of the English court, for the purpose of recognition of the Nevada divorce, had lost her Brazilian domicile and acquired a domicile of choice in Nevada under section 3(1)(a) of the 1971 Act. In these circumstances the Nevada concept of domicile should extend beyond the requirement of section 3 (2) and that it should be relevant as well for the purpose of determining capacity to remarry.^(7 6)

The use of the domicile in the foreign sense to test capacity to remarry is unsupported by previous authority and not required by the 1971 Act which uses this concept only for determining the validity of foreign divorce.^(7 7) Moreover, the learned judge's approach seems to give primacy to recognition rules of domicile over nationality and habitual residence, as a result of which the remarriage will be valid if the foreign divorce is recognised on the ground of domicile but not on the ground of nationality or habitual residence.^(7 8) This appears to give a primacy which is not required by the 1971 Act, and is regarded as a retrograde step from the common law rule under which a divorce was to be recognised only if it was granted or recognised by the domicile of the parties, and which common law rule was to be widened by the Act.

Sir David Cairns, in upholding the validity of the second marriage based his decision on two different grounds. The first seems to support Lincoln J's view that capacity to marry is to be decided by the law of intended matrimonial home. The second supports

7 5- See, Downes, (1986) 35 I.C.L.Q. 170, 173.

7 6- *Lawrence v. Lawrence* [1985] 2 ALL.E.R. 733, 744-745.

7 7- Carter, (1985) 101 L.Q.Rev.496 ,501; Downes, (1986) 35 I.C.L.Q.170, 173; Hill, (1985) 36 N.I.L.Q. 251, 253.

7 8- Jaffey, (1985) 48 M.L.Rev. 465, 468.

Ackner L.J.'s view that the recognition of divorce carries with it the right to marry.⁽⁷⁹⁾

The actual result in the *Lawrence* case is strongly criticised on the ground that it is not to be found in the transposition of domestic policy attitudes into a transnational factual context. Nor is to be found in the interpretation of section 7 of the 1971 Act, and not with choice of law rules governing capacity to marry.⁽⁸⁰⁾ It is argued that the reason for upholding the validity of the second marriage was, in addition to the recognition of divorce, that the parties had established their matrimonial home in England and that England was the country with which the parties had most real and substantial connection.⁽⁸¹⁾

It is submitted that the reason for upholding the validity of the wife's marriage is to be found in Ackner L.J.'s judgment. The learned judge states clearly that the validity of the second marriage was an inevitable consequence of the recognition of the Nevada divorce. It would be inconsistent with the essential function of the decree of divorce to deny the validity of the second marriage simply because the wife lacks capacity under her personal law. The failure of the traditional choice of law rules to give a satisfactory solution as to the effect of recognition of foreign divorce on capacity to remarry leads the judge to extend section 7 to cover case where remarriage takes place abroad. It is submitted that this view is consistent with the policy of the *lex fori* method.

In 1984, the English and Scottish Law Commissions examined the issue under consideration and recommended that section 7 of the 1971 Act should be extended to cases where the remarriage is celebrated outside the United Kingdom.⁽⁸²⁾ In effect this recommendation means that priority is given to the rules relating to divorce recognition over the traditional common law approach that status is exclusively to be determined by the law of domicile.⁽⁸³⁾ The Law Commissions make it clear that the policy behind it is to

79- *Lawrence v. Lawrence* [1985] 2 ALL.E.R. 733, 756.

80- Carter, (1985) 101 L.Q.Rev.501.

81- Hill, (1985) 35.N.I.L.Q. 251, 255; Carter, (1985) 101 L.Q.Rev. 501, 502.

82- Law. Com. No.137 & Scot Law Com No.88, paras. 6,49-6,59.

83- As in *Padolecchia v. Padolecchia* [1968] P. 314 and *R v. Brentwood Superintendent Registrar of*

simplify the law.⁽⁸⁴⁾

A further issue has been considered by the Law Commissions, namely, the remarriage after an English or Scottish divorce.⁽⁸⁵⁾ It has been seen that section 7 of the 1971 Act did not cover cases where remarriage following an English or Scottish divorce had taken place within the United Kingdom, and such a divorce would not be recognised by the law of the domicile of one or both of the parties. Applying the rules governing capacity to marry, the result would be that the second marriage would be invalid, whereas in the situation envisaged by section 7 it would be valid if the English or Scottish court recognised the foreign divorce even if the personal law of the parties did not recognise it. This means that section 7 gives greater effect to foreign than to English or Scottish divorces.⁽⁸⁶⁾ The Law Commissions recommended that the priority should be given to English and Scottish divorces over the rules governing choice of law relating to marriage.⁽⁸⁷⁾

The proposal of the Law Commissions is criticised "as a retrograde step in English private international law, a step devoid of policy justification and a step likely to lead to unwarranted (and often pretentious) assertions of extra-territoriality abhorrent to international comity".⁽⁸⁸⁾ However, this argument has been rejected in favour of simplicity of law and to ensure uniformity of decision within the forum court when section 50 of the Family Law Act 1986 confirmed the proposal of the Law Commissions. This section provides that "where, in any part of the United Kingdom-(a) a divorce...has been granted by a court of civil jurisdiction, or (b) the validity of a divorce...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

marriage, exp Arias [1968] 3 ALL.E.R. 279.

84- Para. 6, 59.

85- Para. 6, 57.

86- Dicey & Morris, 11th ed., pp. 55, 56; North, *op.cit.*, (1977), p. 195.

87- Law.Com. No. 137 & Scot. Law Com. No.88, para. 6.57.

88- Carter, (1985) 101 L.Q.Rev. 505, 505.

cause the remarriage of either party (where the remarriage takes place) to be treated as invalid in that part".

2- Divorce Recognised by the Relevant Foreign Law But not by English or Scots Law: The case envisaged here is that of a prior marriage which has been dissolved by a divorce valid according to the relevant foreign country whose law governs capacity to marry, but not according to English or Scots law. Do the persons concerned possess capacity to remarry in the eyes of English or Scots law, even if still bound by a previous marriage in the English and Scottish view? Applying the *lex causae* method would lead to the result that a person is validly and monogomously married to two persons at the same time. Under the *lex fori* method the proposed marriage would be invalid.⁽⁸⁹⁾

It will be remembered that under English and Scots law a domiciled English or Scottish person who is bound by a prior valid and subsisting marriage, cannot contract another until the first marriage is ended by death or is annulled or dissolved. The policy behind this rule is to avoid a case of bigamy. It follows that a married English or Scottish person who is divorced abroad has no capacity to remarry either in United Kingdom or abroad if the divorce is not recognised under the English or Scottish law.

In *Shaw v. Gould*,⁽⁹⁰⁾ the House of Lords decided that the wife lacked capacity to contract a new marriage because her first marriage was still subsisting as the Scottish divorce was not recognised in England. In this case, since the wife was an English domiciliary the problem of the incidental question did not arise,⁽⁹¹⁾ and therefore, the House of Lords did not find difficulty in deciding that the second marriage would only be contracted validly, in the English view, if the divorce was entitled to recognition under

89- Dicey & Morris, 11th ed., p. 51; Cheshire & North, 12h ed., p. 603; Hartly, (1967) 16 I.C.L.Q.684, 685; Jaffey, op.cit., p. 34; Palsson, op.cit., p. 99; Clive, 3rd ed., p. 137.

90- (1868) L.R 3 H.L 55.

91- Except in so far that there might be said to be a separate issue, legitimacy of claimants, which the House of Lords treated as inextricably linked with the validity of the parents' marriage, in tern linked inextricably with the anterior Scots divorce.

English law. However, when the incidental question arises the problem can give rise to some difficulties.

There is no English or Scottish case in which the incidental question has arisen in this context, as there is for the converse situation. Nor does the case fall within section 50 of the Family Law Act 1986. Academic opinion is divided as to which law should decide the incidental question in this kind of case. According to one view,^(9 2) the law governing the main question (capacity to marry) should decide the incidental question of the validity of divorce. Applying this rule the result would be that the parties to the proposed marriage would be regarded as capable of remarriage despite the non-recognition of the divorce by the forum court. The Canadian case of *Schwebel v. Ungar*^(9 3) appears to support this view. In this case a Jewish couple had been divorced in Italy by a *ghet* while they were domiciled in Hungary. This divorce was not recognised by Hungarian law, nor by Italian law, but it was recognised by the law of Israel where both parties acquired a domicile after the divorce. Later, the wife, still domiciled in Israel, married in Ontario a second husband who was domiciled there. He petitioned the Ontario court for a declaration that his marriage was void because the wife was still married to her first husband since the Jewish *ghet* obtained in Italy was not entitled to recognition according to the Ontario conflict laws.

The court rejected the husband's plea and held the second marriage was valid because the wife's capacity to marry was governed by the law of her domicile, and by that law the divorce was valid, even though it was not valid by the Ontario law. Although the result of the decision has been welcomed on the ground that it promoted freedom to marry since the parties had married in good faith and had lived together for some time, or on the ground that it achieved uniformity of decision between the courts of the forum and the courts of the foreign country,^(9 4) it is submitted on the other hand, that this solution is in direct

9 2- North, op.cit., (1977), p. 224; (1975) 91 L.Q.Rev. 36 at 45, 46, 53.

9 3- (1964) 48 D.L.R (2d) 644, affirming (1963) 42 D.L.R (2d), comments, Hooper, *A New Rule for Recognition of Foreign Divorces?* (1964) 27 M.L.Rev 727; Lysyk, *Conflict of Laws-Status-Capacity to marry-Recognition of prior Foreign Divorces-The Incidental Question* (1965) 43 Can. Bar. Rev. 363; Webb, (1965) 14 I.C.L.Q. 659.

conflict with the concept of marriage as monogamous in English and Scottish law.⁽⁹⁵⁾ This solution will imply the recognition of a kind of legal bigamy, the "divorced" party being lawfully married to two persons at the same time, and therefore, "intractable problems in relation to succession, matrimonial relief and other matters could thus arise. 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?"⁽⁹⁶⁾ Accordingly, the *lex fori* method should be used to decide the incidental question of the validity of divorce to avoid such an absurd result, which would be the inevitable consequence if the *lex causae* method were to be applied.

The Law Commission in its consultation paper on the Recognition of Foreign Nullity, Divorces and Related Matters examined the situation under consideration and recommended that "in our view, if a foreign divorce or annulment is refused recognition in the United Kingdom, and the marriage is otherwise valid and subsisting, the spouses should not be regarded here as capable of remarriage, whatever the view taken by the law of their domicile."⁽⁹⁷⁾ In effect this means that a person whose foreign divorce is not recognised as valid should not be regarded as free to remarry, whether in England or Scotland or elsewhere, notwithstanding that the law of his domicile recognised the divorce. A suggestion which would mirror section 50, in that the (British) forum prefers its own recognition rule to that adopted by the law of domicile.

The English and Scots Law Commissions in the final report in 1984 suggested that legislation is unnecessary to deal with the effect of non-recognition of foreign divorce on

94- Dicey & Morris, 11th ed., p. 53; 12th ed., p. 51; Collier, op.cit., p. 31.

95- Hooper, (1964) 27 M.L.R. 727, 730; Hartley, (1967) 16 I.C.L.Q. 680, 684; Clive, 3rd ed., p. 150.

96- Jaffay, op.cit., p. 36; (1985) 48 M.L.Rev. 465 at 496.

97- Law Com & Scot.Law.Com, unpublished consultation paper circulated to a selected audience in May 1983, p. 97.

capacity to marry.⁽⁹⁸⁾ The main reason given by the Law Commissions was that the problem is not likely to arise in practice. In the case of remarriage in the United Kingdom, conflict between the recognition and capacity rules is not likely to arise because even if the parties have capacity under the relevant foreign law, capacity under the English and Scots law would also be required. In the case of remarriage abroad, the Law Commissions suggested that since the rules for recognition of foreign divorces are so broad, a conflict with the law governing capacity is unlikely. If recognition is denied on the ground of public policy, the Law Commissions took the view that such a non-recognition "ought not to be a bar to the recognition of the validity of a remarriage elsewhere".⁽⁹⁹⁾ In the same line Dr. North⁽¹⁰⁰⁾ argues that, in the case of a remarriage proposed or purported to have taken place abroad, difficulties for a United Kingdom court would be unlikely to arise because the United Kingdom divorce recognition rules based on section 46 of the Family Law Act 1986 are broad and generous. However, as against that, one might say that section 46 (2) is much more strict than section 46 (1) and it might well be the case that a United Kingdom court might differ from the view taken by the law of the husband's domicile in the matter of recognition of e.g. a bare *talaq*.

In the absence of legislation dealing with this issue, it might be argued that the desire to reduce limping marriages, the policy of achieving international uniformity of decision, and the policy of protecting the parties' reasonable expectations requires the application of the *lex causae*. It might also be argued that there is no policy justification for the forum to hold that the marriage is invalid if it is celebrated in accordance with the *lex causae* which would recognise the validity of that marriage, simply because the divorce is not recognised by the forum's court, in the cases where neither the parties nor the marriage has a connection with that court.⁽¹⁰¹⁾

⁹⁸- Law.Com.No.137 & Scot Law Com.No.88.para .6.6; Cheshire & North, 12th ed., p. 605; Nott, (1985) 15 Family law.199 at 201, 202.

⁹⁹- Para. 6.60.

¹⁰⁰- Cheshire & North, 12th ed., p. 605.

¹⁰¹- Dicey & Morris, 11th ed., pp 636-638; Jaffey, op.cit.p. 39; David Gordon, op.cit.p. 153.

However, it is submitted that the *lex fori* method should be used to decide the incidental question. So far as remarriage in England or Scotland is concerned, this method is consistent with the accepted view that the parties must have capacity not only by their personal law but also by English or Scottish law.⁽¹⁰²⁾ The Scottish Law Commission has recently recommended that "no matter what the domiciles of the parties may be, a marriage entered into in Scotland should be invalid if, according to Scottish internal law, (b) either party is already married".⁽¹⁰³⁾ To hold otherwise, would imply the recognition of a kind of legal bigamy, a concept which is offensive to English and Scottish standards of morality and public policy. In the case of remarriage abroad, it is also submitted that the *lex fori* method should be used in this context to avoid the consequences arising from the application of the *lex causae*, namely, that a person is validly and monogomously married to two persons at the same time, and any complications arising from this fact in relation to succession and matrimonial relief.

3- Prohibitions Against Remarriage After Divorce

The point to be considered here is the situation where a foreign divorce imposes prohibitions or restrictions on the right of one or both parties to marry. Does a divorced person possess capacity to marry within the prohibition period in the eyes of English or Scots law even if he lacks a capacity according to his law? It is well settled in England and Scotland that the answer depends on the kind of prohibition or restriction which is imposed by the foreign law. It is submitted that the prohibitions or restrictions under consideration might be divided into two classes.⁽¹⁰⁴⁾ First, those imposed against only one party. Secondly, those imposed on both parties.

¹⁰²- *Shaw v. Gould* (1868) L.R 3 H.L. 55; *Baindail v. Baindail* [1946] P. 122; *Padolecchia v. Padolecchia* [1968] P.314; S.11 (b) of the Matrimonial Causes Act 1973; S.5 (4) (b) of the Marriage (Scotland) Act 1977; Law com No.89 and Scot Law Com No.64, paras. 3.8-3.40-3.42; Scot Law Com., No.85, para. 9.6; Clive, 3rd ed., 150.

¹⁰³- The Scots Law Com. No.85, (1990), para. 9.6; Law Com. No. 89 & the Scots Law Com., No.64, para. 3.8.

¹⁰⁴- Wolff, 2nd-ed., pp. 172, 173-339; Dicey & Morris, 11th ed., pp. 631, 633; 12th ed, pp.672-674; Cheshire & North, 12th ed., pp. 605, 606; Hartley, (1967) 16 I.C.L.Q.694, 699; Palsson, op.ict., pp. 64, 65, 93, 94; Maclean, op.cit., p. 57.

a- Prohibitions Imposed on One Party

Various legal systems forbid one party to a divorce to remarry within a specified period of time or during the life of the other party. Such prohibitions or restrictions are designed to achieve different purposes. Under Iraqi law, for instance, if consummation of marriage has taken place and the marriage is dissolved by divorce, the woman is prohibited from marrying within a *period of Idda*.⁽¹⁰⁵⁾ This prohibition is designed either to prevent doubt arising concerning the paternity of any child born to the divorced woman shortly after the divorce, or to give the husband opportunity to resume the relationship during that period.⁽¹⁰⁶⁾ Some other legal systems forbid the guilty party to the divorce who has committed a matrimonial offence to marry so long as the injured party remained single or until after the death of the injured party.⁽¹⁰⁷⁾ The accepted view in England and Scotland is that a prohibition imposed by a foreign law on only one party will be disregarded if it is considered as being penal and discriminatory, irrespective of the domicile of the parties.⁽¹⁰⁸⁾ This might be justified on the ground that this kind of prohibition is offensive to English and Scottish standards of morality and public policy.

In *Scott v. A.G.*,⁽¹⁰⁹⁾ a husband domiciled in Natal obtained a divorce there on the ground of his wife's adultery. The law of Natal prohibited the remarriage of a guilty party as long as the innocent party remained unmarried. The wife, who was the guilty party married the co-respondent in Cape Colony, and later went through a second ceremony with him in England within the prohibition period. The judge held that the wife's remarriage was valid, on the ground that the prohibition in the law of Natal did not operate as a bar to marriage where the wife had acquired an English domicile, because after the divorce she was a single woman and therefore she is free to remove into any other jurisdiction to

105-See, *supra*, 17.

106- E.g. *Warter v. Warter* (1890) L.R.15 P.D.152.

107- Palsson, *op.cit.*, p. 64; Hartley, (1967) 16 I.C.L.Q. at 694, note (55).

108- William.E.Holder, *Public Policy and National Preferences: The exclusion of Foreign Law in English Private International Law*, (1968) 17 I.C.L.Q. 926 ,948; Wolff, *op.cit.*, p. 339; Cheshire & North, 12th ed., p. 606; Dicey & Morris, 11th ed., p. 632; 12th ed., p. 673

109- (1880) 11.P.D.128.

contract a fresh marriage.⁽¹¹⁰⁾ The decision in this case was explained by the same judge in *Warter v. Warter*,⁽¹¹¹⁾ on a different ground when he held that the incapacity to remarry imposed by the Natal law only attached to the guilty party and was therefore penal in its character and not to be enforced in England, whether or not there was a change in the domicile of the penalised party. This explanation would seem to provide a clear and explicit authority for the proposition that the prohibition on remarriage as penal will be disregarded and the proposed marriage in England or Scotland will be valid on the ground of public policy, whatever the domicile of the parties at the time of the remarriage.

Another kind of prohibition is that which forbids the remarriage of a divorced woman for a limited period. Although this prohibition attaches only to one party, it is submitted that it is far from being penal or discriminatory, because its purpose, as under Iraqi law, is either to avoid doubt about the paternity of any child that might be born after the divorce or to give the husband opportunity to resume the relationship. However, in the Australian case of *Lundgren v. O' Brion*,⁽¹¹²⁾ in which the prohibition was of the kind under consideration, the court was of the view that the prohibition was penal, because it attached to one party only and upheld the validity of the wife's marriage within the prohibition period. Although the result of the decision is good policy for upholding the validity of the wife's marriage, it is hard to accept the reasoning of the court that such prohibitions are penal. It is submitted that the purpose of this kind of prohibition is not to punish the guilty, but to avoid the undesirable result of doubtful paternity of children born at this time.

Hartley has suggested that this prohibition should be applied if it forms part of the law governing the capacity of the parties to the new marriage.⁽¹¹³⁾ It follows that the remarriage of an Iraqi-domiciled divorced woman within the period of the prohibition in England or Scotland should be held invalid. If, however, the wife acquired an English or

110- Ibid, at 131.

111- (1890) L.R.15 P.D.152.

112- [No.2] [1921] V.L.R.361; Dicey & Morris, 11th ed., p. 633; 12th ed., p. 674.

113- Hartley, (1967) 16.I.C.L.Q. at 699; Morris, op.cit., p. 108.

Scottish domicile, the prohibition should not be applied.⁽¹¹⁴⁾ There may be no need for such a distinction: the time limit in its nature is likely to be short, and causes no offence to the forum. It should be regarded as a reasonable exercise of judgment by the foreign forum in fixing the terms of divorce.

b- Prohibitions Imposed on Both Parties

This kind of prohibition which has been considered most frequently by English courts is based on the fact that in some countries the decree of divorce, though absolute, does not permit the parties to remarry before the period of appeal has elapsed, and any marriage within that period is regarded as invalid. Its purpose is not to punish the guilty party but to avoid the undesirable result which might arise from a second marriage if the decree is reversed on appeal. This prohibition constitutes, as Dr. Cheshire points out, something analogous to the marriage disability imposed on domiciled English spouses in the period between the decree *nisi* and the decree absolute.⁽¹¹⁵⁾ Accordingly, the courts considered that this prohibition must be applied so long as it is not an everlasting prohibition if it is applicable under the *lex divortii* even if it does not form part of the law governing the capacity of the divorced person to remarry.⁽¹¹⁶⁾

In *Warter v. Warter*,⁽¹¹⁷⁾ a husband obtained a divorce in India, on the ground of his wife's adultery. Indian law imposed a prohibition on both parties, forbidding remarriage until the period of appeal had elapsed from the decree absolute. The wife remarried in England within this period. It was argued that since the second marriage was in England, the parties should be free from the prohibition imposed by the Indian law. Sir James

114- See, original explanation [*ratio of Scott v. A.G*(1880) 11 P.D.128], *supra*, 287.

115- Cheshire & North, 12th ed , pp. 605 ,606; Dicey & Morris, 11th ed., p .631; 12th-ed., p. 673; Graveson, 7th ed , pp. 261, 288. Morris, 3rd ed., p. 170; under English law the decree is made in two stages, the decree *nisi*, followed by the decree absolute. The marriage ceases as soon as the decree is made absolute and either spouse is then free to remarry. The decree *nisi* does not have this effect, and if either party remarries before it is made absolute, the second marriage will be void. See, section 1 (5) of the Matrimonial Causes Act 1973. Such a two-step procedure is not part of Scots law.

116- Wolff, 2nd ed., p. 379; William. E. Holder (1968) 17 I.C.L.Q. 920, 948; Collier, *op. cit.*, p. 269.

117- (1890) 15 P.D.152.

Hannen rejected this argument when he held that the second marriage was invalid on the ground that the prohibition in Indian law is an integral part of the proceedings, and a condition which must be fulfilled before the parties can contract a fresh marriage, and they cannot evade it by obtaining a domicile in other country or by purporting to marry in another country.⁽¹¹⁸⁾ This decision was followed in *Boettcher v. Boettcher*,⁽¹¹⁹⁾ in which Wallington held that the prohibition had in English law the effect of making the marriage subsist until the time had expired.

It is quite clear that the learned judges justified the invalidity of the second marriage on the ground that the first marriage is not completely dissolved while the period of appeal lasts, so that any marriage within that period is void for bigamy, irrespective of the position of the *lex loci* and the *lex domicilii* of the parties. The justification given by the English judges for invalidating the second marriage was criticised⁽¹²⁰⁾ on the ground that it would lead to the strange result, namely, that the second marriage would always be held invalid even if the first marriage was no longer subsisting according to the *lex divortii*. This situation arises from the fact that in some countries which have such prohibition the decree absolute nevertheless dissolved the marriage from the moment it was pronounced. "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 judgment in rem, and unless and until a Court of Appeal reversed it the marriage was for all purpose at an end."⁽¹²¹⁾ If the marriage is no longer subsisting by the *lex divortii*, there would be no policy to insist that it is still in existence.⁽¹²²⁾

In the Australian case of *Miller v. Teale*,⁽¹²³⁾ Kitto.J justified the invalidity of the second marriage not on the ground of bigamy but on the fact that the prohibition constituted

118- Ibid, at 155.

119- [1949] 93 S.J.237. at 238; *Le Mesurier v. Le Mesurier* [1930] 46 T.L.R.203 at 204.

120- *Miller v. Teale* [1954] 92 C.I.R 406, [1955] 29 Aust. L.J. 91.(H.C.A); Hartley, T.C., (1967) 16 L.C.L.Q. 697.

121- *Marsh v. Marsh* [1945] A.C. 271 at 278.

122- Hartley, (1967) 16 L.C.L.Q. 698.

123- [1955] 29 Aust. L.J. 91.

an independent ground for invalidating the marriage which is governed by the *lex divortii* and operates independently of the rules concerning form and capacity. According to him, the decree absolute of divorce ends the incapacity arising from the first marriage but the prohibition creates a new one. A second marriage celebrated after the decree absolute is invalid" because of an applicable rule of the law which invalidates even monogamous marriages."⁽¹²⁴⁾ The main defect of this view is that it makes the choice of law of validity of marriage more complex by adding a new aspect to the traditional approach. Under this view the validity of marriage is divided into three aspects, form, capacity and prohibitions against remarriage.

II- The Effect of Recognition in Iraqi Law of Foreign Divorces on Capacity to Marry

The choice of law rule relating to the capacity or essential validity of marriage is governed by the national law of the parties. According to article 19 (1) of the Iraqi Civil Code if both parties have capacity to marry each other by the laws of either nationalities at the time of the ceremony, the marriage is valid, but invalid if by either or both of those laws they have no such capacity. There are two exceptions to this general rule, the more significant is that where one of the parties is an Iraqi national at the time of the marriage, the court will not take account of any incapacity by the national law of the other party. The validity of a marriage celebrated in such circumstances will be governed by Iraqi law alone.⁽¹²⁵⁾ The policy behind this exception is the desire to protect Iraqi nationals. This exception is similar to that in *Sottomayer v. De Barros* (No.2)⁽¹²⁶⁾ but with one difference that the Iraqi rule extends to include marriages celebrated abroad. The second exception is to be found in article 32 of the 1951 Civil Code. This provides that the courts must refuse to apply a foreign law if its application would be contrary to public policy. In general any capacities or incapacities imposed by the law of a foreign national must be

¹²⁴⁻ Ibid, at 96.

¹²⁵⁻ Art. 19 (5); All-Hadwy, op.ict., p. 166.

¹²⁶⁻ (1879) 5 P.D. 94, See, supra, 264.

disregarded if they are considered as contrary to Iraqi public policy. As regards the question whether the parties must have capacity to marry by the *lex loci* as well as by their national laws, there is no clear answer, but it seems from the general rules that the requirements of the *lex loci* must be satisfied if the marriage is celebrated in Iraq. On the other hand, if the marriage is celebrated abroad, it is thought that the *lex loci* should be disregarded in order to facilitate the validity of marriage.

In dealing with the question of the effect of divorce on capacity to marry, the Iraqi conflict rules have completely ignored it. Neither the courts nor academic opinion have faced or discussed this question. However, we try to find out the appropriate solution by reference to the general rules governing capacity to marry which have been summarized above, and to the general rules in the Personal Status Code of 1959. It will be remembered that polygamy is a cornerstone of the Iraqi law. Here the law has drawn a distinction between polygyny (i.e. the system whereby the husband is allowed to have more than one wife at the same time), and polyandry (i.e. the system whereby the wife is allowed to have more than one husband at the same time). The only form of polygamy permitted by the Iraqi law is the former.⁽¹²⁷⁾ It follows from this domestic rule that the husband has capacity to marry a second wife even if his prior marriage is still valid and subsisting, while the woman who is bound by a prior, valid and subsisting marriage, cannot contract another until the first marriage is ended by death or annulled or dissolved. If such a marriage has been celebrated nevertheless, the court must declare it void *ab initio*.

This rule cannot give rise to difficulties where the questions of the validity of divorce and capacity to marry are subject to Iraqi law. The difficulties arise where the capacity to marry is subject to foreign national laws, because these laws may take different views as to whether or not the prior marriage was dissolved validly. In the case where a divorce is granted or recognised by Iraqi law but not so recognised in a country whose law governing capacity to marry of the parties is regarded as being the *lex causae* according to Iraqi law,

127- Art.3 (4) (5) of the 1959 Personal Status Code.

it is thought that primacy should be given to the divorce recognition rule for the same reasons which were considered above in the context of English and Scots law.

In the converse case where a prior marriage has been dissolved by a divorce according to the relevant foreign country whose law governs capacity to marry, but not according to Iraqi law, it has been suggested in the context of English and Scots law that a divorced person in these circumstances should not have capacity to marry, because the application of the *lex causae* would lead to the result that a person is validly married to two persons at the same time and this would be contrary to the concept of English and Scottish marriage as a monogamy. Since the Iraqi law has adopted the concept of polygamous marriage it is thought that the husband can marry a second wife even if his prior marriage is still valid and subsisting in the eyes of the Iraqi law. This solution would not be contrary to Iraqi public policy and would not produce difficulties in relation to succession and matrimonial relief since these matters have been regulated by certain provisions.⁽¹²⁸⁾ On the other hand, a divorced woman whose prior marriage is still valid and subsisting in the eyes of Iraqi law should not have capacity to marry because to hold otherwise would imply the recognition of a kind of bigamy, the divorced woman being lawfully married to two husbands at the same time, and this would be contrary to the domestic rule that a woman is not allowed to have more than one husband at the same time. One might argue that this solution would imply the state of discrimination because it puts the female inferior to male. Whatever the power of this argument it must be admitted that this solution reflects the Iraqi domestic rule which is based on Islamic law. As regards the prohibitions or restrictions imposed by foreign laws on the right of one or both parties to marry, the public policy requires that such a prohibition or restriction must be disregarded if it is considered as being penal,⁽¹²⁹⁾ but where the purpose of the prohibition or restriction is not to punish the guilty party it is thought that such a prohibition should be applied because the Iraqi law itself contains such prohibitions.

128- Art.91 (1).

129- Art.32 of the 1951 Civil Code.

CHAPTER SEVEN

The Effect of Recognition of Foreign Divorces on Financial Relief

Until 1984, a person whose overseas divorce was recognised in England and Scotland was unable to seek financial relief and property adjustment even if the marriage was closely connected with England or Scotland and even if both parties and property were within the jurisdiction. The law led to unjustifiably harsh results in certain cases and encouraged the parties to challenge foreign divorces.⁽¹⁾ The unsatisfactory nature of the situation existing before 1984 had long been recognised and criticised by judges and academic opinion. In 1984 the Matrimonial and Family Proceedings Act was enacted to give effect to the proposals of the two Law Commissions. The Act contains separate provisions for England and Scotland enabling the courts in those countries to make financial relief notwithstanding the existence of foreign divorce. In Iraq, there are no statutory provisions dealing with this subject, and the courts have no power to make financial relief to spouses where there has been a foreign divorce.

This chapter will consider in which circumstances the English and Scottish courts have powers to make financial relief after foreign divorce and to find out the differences between them. It will also consider the form of the relief which the Iraqi court may grant if it accepts jurisdiction. This chapter will be divided as follows:

I- The Effect of Recognition of Foreign Divorces on Financial Relief in England and Scotland.

II- The Effect of Recognition of Foreign Divorces on Financial Relief in Iraq.

1- See, *per Lord Scarman* in *Quazi v. Quazi* [1979] 3 W.L.R.833 at 850, *infra*, 300; *Torok v. Torok* [1973] 1 W.L.R.1066.

I- The Effect of Recognition of Foreign Divorces on Financial Relief in England and Scotland

A- The Position at Common Law

It is submitted that if a marriage is dissolved by an English or Scottish divorce the parties are no longer husband and wife, and accordingly no longer enjoy any rights which depend on that status. Their obligation to provide support for each other will cease.⁽²⁾ Nevertheless, the courts have power to grant an ancillary order for financial relief whenever they have jurisdiction in the main suit for divorce,⁽³⁾ provided the order would not be wholly ineffectual.⁽⁴⁾ However, until 1984 the court's power to make an order for financial relief was limited to English and Scottish divorces and did not extend to cover cases where the marriage had been dissolved by a foreign divorce. This meant that a person who had been divorced abroad had no recourse to the courts for financial relief even if the marriage was more closely connected with England or Scotland than with any other country and even if both the property and the parties were within the jurisdiction. Accordingly, a person in a such situation was only able to claim financial relief in the country where the divorce was granted, and that might have been impossible or the financial provision made might have been inadequate.⁽⁵⁾ Hence, a financial incentive

2- The wife and husband *staute matrimonio* are under obligation to maintain each other. See, S.27 of the Matrimonial Causes Act 1973, as amended by Domestic Proceedings and Magistrates' Court Act 1978, S.63; Matrimonial and Family Proceedings Act 1984, S.4 and by Family Law Reform Act 1987, Sched.2, para.52; See, for Scotland S.1 (1) of the Family Law (Scotland) Act 1985.

3- See, Matrimonial Causes Act 1973, SS.22, 23 [as amended by Administration of Justice Act 1982, S.16] 24 and 24 A [added by the Matrimonial Homes and Property Act, 1981 S.7]; Matrimonial Homes Act 1983, S 7 and Sched.1; See, generally, Bromley, & Lowe, *Bromley's Family Law*, London, 7th ed (1987), Ch. 20. For Scotland, See, Family Law(Scotland) Act 1985, SS.8, 14; Matrimonial Home(Family Protection) (Scotland) Act 1981, S.13; See, generally, McInnes, *Divorce Law and Practice in Scotland*, Edinburgh, (1990) Ch. 4; Thomson, *Family Law in Scotland*, Edinburgh, (1991).

4- *Tallack v. Tallack* [1927] P.211.

5- If a foreign order has been obtained, it will often be recognised and enforced; see in this respect, Maintenance Order Act 1950; Maintenance Order [Facilities for Enforcement] Act 1920; Maintenance Orders [Reciprocal Enforcement] Act 1927; Civil Jurisdiction and Judgments Act 1982(in relation to

existed to challenge the validity of the foreign divorce, and to begin divorce litigation in England or Scotland. In most cases this was of no concern to the courts as the parties would have little or no connection with either England or Scotland. If, however, one or both parties was domiciled or had been habitually resident here, the injustice, in comparison with the parties to English or Scots divorce, was considerable.

The liberality of the recognition rules of foreign divorces coupled with the restrictive approach of some foreign courts in considering financial relief provided cases of serious hardship to wives. Thus, a woman whose marriage had been dissolved by a foreign divorce recognised here was, e.g. unable to raise an action for maintenance for herself because she had ceased to be a wife, so that the husband was no longer under a legal liability to maintain her.⁽⁶⁾ She could not establish a claim to financial provision or property adjustment orders.⁽⁷⁾ She could not invoke the powers of the courts to prevent the husband carrying out a transaction which would leave her without any resources or to frustrate or impede the enforcement of any order.⁽⁸⁾

The unsatisfactory nature of the law had long been recognised and the courts took different steps to minimise the difficulties.⁽⁹⁾ In *Torok v. Torok*,⁽¹⁰⁾ the parties were Hungarian and came to live in England in 1956, getting married in Scotland in that year. In 1964 they became naturalised British Subjects. Later the husband left for Canada and the wife and the children remained in England in the house jointly owned by the parties. In 1972 the husband petitioned for divorce in Hungary. The Hungarian court pronounced a partial decree. The wife petitioned the English courts for divorce and to exercise their discretion to expedite the making of a decree absolute. Ormrod J. observed

orders coming within the category of 'maintenance' orders; *De Cavel v. De Cavel* [1980] E.C.R. 731; Maintenance Enforcement Act 1991.

6- *Turczak v. Turczak* [1970] P.198.

7- *Torok v. Torok* [1973] 1 W.L.R.1066; *Quazi v. Quazi* [1979] 3 W.L.R.833.

8- *Joyce v. Joyce* [1979] Fam.Law.93, 112.

9- Cheshire & North, 12 th ed , p. 709.

10- [1973] 1 W.L.R.1066; *Bryant v. Bryant* [1980] 11 Fam Law.85.

that any final decree made by the Hungarian court would be entitled to recognition by virtue of section 3 (1) (b) of the 1971 Act^(1 1) and this recognition would prevent the court from making financial relief in favour of the wife, notwithstanding that the matrimonial home was within the jurisdiction. The learned judge, therefore, was able to avert such a situation when he held that the marriage was still subsisting and that the English court had jurisdiction to grant a decree, which would be expedited in order that the question of financial relief could be considered.

In certain cases, the courts decided to refuse recognition of foreign divorces in order to enable the wife to claim maintenance or bring an action for divorce in which she could claim financial relief.^(1 2) This step is highly unsatisfactory because it increases limping marriages, the practicalities of which cannot be ignored, and it would undermine the international Convention to which the United Kingdom is a party. The defect was not that the recognition rules of foreign divorces were vast but that the law did not provide for granting financial relief after recognition. Another step to minimise the difficulties faced by the parties to a foreign divorce was to grant relief in favour of a child. The recognition of foreign divorces did not prevent the court from making maintenance orders in respect of children.^(1 3) But the court's power, in comparison with the power exercisable in divorce proceedings, was narrow both in respect of the kinds of orders that would be made, and of the range of persons who would be ordered to make payments.

The final step was to keep alive an order for the maintenance of a wife made during the subsistence of the marriage by English courts, notwithstanding that the marriage was dissolved by a foreign divorce recognised in England.^(1 4) The court also retained its

1 1- See, now S.46 (1) (b) (iii) of the Family Law Act 1986.

1 2- *Joyce v. Joyce* [1979] Fam.Law. 93, 112; *Sharif v. Sharif* [1980] 10 Fam. Law 216; *Chaudhary v. Chaudhary* [1984] 3 All.E.R.1017.

1 3- *P (L.E) v. P (J.M)* [1971] P.318; *Hack v. Hack* [1976] 6 Fam.Law.177.

1 4- *Wood v. Wood* [1957] P. 254; *Qureshi v. Qureshi* [1971] 1 All.E.R.325; *Macauley v. Macauley* [1991] W.L.R.179.

discretion to continue, vary or discharge the maintenance order.⁽¹⁵⁾ The same principle was also applied to an interim order for maintenance made by the English court, notwithstanding a later foreign divorce recognised here.⁽¹⁶⁾ But the court's powers to make a financial provision order on the ground of wilful neglect to maintain are restricted, and in particular do not extend to the making of property adjustment orders. Further, there remains the problem posed by the need to deal with immovable property.

The Call for Reform

Undoubtedly, the law outlined above led to unjustifiably harsh results to those who had been divorced abroad and left with no claim for financial relief. It is hard to justify the denial to those people of any claim in the English or Scottish courts, particularly if they had been living here for a substantial period and possessed substantial assets in this country.⁽¹⁷⁾ The law also encouraged the parties to challenge foreign divorce in order to claim maintenance or bring an action for divorce in this country in which they could claim financial relief. Hence, the law led to unnecessary and expensive court cases. *Quazi* is notable here. The main issue in this case was the wife's right under the Matrimonial Causes Act 1973 to claim an interest in the small house in Wimbledon. The case involved long and complicated inquiries into the validity of Muslim divorces and their recognition in England. It occupied no less than 24 working days in the courts and involved 5 experts in foreign laws and a number of English lawyers. The cost of this case far exceeded the value of the house. The result was the court had no power to deal with the house since the parties had been validly divorced.

This unsatisfactory nature of the law led the judges and academic authorities to call for reform. In *Torok v. Torok*,⁽¹⁸⁾ Ormrod J. commented on the effect of the Hungarian divorce upon the wife if it had been recognised:

¹⁵ - *Bragg v. Bragg* [1925] P. 20.

¹⁶ - *Newmarch v. Newmarch* [1978] Fam.Law 79; Criticised by .Parry, *Foreign Decree and English provision*, (1979) 9 Family Law 12.

¹⁷ - *Torok v. Torok* [1973] 1 W.L.R. 1066; *Quazi v. Quazi* [1979] 3 W.L.R. 833.

¹⁸ - [1973] 1 W.L.R. 1066 at 1070.

"this, I think, must be an unforeseen situation, unforeseen that is at the time when the Act of 1971 was drafted; because the effect of the Act is to oust the jurisdiction of this court to deal with a family living in this country and with a property-a matrimonial home or a house in joint names- in this country. Now, that is a situation which plainly should be avoided at all cost."

In *Quazi v Quazi*,⁽¹⁹⁾ Lord Scarman felt constrained to ask himself whether there were better and cheaper ways of doing justice. His Lordship then called for reform when he said:

"I agree with the Court of Appeal⁽²⁰⁾ that the reform needed is one whereby a resident in the United Kingdom whose overseas divorce...is recognised by our law as valid, should be able, like one who obtained a divorce...in this country, to claim a property adjustment or other financial order under the Matrimonial Causes Act 1973...I would comment that such a reform should achieve not only a greater measure of justice for first generation immigrant families but a considerable saving for the legal aid fund. The incentive to challenge the foreign divorces would be gone, and the court could deal with the property and financial problems of the parties upon their merits."

The call for urgent legislative reform was also supported by academic authorities. Karsten wrote: "the loss of the power to award financial relief to a spouse can be an exceedingly heavy price to pay for the avoidance of limping marriages... Once this much needed reform materialises, our courts will be able to banish their present scruples about recognising foreign divorces".⁽²¹⁾ During the debate on the Bill leading to the 1971 Act, Edward Lyons M.P. commented: "one hopes that there will be legislation soon to enable the courts in this country to ensure that wives living here who had been divorced abroad would have their rights to maintenance protected".⁽²²⁾

19- [1979] 3 W.L.R. 833 at 850; See also, *per* Lord Viscount Dilhorne at 841; *Viswalingham v. Viswalingham* [1980] 1 F.L.R.15.

20- [1979] 3 W.L.R.402 at 405 *per* Ommrod.

21- *Recognition of non-judicial divorces*, (1980) 43 M.L.Rev.202, 208-209; and See also, (1970) 33 M.L.R.ev. 205; *The Recognition of Divorces and Legal Separations Act 1971*, (1972) 35 M.L.Rev.299; David Pearl, (1974) C.L.J.77; Wade, (1974) 23 I.C.L.Q. 461; Parry, (1979) 9 Family Law 12; Dickson, *Foreign Divorces Which Jar on Our Conscience*, (1980) 43 M.L.Rev.81; Nott, *The Recognition of Foreign Divorces: Some Problems Considered*, (1980) 10 Family Law 13; Morris, 2nd ed, p. 172.

The whole problem was considered in 1980 by the two Law Commissions.⁽²³⁾ Although they agreed that in some circumstances the court should have the power to make financial relief after the recognition of foreign divorce, they expressed different opinions as to what those circumstances should be. In general, the English Law Commission adopted an approach in which there is wide jurisdiction and in which it is left to the courts, guided by a list of factors to be taken into account, to exclude inappropriate applications, while the Scottish Law Commission preferred restrictive jurisdictional rules combined with clear guidelines in advance to exclude inappropriate applications. Their recommendations were implemented by the Matrimonial and Family Proceedings Act 1984. Part III (SS.12-27) confers such a power on the courts in England, while part IV (SS.28-31) makes provisions for applications to be made in Scotland.

B- Financial Relief in England

1- The Scope of Part III

Section 12 (1) provides that "where-(a) a marriage has been dissolved...by means of judicial or other proceedings in an overseas country, and (b) the divorce...is entitled to be recognised as valid in England..., either party to the marriage may apply to the court⁽²⁴⁾ in the manner prescribed by rules of court for an order for financial relief...".⁽²⁵⁾

There are a number of comments that must be made on this section. The first point is that the power of the English court to make financial relief is limited to divorces granted in

22- Hansard. H.C.Deb. 5 May 1971, Vol, 816.Col.1562.

23- Law Com No.117' Family Law: *Financial Relief After Foreign Divorce*' 1982; W.P. No.77 1980; Scots Law Com No. 77' *Family. Report on Financial Provision After Foreign Divorce*' 1982; See, John Williams, *Financial Provision after Foreign Divorces* (1983) 133 N.L.J.767; Canton, *The Matrimonial and Family Proceedings Act 1984: Financial Relief after Divorce* (1985) 15 Family Law 13; *Financial Relief after Talaq divorce* (1983) W.L.J.928; David Gordon, *Part III of the MFPA: 1984 A Panacea for Foreign Divorce?* (1986) J.S.W.L.329 and *Foreign Divorces: English Law and Practice*, Newcastle, (1988) ch, 11; Morris, 4th ed., p. 208.

24- 'The Court' means the High Court, or County Court if the latter is given jurisdiction under part V, S.27.

25- 'Order for financial relief' means an order under SS.17 or 22 of this Act, SS.12 (4), 27.

an "overseas country" which means a country or territory outside the British Islands.⁽²⁶⁾ Hence, the party to Scottish divorce cannot seek financial relief in the English court under the provision of this part. The purpose of the 1984 Act is to prevent hardship for spouses who cannot obtain relief from the country in which the divorce was granted. Since the courts in Scotland have adequate power to make financial relief,⁽²⁷⁾ it is therefore, unlikely that a person divorced in Scotland will face serious injustice. Such a person must seek financial relief in the divorce proceedings, and not in a subsequent application in England. Scottish orders will be recognised and enforced in England.⁽²⁸⁾

Secondly, the ability to make an application is not restricted to those who were respondents in the foreign divorce proceedings. Either party to the foreign divorce can apply for relief.⁽²⁹⁾ It may be argued that 'forum-shopping' and the protection of the respondent require that a person who chooses foreign proceedings should be prevented from coming back to England to claim financial relief. It is true that one of the objects of the reform in this area of law should be to discourage 'forum-shopping' and provide protection for respondents-but not in such a way as to defeat the main purpose of the reform. The proper way to discourage forum-shopping and provide protection for the respondents is by selecting appropriate jurisdiction and choice of law rules and not by excluding the petitioners in the foreign proceedings. Such an approach would limit the scope of the 1984 Act and would cause hardship in certain cases, and therefore, the mischief against which the Act was enacted would be defeated.

Thirdly, let us consider *Chebaro v. Chebaro*⁽³⁰⁾ in which the marriage was dissolved

26- S.27; See, the definition of 'British Islands', supra, Chapter Four, footnote 160.

27- See, SS.8, 14 of the Family Law (Scotland) Act 1985; S.13 of the Matrimonial Home (Family Protection) (Scotland) Act 1981.

28- See, supra, this chapter, 295, footnote 5.

29- Contrast with Scots law S.28 (3) (b) infra; It should be noted that a party to a marriage shall not be entitled to apply for relief in relation to that marriage if he or she remarried even if the subsequent marriage is void or voidable; S.12 (2) (3), such a restriction is similar to that where there have been proceedings in England, See, S.28 (3) of the Matrimonial Causes Act 1973.

by a divorce obtained by the husband in the Lebanon prior to 16 September 1985, when part III came into force. The wife applied for leave to make an application for financial relief. The husband raised the question of jurisdiction, on the ground that part III does not apply where the divorce was granted before 16 September 1985. The court dismissed the husband's petition on the basis that, although the 1984 Act contains no express provision on retrospectivity, the language of that Act makes it clear that Section 12 is intended to apply to divorces whenever pronounced and whether before or after 16 September 1985. The court reached this conclusion by holding that the use of the past tense in Section 1 (1) (a) "where a marriage has been dissolved", when contrasted with the present tense in Section 12 (1) (b) "...is entitled to be recognised" clearly indicated that part III is retrospective.^(3 1)

There is no doubt that the interpretation of Section 12 retrospectively is sound in that it would cover as many foreign divorces as possible. What is in doubt is whether such an approach would protect respondents who might have relied on the law as it stood before 16 September 1985. It is submitted that if the court's approach would cause hardship to respondents then the court's view would be inconsistent with the well established principle that a statute should not be interpreted retrospectively, if to do so would impair an existing right or obligation.^(3 2) However, the Court of Appeal makes it clear that any hardship which might arise from a retrospective construction of the provision would be reduced by the existence of the filter procedure which permits the court to exercise its discretion to refuse leave under Section 13.^(3 3)

Fourthly, Section 12 (a) requires not only that a divorce must be obtained in an overseas country but that it must be obtained by means of "judicial or other proceedings". The 1984 Act does not define the meaning of this phrase and this may lead to trouble over

30- [1987] 1 All.E.R.999.

31- Ibid at 1001; See, David Gordon, op.cit p. 169.

32- *Tew Bon Tew v. Kendraan Basmara* [1982] 3 All.E.R. 833 at 836.

33- *Chebaro v. Chebaro* [1987] 1 All.E.R.999 at 1003.

the scope of section 12 as to whether this section will cover all types of extra-judicial divorces or only those obtained by proceedings.⁽³⁴⁾

In an explanatory note to the draft section 12 the Law Commission states that: "the reference to 'judicial or other proceedings' covers cases where the marriage has been terminated extra-judicially (for example, by talaq): cf, Recognition of Divorces and Legal Separation Act 1971, S.2 (a)".⁽³⁵⁾ Although the view of the Law Commission is in line with the House of Lords interpretation in *Quazi v. Quazi*⁽³⁶⁾ of the similarly worded section 2 (a) of the 1971 Act, it is far from clear whether other types of extra-judicial divorces are within the scope of section 12. This doubt arose as a result of the decision of the Court of Appeal in *Chaudhary v. Chaudhary*⁽³⁷⁾ in which it was held that the phrase "judicial or other proceedings" in section 2 should be interpreted restrictively to exclude informal divorces.⁽³⁸⁾

The recognition of extra-judicial divorces whether or not obtained by proceedings is now governed by the Family Law Act 1986. This made no reference to section 12 and therefore, the question is whether section 12 should be interpreted restrictively to apply only to divorces entitled to recognition under section 46 (1) or should be interpreted widely to apply also to divorces entitled to recognition under section 46 (2). It seems for the following reasons to be an error if the power of the English courts to grant financial relief is limited only to divorces obtained by proceedings.⁽³⁹⁾

(1) The Matrimonial and Family Proceedings Act 1984 was enacted to end the injustice for those who have been divorced and have suffered financially abroad. If section 12 is

34 -See, David Gordon, (1986) J.S.W.L.336-338; op.cit.pp. 170-173.

35- Law Com.No. 117.p .21.

36 -[1979] 3 W.L.R.833.

37 -[1984] 3 All.E.R.1017.

38- Contrast S.46 (1) with S.46 (2) of the Family Law Act 1986.

39 -David Pearl, *Family Law and the Immigrant Communities*, Bristol, 1986, p .79; David Gordon, (1986) J.S.W.L.338; op.cit.pp. 173.

limited to divorces obtained by proceedings, then for those who have been divorced by means other than by proceedings, the Act will have changed nothing and merely raised false hopes amongst the immigrant community of financial relief following foreign divorce and parity with English divorces.

(2) The policy against 'limping marriages' requires that section 12 should be interpreted widely because it will be remembered that the lack of financial relief in the foreign court was the main reason for denial of recognition of foreign divorces. If, therefore, section 12 is limited to divorces obtained by proceedings, then a party to a foreign divorce not obtained by proceedings will continue to challenge the recognition of such divorces and this would absorb a quite excessive amount of time and money.⁽⁴⁰⁾

(3) Section 28 of part IV, which gives the Scottish courts the same power to grant financial provision after recognition of foreign divorces, made no reference to the phrase "judicial or other proceedings". This would imply that a party to foreign divorce whether or not obtained by proceedings can claim financial provision from the Scottish courts. It is unfortunate if the English and Scottish provisions on this point differ where their recognition rules are the same. Moreover, the provision is all the more needed in cases where the divorce has been obtained by means other than judicial, since it is less likely that financial matters have been adequately treated.

(4) The decision of the Court of Appeal in *Chebaro v. Chebaro*⁽⁴¹⁾ that section 12 is retrospective in operation should encourage the interpretation of this section widely to include as many divorces as possible.

(5) The distinction made in the Family Law Act 1986 between divorces obtained by proceedings and those obtained otherwise than by means of proceedings⁽⁴²⁾ should not

40- *Quazi v. Quazi* [1979] 3 W.L.R.833; *Torok v. Torok* [1973] 1 W.L.R.1066.

41 - [1987] 1 All.E.R.999.

42- Contrast S.46 (1) with S.46 (2).

encourage a strict interpretation of section 12 because that distinction was based on considerations of public policy, where public policy considerations under the Matrimonial and Family Proceedings Act 1984 require that section 12 should be interpreted widely.

2- The Scheme of Part III

A person, whose divorce falls within section 12, seeking financial relief in England must firstly meet the jurisdictional requirement, secondly obtain leave from the court and thirdly satisfy the court that England is the appropriate jurisdiction.

a- Jurisdictional Requirements

In formulating the jurisdictional grounds the Law Commission was attempting to strike a balance between the need to establish a connection with England and the need to devise a scheme which does not exclude the meritorious case.⁽⁴³⁾ Accordingly section 15 reflects the recommendation of the Law Commissions, in which the jurisdictional grounds must be satisfied before an application can be made for leave under section 13. Subject to the provisions of the Civil Jurisdiction and Judgments Acts 1982 and 1991⁽⁴⁴⁾ the English court has jurisdiction to grant financial relief if: (a) either party to the marriage was domiciled in England on the date of the application for leave or when the overseas divorce took effect;⁽⁴⁵⁾ or (b) either party was habitually resident throughout the period of one year ending on the date of the application for leave or when the overseas divorce took effect;⁽⁴⁶⁾ or (c) either or both parties had at the date of the application for leave a beneficial interest in possession in a dwelling-house in England which was at some time during the marriage a matrimonial home of the parties.⁽⁴⁷⁾

The jurisdictional grounds of domicile and habitual residence at the time when the foreign divorce became effective reflect those contained in section 5 (2) of the Domicile and

43- Law Com.No.117 paras 2.7-2.8; W.P.No.77 para. 31.

44- See, *infra*, 308.

45- S.15 (1) (a).

46- S.15 (1) (b).

47 -S.15 (1) (c).

Matrimonial Proceedings Act 1973. Under section 5 (2) the English courts have jurisdiction to entertain proceedings for divorce if either of the parties to the marriage is domiciled in England on the date when the proceedings begun, or was habitually resident throughout the period of one year ending with that date. The rationale behind introducing these jurisdictional grounds into the present context is that if the domicile or habitual residence were satisfied at the time of the foreign divorce, the applicant could have petitioned for divorce in England. Had the applicant done so, the court would have had jurisdiction to grant the financial relief sought. This head of jurisdiction may be criticised on the ground that it would open the English courts to applications by persons who at the time of the application have no connection with England.⁽⁴⁸⁾ Nevertheless, the opening of the doors of the English courts to those persons seems to be less dangerous than that of closing them and thereby excluding meritorious cases.

As has been mentioned above, the grounds of domicile and habitual residence must be satisfied not at the time when the foreign proceedings were started or when the divorce was granted but at the time when the foreign divorce "took effect" in the country where it was obtained.⁽⁴⁹⁾ In the case of an extra-judicial divorce, however, difficulty of proof can arise in respect of the question when it became effective, particularly in cases of the bare *talaaq*, when the husband can divorce his wife without taking the matter to the court. In such cases the date when the divorce became effective may be in doubt.⁽⁵⁰⁾

The second alternative time in respect of which the jurisdictional bases of domicile and habitual residence must be satisfied is the time when the application for leave is made. The main criticism of this criterion is that it would permit applications in cases where the marriage had no connection at all with England, as in the case where, after the marriage has been dissolved abroad, one of the parties comes to England and subsequently establishes the requirements.⁽⁵¹⁾ However, in the view of the Law Commission such a head of

48- Scots Law Com No.77 para. 3.2-3.4.

49- Law Com.No.117 paras. 34.Note.155.

50- David Gordon, (1986) J.S.W.L.340.

jurisdiction is necessary to cover cases in which a connection with England might arise after the marriage had been dissolved.^(5 2) *Quazi v. Quazi* is cited in this context when neither Mrs Quazi nor her husband had any connection with England at the time of divorce, but subsequently they established such a connection. Moreover, the Law Commission thought there might be cases in which the court must investigate which of several divorces actually dissolved a marriage: such an investigation could prove wide ranging and therefore, time consuming and expensive. Accordingly, the introduction of such a head of jurisdiction would avoid difficulties. It seems clear that these jurisdictional grounds are generous and they do not require a strong connection between the parties and England to justify exercise by the forum of its jurisdiction to give financial relief. It would be possible for a divorced person to come to England for the first time after divorce and claim for financial relief. The risk of injustice to respondents is obvious and the possibility of enforcement of orders abroad is weak.

The third head of jurisdiction, that there had been a matrimonial home, was rejected in the working Paper on the ground that it would allow parties with very little connection with England to invoke the court's jurisdiction and it would cause difficulty in relation to the definition of the term 'matrimonial home'.^(5 3) The Law Commission subsequently decided that the court should not be prevented from dealing with the quite common situation "where both parties live abroad after the foreign divorce, but have in fact lived here, perhaps for a substantial period during the marriage and the only substantial asset is the matrimonial home in this country".^(5 4)

While it seems to be wrong to prevent the courts from dealing with orders in relation to the matrimonial home, because the property here is not just any property, it is the property which was the parties' home at some time during their marriage and moreover, is, of

5 1- Canton, (1985) 15 Family Law 13 at 15.

5 2- Law Com.W.P.No.77 paras. 34-37.

5 3- Law Com.W.P.No.77 para. 44.

5 4- Law Com.No.117 para. 2. 9.

course, immovable, doubt must be expressed as to whether such a head of jurisdiction might not pose problems for the courts. The term 'matrimonial home' is not defined in part III, but it is understood that a dwelling-house is not a matrimonial home if it has been occupied by one party alone.⁽⁵⁵⁾ Equally, it is sometimes difficult to decide whether there had been a matrimonial home in cases where the parties had lived under the same roof. In the case of *Quazi*, the wife lived separately from the husband in the house for several weeks. In such circumstances could it be said that the house constituted a matrimonial home?⁽⁵⁶⁾ Where this head is the only basis of jurisdiction the power of the courts are limited to orders relating to the former matrimonial home.⁽⁵⁷⁾

The jurisdictional grounds discussed above are subject to the Civil Jurisdiction and Judgments Acts 1982 and 1991. Section 15 (2) provides a specific ground of jurisdiction for an application under part III in cases where the jurisdiction of the English court is based on the Civil Jurisdiction and Judgments Acts 1982 and 1991. These Acts were enacted to give effect to the Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (including the Protocol annexed to that Conventions) signed at Brussels on 27 September 1986 and amended by Accession Convention of 1978,⁽⁵⁸⁾ and at Lugano on 18th September 1989 respectively.

The main concern of the Brussels and Lugano Conventions is with civil and commercial matters.⁽⁵⁹⁾ Although article 1 (1) excludes from the scope of the

⁵⁵ Cf, Matrimonial Home Act 1983; See, David Gordon, op.cit.p. 175.

⁵⁶ Canton, (1985) 15 Family Law 13 at 16; Consider generally Scottish domestic Succession law, e.g.the "prior right" on intestacy of the surviving spouse to the dwelling-house success. Succession (Scotland) Act, 1964, 8 (1) and S.8 (4). "This section applies, in the case of any intestate, to any dwelling-house in which the surviving spouse of the intestate was ordinarily resident at the date of death of the intestate."

⁵⁷- S.20; infra, 320.

⁵⁸- For details See, L.A., Collins, the Civil Jurisdiction and Judgments Act 1982; Hartley, Civil Jurisdiction and Judgments, 1984. The Reports on the Convention by P.Jenard & P.Schlosser, OJ 1979, C 59, may be referred to as aids to its interpretation (S.3 of the Civil Jurisdiction and Judgments Act 1982); Cheshire & North, 12th ed., Ch, 14.

Conventions "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, will and succession", article 5 (2) indicates clearly that "matters relating to maintenance" are within the Conventions. Since no definition of 'maintenance' is to be found in the Conventions or the Acts, it follows that it is not clear whether some orders under part III of the Matrimonial and Family Proceedings Act 1984 are within the Conventions. If, however, an order under part III is considered within the Conventions, then the jurisdictional grounds in section 15 (1) (a) to (c) should be replaced by those imposed by virtue of the 1982 and 1991 Acts. Therefore, we must consider firstly whether or not an order under part III of the 1984 Act falls within the Conventions, and secondly the operation of the jurisdictional rules of the 1982 and 1991 Acts in the field of financial relief under part III.

The phrase "rights in property, arising out of a matrimonial relationship" contained in article 1(1) was interpreted by the European Court of Justice in *De Cavel v. De Cavel* (No.1),⁽⁶⁰⁾ in which the husband instituted divorce proceedings in France. He alleged that his wife had removed from his flat in Cannes some valuable carpets which were his property, and had also removed a number of objects from the flat in Frankfurt. He requested protection measures and the court authorised the putting under seal of the furniture and other effects in the couple's flat and a seal in the wife's name in a bank in Frankfurt. The court also authorised the freezing of the wife's bank account. The husband sought to enforce those orders in Germany under the Brussels Convention. The European Court of Justice held that provisional measures of the kind in question, granted during divorce proceedings, fall outside the Convention. Moreover, the court held that questions relating to status or proprietary relationships resulting directly from matrimonial relationships are also outside the Convention, whereas, proprietary relationships existing between the parties without connection with the marriage are within the scope of the Convention.

⁵⁹- Art. 1.

⁶⁰- [1979] E.C.R.1055.

Thus, an order under part III may not be within the Conventions, if it considered to be within the provisional protection measures, such as those ordered by the French court, or if it relates to rights arising directly from the matrimonial relationship or its dissolution, such as a former matrimonial home under section 20.^(6 1) A possible area of debate is article 5 (2) which states that matters relating to maintenance are within the Conventions. It can be argued that orders made by the courts under part III after the marriage has been dissolved by a foreign divorce are not 'maintenance' within article 5(2), because the marriage is already at an end before the proceedings in England begin.^(6 2) If this argument is correct, it follows that the jurisdictional rules in the 1982 and 1991 Acts will have no application in relation to financial relief on divorce under part III of the 1984 Act.

This, however, would not be a safe argument and some orders under part III may be classed as maintenance under article 5 (2) even though they are granted sometime after the divorce, because the European Court of Justice held in *De Cavel v. De Cavel* (No.2)^(6 3) that the "compensatory payments" provided for in the French Civil Code (Art.270), concerned with financial obligations between spouses after divorce and fixed on the basis of the parties' needs and resources were in the nature of maintenance under article 5 (2). It is also stated by Schlosser^(6 4) that the emphasis of the Conventions must be on the nature of the payments between the parties rather than the timing of such payments. Thus, the European Court of Justice may regard some orders under part III of the Matrimonial and Family Proceedings Act 1984 as within the Conventions, as for example financial orders for periodical payments or lump sum payments for a child or between spouses, if such orders are considered to support a child or one spouse. If, however, a payment is not considered to support a child or spouse, that payment would not be within the Conventions.^(6 5)

6 1- See, David Gordon, op.cit.p. 176.

6 2- Cheshire & North, 12th ed., pp. 711-712.

6 3- [1980] E.C.R.731. Following this case article 5 (2) was amended to include matters "ancillary to proceedings concerning the status of a person".

6 4- Paras. 43-50 and 91-97.

If an order under part III is considered to be within the Conventions, then section 15 (2) must apply. This provides that where the jurisdiction of the court falls to be determined by reference to the jurisdictional requirements imposed by virtue of the 1982 and 1991 Acts, the English court cannot take jurisdiction if the requirements of the 1982 and 1991 Acts are not satisfied even if the jurisdictional requirements under section 15 (1) (a) to (c) are: and, conversely must take jurisdiction if the requirements of the 1982 and 1991 Acts are satisfied, even if the jurisdictional requirements under section 1 (1) (a) to (c) are not.⁽⁶⁶⁾

According to the 1982 and 1991 Acts, the English court will have jurisdiction to entertain proceedings under part III of the Matrimonial and Family Proceedings Act 1984 if the respondent is domiciled in England;⁽⁶⁷⁾ or he is domiciled in another contracting State and the court is a court for the place where the maintenance creditor is domiciled or habitually resident;⁽⁶⁸⁾ or; if the object of the proceedings relates to rights in *rem* in, or tenancies of, immovable property, if the property is in England;⁽⁶⁹⁾ or if the parties have agreed to submit their dispute to the English court;⁽⁷⁰⁾ or if the respondent enters an appearance other than solely to contest the jurisdiction.⁽⁷¹⁾

It must be noted that these Acts give domicile a special meaning for this purpose, different from its ordinary one in English law.⁽⁷²⁾ The main difference between the concept of domicile in these Acts and that under section 15 (1) of the 1984 Act is that under section 15 (1) the question where a person is domiciled depends on the *lex fori*, whereas under the 1982 and 1991 Acts the English court must apply the law of another contracting

⁶⁵- David Gordon, op.cit.pp. 177-179.

⁶⁶- Cheshire & North, 12th ed., p. 712.

⁶⁷- S.1, Sched 1, Art.2.

⁶⁸-- S.2, Sched 1, Art.5 (2).

⁶⁹- S.5, Sched.1, Art.16.

⁷⁰- S.6.Sched.1, Art.17.

⁷¹- S.6, Sched.1, Art.18.

⁷²- See, supra, 27.

State to determine where a person is domiciled in that State;⁽⁷³⁾ under the 1982 and 1991 Acts it will be possible for a person to have more than one domicile, whereas under 15 (1) only one domicile is possible. Moreover, the meaning of 'domicile' under the 1982 and 1991 Acts is etiolated, as is now explained. Under the 1982 and 1991 Acts,⁽⁷⁴⁾ an individual is domiciled in the United Kingdom (or a part of it) if he is resident in and has a substantial connection with the United Kingdom (or that part); if he is resident in the United Kingdom but has no substantial connection with any part of the United Kingdom he is domiciled in that part in which he is resident. Substantial connection is presumed from residence for three months or more unless the contrary is proved. In order to determine in what place an individual is domiciled, e.g for the purpose of article 5 (2), section 41 (4) provides that an individual is domiciled in a particular place in the United Kingdom if he is domiciled in the part of the United Kingdom in which that place is situated and is resident in that place. An individual is domiciled in a State other than a contracting State if he is resident in that State and the nature and circumstances of his residence indicate that he has a substantial connection with that State.

It is apparent from the above discussion that it is possible that the European Court of Justice might decide that an order made under part III of the 1984 Act is within the Conventions. For the avoidance of doubt and the possibility of clashes between the jurisdictional rules of the Conventions and the 1984 Act, section 15 (2) was enacted to give the English court jurisdiction in cases where an order under part III might be thought to be under the Conventions despite the different and generally wider rules of jurisdiction provided under section 15 (1). Although it might be appear that the 1984 Act draws a distinction between applications which fall within the Conventions and those which fall outside the Conventions, it is submitted that this distinction has little significance if we admit that in practice it may be that few applications will be found to be governed by section 15 (2). In the majority of cases the jurisdictional rules in section 15 (1) will govern

⁷³- S.41, Art.52.

⁷⁴- S.41.

the court's jurisdiction to make an order under part III, as where the respondent is domiciled in a country outside the Conventions.

b- Obtaining Leave

The jurisdiction requirements discussed above are too wide and would allow parties with very little connection with England to invoke the court's jurisdiction. In order to ensure that the courts' powers are only exercised in appropriate cases and to provide protection for the respondents against attempts to exert improper pressure on them, section 13 provides that no application for financial relief order can be made unless the leave of the court has been granted in accordance with rules of the courts.^(7 5) Applications for leave under section 13 are made *ex parte* and should be accompanied by an affidavit stating the facts relied upon.^(7 6) But it seems from the decided cases that the court has a discretion to allow the respondent to be heard.^(7 7)

Although the idea of obtaining leave is to protect the potential respondent and to save him time and money, doubt was expressed as to whether such a procedure would succeed in providing protection for potential respondents.^(7 8) It was said that such a procedure is both suspect and dangerous. It is suspect because if the respondent were to be given an opportunity to be heard the object of such a procedure would be defeated as he would have the expense and worry of being involved in a court case. On the other hand, the procedure is dangerous because it allows the court to hear only the applicant's evidence and proceed on the basis of that evidence and such evidence may be exaggerated or unfair to the respondent. Although this argument is attractive in theory, the fact remains that the obtaining of leave is necessary in the context of English law to protect the respondent against an application which might be thought to be wholly inappropriate. It is true that the

7 5- See, Family Proceedings Rules 1991, r.3.

7 6- Rule 3.17; *W v. W* [1989] 1 F.L.R.22; *Rv. Kensington ITC* [1917] 1 K.B 486 at 504, *per* Lord Cozens-Hardy MR.

7 7- *Chebaro v. Chebaro* [1987] 1 All.E.R 999; *Holmes v. Holmes* [1989] 3 All.E.R.786.

7 8- Scots Law Com No.77 para. 2.13; Canton, (1985) 15 Family Law 13 at 15; David Gordon, (1986) J.S.W.L. 329 at 334 and *op.cit.*, p. 183.

court will hear only the applicant's evidence but this does not necessarily mean that the court will proceed and grant leave on the basis of that evidence. The decided cases show that there is a duty on the applicant to make full disclosure of the material facts.⁽⁷⁹⁾ Moreover, the court will not grant leave unless it considers that there is substantial ground for the making of an application for an order.⁽⁸⁰⁾ Here it is submitted that the court must take into account the matters listed in section 16⁽⁸¹⁾ in granting leave. If on the application for leave to apply the court was satisfied that if leave was given the application for relief would fail because it would not be appropriate for an order for such relief to be made by a court in England, then the court would dismiss the application.⁽⁸²⁾

The court may grant leave notwithstanding the existence of a financial order made by a foreign court requiring the respondent to make any payment or transfer any property to the applicant or a child of the family.⁽⁸³⁾ This is because the foreign order may be inadequate or inappropriate.⁽⁸⁴⁾ If, however, the foreign court has made adequate orders which are clearly enforceable, the application must be dismissed.⁽⁸⁵⁾ Here it seems that the possibility that financial relief made in England would be better than that in a foreign country is an insufficient reason to give the English court jurisdiction under the 1984 Act.⁽⁸⁶⁾ It is open to the court to grant leave subject to such conditions as it sees fit.⁽⁸⁷⁾ For example, the applicant may be required to give an undertaking not to enforce any order made by a foreign court or to have any such order discharged.⁽⁸⁸⁾ Once leave has been granted, the court may make an interim order for maintenance in favour of the

79- *W v. W* [1989] 1 F.L.R.22; *Holmes v. Holmes* [1989] 3 All.E.R.786.

80- S.13 (1).

81- See, *infra*, 315.

82- *Holmes v. Holmes* [1989] 3 All.E.R.786.

83- S.13 (2).

84- Cheshire & North, 12th ed., p. 712.

85- *Holmes v. Holmes* [1989] 3 All.E.R.786.

86- *Holmes v. Holmes* [1989] 3 All.E.R.786 at 795; *De Dampierre v. De Dampierre* [1987] 2 All.E.R.1 at 12.

87- S.13 (3).

88- Dicey & Morris, 12th ed., p. 772; Morris, 4th ed., p. 209.

applicant or any child of the family where they are in immediate need of assistance.⁽⁸⁹⁾ Such order would cease to be effective no later than the date on which the full application for relief is finally determined: such an order cannot be made when the jurisdiction of the court is based on matrimonial home under section 15 (1) (c).⁽⁹⁰⁾

c- Proving Appropriateness

Obtaining leave under section 13 does not necessarily mean that an order will be made. The 1984 Act requires, before an order will be made, the applicant to show that England is the appropriate venue for the application. These requirements are designed to enable the courts more readily to identify and exclude unmeritorious cases which might be brought as a result of the width of the jurisdiction rules.⁽⁹¹⁾ According to section 16, the court must consider a wide range of matters in determining the appropriateness of the venue. In particular,⁽⁹²⁾ the connection that the parties to the marriage have with England, the country where the divorce was granted and any other country outside England; whether adequate relief has been or could be obtained in a country outside England; the likelihood of any order made under part III of the 1984 Act being enforceable and the length of time that has elapsed since the date of divorce.

What is notable in section 16 is that it gives the court a wide discretion to dismiss the application if the court is not satisfied that it would be appropriate to make an order.⁽⁹³⁾ Thus, it is highly likely that the court would not grant an order if the parties have more connection with the foreign country than with England either residentially or financially; or if the order is unlikely to be enforceable in the foreign country; or if the applicant did not bring proceedings within a reasonable time. It appears that at the hearing of the substantive

⁸⁹- S.14 (1).

⁹⁰- S.14 (2).

⁹¹- Canton, (1985) 15 Family Law 13 at 16.

⁹²- S.16(2); David Gordon, op.cit.pp. 184-188; Dicey & Morris, 12th ed., pp .773-774; Morris, 4th-ed., p. 210.

⁹³- S.16 (1); John.Williams, (1983) 133 N.L.J.767 at 768.

application, section 16 imposes on the court the duty to consider whether England is the appropriate venue for the application. It is interesting to note that the Court of Appeal in *Holmes v. Holmes*,⁽⁹⁴⁾ rejected the idea that the 1984 Act drew a distinction between the criteria which the court should take into account in deciding whether to entertain the application and those which the court has to consider in the matter of application for leave. The court held that the matters in section 16 must be taken into account in the stage of application for leave, and if it is not satisfied that England is the appropriate venue, the application for leave must be dismissed.

The decision raises doubt as to whether the court needs to reconsider section 16 on the hearing of the substantive application. It is understood from the Law Commission that section 16 must be considered by the court before it can make an order.⁽⁹⁵⁾ Here, it seems that such an investigation would prolong proceedings and therefore, would be time consuming and substantially increase expenses. Moreover, it is odd to reconsider what has been considered if there have been no intervening changes in circumstances or if such changes are not relevant.⁽⁹⁶⁾ On the other hand, reconsideration is another safeguard against incautious venturing into an area where a careful tread is much to be desired.

d- Orders Which the Court Can Make

If the court is satisfied that it is appropriate for it to make an order for financial relief, the form of the relief which the court may grant is decided by English law. The English court always applies its own law when making an order for financial relief ancillary to divorce proceedings irrespective of the domicile of the parties.⁽⁹⁷⁾ Although the general argument of choice of law rule has been considered,⁽⁹⁸⁾ it is interesting to note that in the

94- [1989] 3 All.E.R.786 at 795.

95- Law Com No.117, para 2. 5 and P. 29.

96- John. Williams, (1983) 133 N.L.J.767 at 768.

97- *Sealey v. Callan* [1953] P.135; *Cammell v. Cammell* [1965] P.465; in cases to which the Maintenance Orders [Facilities for Enforcement] Act 1970 or the Maintenance Orders [Reciprocal Enforcement] Act 1972 apply, there may be a limited number of circumstances where foreign law is relevant by reason of the reciprocal provision.

98- See, ch. 3.

view of the Law Commission, the application of a choice of law rule other than English to grant relief under part III would produce difficulties in determining which other law would be appropriate or in obtaining expert evidence or it would frustrate the object of reform if the foreign law concerned contains no provision or provides inadequate relief.⁽⁹⁹⁾

The application of English law may lead to the result that an order made under part III may not be recognised and enforced abroad. This can be seen, e.g. in respect of Iraqi law. The question of financial relief after divorce is a matter to be decided by the national law of the husband.⁽¹⁰⁰⁾ The financial relief under Iraqi law takes the form of dower, maintenance during the *Idda* period and compensation.⁽¹⁰¹⁾ If, however, the English court orders the Iraqi husband to make payment for the wife which falls outside the concept of Iraqi financial relief, such an order will not be recognised and enforceability would depend on the Iraqi husband and property being within the jurisdiction of the British court. The other side of this argument is that if, in a 'mixed' cultural marriage leaning to Britain in nature, the British wife is wealthy, it may be that the Iraqi husband should be able to claim maintenance from her after divorce though this is quite incompatible with the husband's Iraqi personal law. One of the benefits of the 1984 Act is that it reduces the need to challenge the substance of foreign decrees because something can be done about inadequate provision. Clearly there is a need here for a balance. The English court should proceed with sensitivity, and with a view to parties' expectations, and the nature of the marriage it is dealing with-i.e.in a mixed marriage of Iraqi husband and British wife, whether the marriage and all the circumstances lean to Iraq or to Britain, of course, if there is a matrimonial home in Britain, it should be dealt with surely in accordance with English law.

The result of the application of English law is that the court can make any of the orders which it could make on granting an English decree of divorce ⁽¹⁰²⁾ But the court's powers

⁹⁹- Law Com.W.P.No.77 paras 52,56.

¹⁰⁰- Art.19 (3) of the 1951 Civil Code.

¹⁰¹- See, *Infra*, 331.

¹⁰²- SS.23, 24 of the Matrimonial Causes Act 1973.

are restricted where the sole ground of jurisdiction is the presence of a matrimonial home.⁽¹⁰³⁾ Thus, where the jurisdiction is assumed on the domicile or habitual residence basis or is based on the Civil Jurisdiction and Judgments Acts 1982 and 1991 the court can make to the other party of the marriage or child of the family any of the orders which it could make under part II of the Matrimonial Causes Act 1973 if the divorce had been granted in England,⁽¹⁰⁴⁾ viz, It can make periodical payments;⁽¹⁰⁵⁾ secured periodical payments;⁽¹⁰⁶⁾ lump sum orders;⁽¹⁰⁷⁾ transfer or settlement of property orders;⁽¹⁰⁸⁾ orders for sale of property;⁽¹⁰⁹⁾ an order varying an ante-nuptial or post-nuptial settlement⁽¹¹⁰⁾ and an order extinguishing or reducing the interest of either party under such settlement.⁽¹¹¹⁾

In deciding whether to make any of the orders above, section 18 of the Matrimonial and Family Proceedings Act 1984 imposes on the court the duty to have regard to a range of matters which are essentially the same as if it itself was granting a decree.⁽¹¹²⁾ Briefly, the court must have regard to the welfare of any child of the family,⁽¹¹³⁾ the financial position, the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties or of the child; the standard of living; the conduct of each of the parties. In addition, the court must consider the extent to which any overseas order has been made or is likely to be complied with.⁽¹¹⁴⁾ There is nothing

103- S.20 of the Matrimonial and Family Proceedings Act 1984.

104- Ibid, S.17. Under S.22, the court can make an order for the transfer of certain tenancies, Matrimonial Home Act 1983, S.7 and Sched.1.S.25 amends the Inheritance (Provision for Family and Dependents) Act 1975 to give persons divorced abroad the same rights to apply for provision under that Act as persons divorced in England.

105 -S.23 (1) (a) (d) of the Matrimonial Causes Act 1973.

106 -Ibid, S.23 (1) (b) (e).

107 -Ibid, S.23 (1) (c) (f).

108 -Ibid, S.24 (1) (a) (b).

109- Ibid, S.24 A (1) inserted by Matrimonial Home and Property Act 1981, S.7.

110-Ibid, S.24 (1) (c).

111- Ibid, S.24 (1) (d).

112- Ibid, SS.25, 25 A inserted by Matrimonial and Family Proceedings Act 1984, S.7.

113- S.18 (2).

in the Matrimonial Causes Act 1973 to prevent the parties themselves from agreeing the financial provision to be made. The court will normally approve such an agreement provided that it is not contrary to public policy, and will incorporate it in an order.⁽¹¹⁵⁾ This principle has been enacted in section 19 of the 1984 Act which gives the court the power, unless it has reason to think that there are other circumstances in to which it ought to inquire, to approve a consent order if the parties make an application for a consent order for financial relief based on section 17 above, or if they agree to an order varying or discharging an order under that section.

Where jurisdiction is assumed on the matrimonial basis,⁽¹¹⁶⁾ the court's powers are limited to making orders affecting an interest in the dwelling house,⁽¹¹⁷⁾ i.e. an order for the transfer or settlement of the whole or part of one party's interest in the house; an order varying an ante- or post-nuptial settlement; an order extinguishing or reducing either party's interest in the house; an order for the sale of a party's interest in the house,⁽¹¹⁸⁾ or as to lump sum,⁽¹¹⁹⁾ limited in amount to the value of that interest,⁽¹²⁰⁾ to a party to the marriage or for the benefit of a child of the family.

Finally, section 23 gives the court, provided leave has been granted, power to make such order as it thinks fit restraining any disposition about to be made with the intention of defeating the claim for financial relief or setting aside any such disposition already made,⁽¹²¹⁾ but where the only ground of jurisdiction is the presence of a former

114 -S.18 (6).

115- S.33 A inserted by Matrimonial and Family Proceedings Act 1984, S.7.

116- S.15 (1) (c).

117- S.20; Section 27 states that " 'dwelling-house' includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling-house and occupied therewith."

118- S.20 (i) (c) (e) (f) (g).

119- S.20 (1) (a) (b).

120- S.20 (2).

121- See, also S.37 of the Matrimonial Causes Act 1973; Family Proceedings Rules 1991, r.2.68; *Ghath v. Ghath* [1992] 2 All.E.R.920.

matrimonial home the court's powers are confined to restraining or setting aside a disposition of the property in respect of that dwelling-house.⁽¹²²⁾ Under section 24 the court can exercise this power even where the jurisdiction requirements are not satisfied provided the court is satisfied that the marriage has been dissolved by means of judicial or other proceedings in an overseas country and that the applicant intends to apply for leave for financial relief as soon as he has been habitually resident in England for one year. It should be noted that the court's power under this section will not extend to making an order setting aside dispositions already made.

C- Financial Relief in Scotland

The approach of Scots law to dealing with applications for financial relief is different from English law. While the latter adopted wide jurisdictional rules combined with a filter system to exclude inappropriate cases, the former preferred restrictive jurisdictional rules with conditions identifying certain cases as inappropriate in advance. There are two main reasons behind the Scottish approach; (1) the Scots law was intended to protect the 'Scottish wife' rather than people having more tentative links with Scotland; (2) the Scots law rejected the English idea of leave to make an application. Here, the Scottish Law Commission expressed doubt as to whether such a procedure would achieve the desired result of protecting defenders from the expense and inconvenience of involvement in dubious actions. Moreover, since the Scottish system is not familiar with such a procedure, the Scottish Law Commission thought that the introduction of a special set of procedural rules for limited cases could not be justified.⁽¹²³⁾ Accordingly, a person seeking financial relief in Scotland does not need to go through a filter mechanism. Such a person needs only to satisfy the court that he is within the scope of section 28 (1) and that the provisions of the jurisdictional requirements and the conditions contained in Section 28 (2)-(4) are met.

¹²²- S.23 (4).

¹²³- Scots Law Com.No.72. para. 2-13; Canton, (1985) 15 Family Law 13 at 16.

1- The Scope of Part 1V⁽¹²⁴⁾

Section 28 (1) provides that "where parties to a marriage have been divorced in an overseas country..., the Court⁽¹²⁵⁾ may entertain an application by one of the parties for an order for financial provision".

Although section 28 (1) is similar to English section 12 (1) in that it applies only to divorces obtained in an " overseas country",⁽¹²⁶⁾ it is, on the other hand, wider than its English counterpart in that it applies not only to overseas divorces obtained by means of proceedings but also to divorces obtained otherwise than by means of proceedings. This can be seen from the fact that the Scottish section made no reference to the phrase "judicial or other proceedings" contained in section 12 (1). While it is not clear whether divorces whose recognition is governed by section 46 (2) of the Family Law Act 1986 are within English section 12, they are clearly within section 28 (1). Thus, the Scots law in this context is more clear and certain and would avoid for the Scottish court the confusion and the uncertainty over the phrase "other proceedings" in this area of law.

The ability to make an application in Scotland is limited to those who were not pursuers (or joint pursuers) in the foreign proceedings.⁽¹²⁷⁾ It seems the main reason behind this limitation is to discourage "forum-shopping". There is no doubt that "forum-shopping" should be discouraged in this area of law but not in such a way as to defeat the object of reform. It is thought that the Scottish provisions contain within themselves sufficient protection against "forum-shopping". In certain cases it is not clear which party is the pursuer and which is the defender. For instance, in cases of the dissolution of marriage by *khula* under Iraqi law, both parties must apply jointly to the court to confirm their agreement to dissolve the marriage.⁽¹²⁸⁾ In such cases the limitation applies and the result

124- This part came into force on 1, September 1986.

125- "The Court" means " the Court of Session or the Sheriff Court" S.30.

126- "Overseas Country" means "a Country or territory outside the British Islands" S.30.

127- S.28 (3) (b); contrast with English section 12 (1).

128- Art.48 of the 1959 Personal Status Code.

is that neither party can ask the Scottish court for financial relief since both were the pursuers (or joint pursuers) in the foreign proceedings. There is no point in withdrawing the court's power to make an order for such persons merely because they followed their religion in obtaining the divorce. The situation may be thought to show insufficient understanding by Scots law of foreign rules. The English law in this point is more justified and it achieves the desired result of the reform, while the Scots law will have changed nothing and merely raised false hope for the pursuers in foreign proceedings.

2- The Scheme of Part 1V

A person, whose divorce falls within section 28 (1), seeking financial relief in Scotland must firstly satisfy the jurisdictional requirements and secondly meet the strict conditions listed in section 28 (3).

a- Jurisdictional Requirements

Section 28 (2) sets out the jurisdictional requirements which must be met before an application can be made. Subject to the provisions of the Civil Jurisdiction and Judgments Acts 1982 and 1991, the Scottish court has jurisdiction to entertain an application for an order for financial relief if the applicant was domiciled or habitually resident in Scotland on the date when the application was made and the other party to the marriage either: (1) was domiciled or habitually resident in Scotland at that date; or (2) was domiciled or habitually resident there when the parties last lived together as husband and wife; or (3) when the application was made, was an owner or tenant of, or had a beneficial interest in, property in Scotland which had at sometime been a matrimonial home.

It is quite clear that these rules differ considerably from those in the English law. The requirement that the applicant be domiciled or habitually resident in Scotland on the date when the application is made reflects the stated policy of protection of the "Scottish wife" who is left financially unprotected after foreign divorce rather than a general invitation to all. The requirement that the defender must also have a close connection with Scotland at

the time of the application reflects the desire to provide some protection for him.

In contrast with the English rules, the Scottish rules would eliminate the worst cases of "forum-shopping" and would provide greater opportunity to enforce an order in practice. However, against these advantages, the Scottish rules are too narrow and might exclude cases which would be found in England to be meritorious and appropriate, particularly in cases where the domicile or habitual residence of the applicant rule is not satisfied at the time of the application but was only satisfied at the earlier date when the foreign divorce became effective.⁽¹²⁹⁾ The Scots Law Commission had rejected this criteria when they concluded that "there is no need to open our courts to applications by those who were divorced abroad and who, at the time of the application, are domiciled and habitually resident abroad".⁽¹³⁰⁾ The opening of the doors of the Scottish courts to those persons seems to be less serious than that of closing them, particularly where there had been a matrimonial home. Suppose both parties married and lived in Scotland. Later, on a temporary visit to Iraq, the husband obtained a decree of divorce from the Iraqi court the validity of which would be recognised in Scotland. While the wife remained in Iraq, the husband returned to Scotland and occupied the former matrimonial home. Since the marriage had substantial connections with Scotland (the parties having been living in Scotland, and their matrimonial home being in this country and the husband retaining his Scottish domicile) it seems unfair to prevent such a wife of Iraqi origin from seeking financial relief at least in relation to the matrimonial home. The opening of the doors to such a wife neither would encourage "forum-shopping" nor would be unfair to the husband. Contrary, the closing of the doors would encourage the wife to challenge the divorce and this would absorb a quite excessive amount of time and money.

Unlike the English law, no period of time is required for the habitual residence when the jurisdiction of the Scottish court is assumed on this basis. The Scottish Law Commission justified such an approach on the ground that the conditions listed in section

¹²⁹- Contrast with English section 12 (1) (a) (b).

¹³⁰- Scots Law Com.No.72,para. 3-4.

28 (3) made any particular period of habitual residence in this context unnecessary.⁽¹³¹⁾ The conditions, as we shall see, show that an application for financial relief will not be competent unless there is a strong connection with Scotland. Nevertheless, since the term of habitual residence has not been settled yet it seems desirable to specify at least a one year period as in the case of divorce proceedings.⁽¹³²⁾ Where the jurisdiction of the Scottish court is based on a matrimonial home,⁽¹³³⁾ the court's powers are restricted in a manner similar to that in England. This means that the orders which the court can make will be limited to an order relating to the former matrimonial home in Scotland.

The jurisdictional grounds in section 28 (2) are subject to the provisions of the Civil Jurisdiction and Judgments Acts 1982 and 1991.⁽¹³⁴⁾ The whole question of the inter-relation of these Acts with the field of financial relief in the Matrimonial and Family Proceedings Act 1984 has already been considered.⁽¹³⁵⁾ However, if an order under part 1V is considered to be within the Conventions, then section 28(4) must apply. Thus, where the jurisdiction of the Scottish court falls to be determined by reference to the jurisdictional requirements imposed by virtue of the 1982 and 1991 Acts, the Scottish court cannot take jurisdiction if the requirements of the 1982 and 1991 Acts are not satisfied even if the jurisdictional requirements under section 28 (2) are; and, conversely must take jurisdiction if the requirements of the 1982 and 1991 Acts are satisfied even if the jurisdictional requirements under section 28 (2) are not.⁽¹³⁶⁾

According to the 1982 and 1991 Acts the Scottish court will have jurisdiction to entertain proceedings under part 1V of the 1984 Act if the defender is domiciled in Scotland;⁽¹³⁷⁾ or the defender is domiciled in another contracting state and the court is a

131- Ibid, para. 3-4.

132- John Williams, (1983) 133 N.L.J. 767 at 768.

133- S.28 (2) (b) (iii).

134- S.28 (4).

135- See, supra, 308.

136- S.28 (4).

137- S.1, Sched 8, Art. 2.

court for the place where the maintenance creditor is domiciled or habitually resident;⁽¹³⁸⁾ or if the object of proceedings relates to rights in *rem* in, or tenancies of, immovable property, if the property is in Scotland;⁽¹³⁹⁾ or if the parties have agreed to submit their dispute to the Scottish court;⁽¹⁴⁰⁾ or if the defender enters an appearance other than solely to contest the jurisdiction.⁽¹⁴¹⁾

b- Strict Conditions

Even if the divorce falls within section 28 (1) and the jurisdictional rules are satisfied the Scottish court will not be competent to make an order unless the conditions listed in section 28 (3) are met: (a) the divorce is one which would be recognised in Scotland; (b) the other party initiated the divorce proceedings; (c) the application was made within five years after the date when the divorce took effect; (d) a court in Scotland would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect; (e) the marriage had a substantial connection with Scotland, and finally (f) both parties are living at the time of the application. The basic idea of section 28 (3) is the same as that of English section 16 (2) but the flexibility and the scope for discretion which characterize English law are notably absent in Scots law.⁽¹⁴²⁾

The condition that the application must be made within a fixed time limit was rejected by the Law Commission in favour of the view that the time factor should be left to the discretion of the court.⁽¹⁴³⁾ They thought that a time limit might prejudice a wife who had no notice of the proceedings. Moreover, in cases where there is a multiplicity of divorces a time limit could confront the court with the problems of deciding which of several foreign

¹³⁸ -S.2 (5), Sched 8, Art.2 (5).

¹³⁹- S.4, Sched 8, Art. 16.

¹⁴⁰- S.5, Sched 8, Art. 17.

¹⁴¹- S.6, Sched 8, Art. 18.

¹⁴²- Canton, (1985) 15 Family Law 13 at 16,17.

¹⁴³- S.16 (2) (i).

divorces actually dissolved the marriage in order to identify the date from which the period should run.⁽¹⁴⁴⁾ It is obvious that the main argument of the Law Commission was based on the facts of *Quazi v. Quazi*.⁽¹⁴⁵⁾ Although it is hard to ignore the power of this argument, one may say on the other hand, that the Law Commission's approach would produce a state of uncertainty where certainty and finality are desirable in this field of law. It would also provide no protection for respondents against wholly stale claims. Further, the circumstances of *Quazi v. Quazi* are unlikely to arise frequently. Accordingly, the application for financial relief should not have been allowed to remain doubtful indefinitely. The reasonable rule is that the applicant should be required to seek financial relief within a reasonable time. The Scottish rule is reasonable because it is clear, certain, simple and it encourages the making of claims for financial relief quickly and it enables stale claims to be excluded.

As regards the condition (c),⁽¹⁴⁶⁾ it seems clear that the Scottish court is not prepared to grant financial relief to those who were divorced abroad if at the time of the foreign divorce neither party could have brought divorce proceedings in Scotland. This condition implies that at least one of the parties must have been domiciled or habitually resident in Scotland before the foreign divorce took effect. "It would", the Scottish Law Commission said, "be going too far to allow our law to be applied in cases where, had a divorce action been brought in Scotland, our courts would have had to decline jurisdiction".⁽¹⁴⁷⁾ Although this condition ensures a certain connection between the marriage and Scotland at the time of the foreign divorce, the Scottish Law Commission felt that it was not sufficient connection to justify applying Scots law to financial relief after foreign divorce. In addition, condition (e) must be met. This requires that the marriage must have a substantial connection with Scotland.⁽¹⁴⁸⁾ The term "substantial connection" is not defined but it

144- Law Com.W.P.No.77 para. 55.

145- [1979] 3 W.L.R.833.

146- S.28 (3) (d).

147- Scots Law Com.No.72,para. 3-14.

148- S.28 (3) (e).

seems that the connection need not be more substantial than with any other country because, since the parties these days can travel easily from one country to another, it is difficult to determine whether a marriage had more substantial connection with Scotland. In other words, doubt attends the meaning of this requirement.

The final condition is that both parties are living at the time of the application.⁽¹⁴⁹⁾ Unlike the English law,⁽¹⁵⁰⁾ no financial relief is available under Scots law to persons who have been divorced overseas against the executors of a former spouse who had died since the date of the foreign divorce. Such a condition avoids the practical difficulties which might arise if the deceased party's estate had already been distributed. This is a difficulty which is rare to encounter. In any event, this further difference between the English and Scots approaches should be noted.

c- Orders Which the Court Can Make

The form of relief which the court can make after a foreign divorce is governed by Scots law.⁽¹⁵¹⁾ The Scottish Law Commission rejected strongly any idea which might lead to the application of foreign law⁽¹⁵²⁾ for the same reasons given by the Law Commission in relation to English law.⁽¹⁵³⁾ The result of the application of Scots law in an action for financial relief after foreign divorce is that the Scottish court can make any of the orders which it could make on granting a Scottish decree of divorce. But where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland, the court's powers will be limited.⁽¹⁵⁴⁾ Thus, where the jurisdiction is assumed on section 28 (2) (b) (i), (ii) and (4) the court can make any of the orders which it could make if the divorce had been granted in Scotland viz, it can make an order for the payment of a capital

149- S.28 (3) (f).

150- S.25.

151- S.28 (1).

152- Scots Law Com.No.72, para. 3-19.

153- See, *supra*, 316.

154- S.29 (5).

sum or the transfer of property; periodical allowance;⁽¹⁵⁵⁾ any " incidental order"⁽¹⁵⁶⁾ including, an order for the sale or valuation of property, an order regulating the occupation of the matrimonial home or the use of furniture and furnishings in it; an order that security shall be given for any financial provision; an order setting aside or varying any term in an ante-nuptial or post-nuptial marriage settlement; an order as to the date from which any interest on any amount awarded shall run.⁽¹⁵⁷⁾ In addition to those orders, section 29 (4) of the 1984 Act gives the court power to make an interim order for the payment of periodical allowance if it appears from the averments that an order for financial relief will be made and that it is necessary to make such an order to avoid hardship to the applicant.

In making an order for financial relief after foreign divorce, the court is required to exercise its power so far as it is reasonable and practicable to put the parties in the financial position in which they would have been if the application had been raised in Scotland and had been disposed of on the date when the foreign divorce took effect.⁽¹⁵⁸⁾ The court must take into account the parties' resources, present and foreseeable, and any order made by a foreign court for financial relief or the transfer of property.⁽¹⁵⁹⁾ The court must also have regard to the welfare of a child, the age of each party, the duration of marriage, any physical or mental disability of either of the parties or of the child.⁽¹⁶⁰⁾

In a case where jurisdiction is based only on the defender's interest in a matrimonial home, the court may only make⁽¹⁶¹⁾ orders relating to the former matrimonial home,⁽¹⁶²⁾

155- S.8 (1) (a) and (b) of the Family Law (Scotland) Act 1985.

156- S.8 (1) (c), Ibid.

157- S.14 (1), Ibid.

158 -S.29 (2); See, John.C.McInnes, op.cit.p. 155.

159- S.29 (3).

160- S.11 of the Family Law (Scotland) Act 1985.

161- S.29 (5).

162- "Matrimonial home" means "any house, caravan, houseboat, or other structure which has been provided or has been made available by one or both of the spouses, or has become a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure". See, S.22 of the Matrimonial Home [Family Protection] (Scotland) Act 1981; S.30 (1) of the Matrimonial and

or its furniture or plenishings,⁽¹⁶³⁾ or that the other party pays a capital sum not exceeding that other party's interest in the matrimonial home. In addition to the above orders, the court can make an order setting aside or varying any transfer of, or transaction involving, property which was effected by the other party to the marriage if satisfied by the challenger that the transaction had, or was likely to have, the effect of defeating in whole or in part, the applicant's claim for financial provisions.⁽¹⁶⁴⁾

II- The Effect of Recognition of Foreign Divorces on Financial Relief in Iraq

One of the legal consequences of a valid marriage in Muslim law is that a husband is under an obligation to maintain his wife. A wife is not under a corresponding obligation to maintain her husband.⁽¹⁶⁵⁾ This of course reflected the fact that in the traditional Muslim society it was very unlikely that a wife would have an income. In recent years, although in many Muslim countries the law governing maintenance has been reformed to put the wife under the obligation to maintain the family if she has means,⁽¹⁶⁶⁾ the Iraqi law still retains the Classical Muslim rule.⁽¹⁶⁷⁾

If a marriage is dissolved by divorce the parties are no longer husband and wife, and accordingly the legal liability of the husband to maintain his wife will cease. Nevertheless,

Family Proceedings Act 1984.

163- "Furniture and Plenishings" mean "any article situated in a matrimonial home which-(a) is owned or hired by either spouse or is being acquired by either spouse under a hire purchase agreement or conditional sale agreement; and (b) is reasonable necessary to enable the home to be used as a family residence, but does not include any vehicle, caravan or houseboat, or such other structure as is mentioned in the definition of matrimonial home" S, 22 of the Matrimonial Home [Family Protection] (Scotland) Act 1981; S.30 (1) of the Matrimonial and Family Proceedings Act 1984.

164- SS.18 and 19 of the Family Law (Scotland) Act 1985.

165- Abbas, M. op.cit.p. 109; Nasir, op.cit.p. 93; contrast with the position in England and Scotland, See, supra, 295.

166- See, Art.23 of the Tunisia Personal Status Code 1956; Art. 52 of the Unified Arab Draft Code for Personal Status 1985.

167- Art.23 (1) of the 1959 Personal Status Code.

the Iraqi courts have powers on granting divorce or at any time thereafter to make financial relief to the wife and children but not to the husband. In cases where the marriage has been dissolved by *talaq* the Iraqi law enables the court to make an order for compensation to the wife if it thinks that the husband divorced his wife in an arbitrary manner.⁽¹⁶⁸⁾

The question of financial relief after recognition of divorces granted in the Arab states has not been regulated either by the Arab treaty or by Iraqi law. It is thought that the absence of rules concerning this matter would not produce hardship to parties divorced in Arab states because, although these states all have their own legal systems, the grounds for divorce and the financial relief in those states are substantially similar to that in Iraq. As regards the question of financial relief after the recognition of non-Arab foreign divorces the Enforcement of Civil and Commercial Judgments Code 1928, to which the court may refer in giving recognition, contains no provisions regarding this matter. The courts at present have no power to make an order for financial relief after a foreign divorce. The wife will face the same hardship existing in England and Scotland before the enactment of the 1984 Act if the foreign law contains no provision, or provides inadequate relief.

If, however, the court accepts jurisdiction, then the form of the relief which the Iraqi court may grant is decided not by Iraqi law but by the national law of the husband.⁽¹⁶⁹⁾ This is justified on the ground that the law which governs the dissolution of marriage should also govern the consequences of that dissolution. Since the rule in Iraqi law is that the dissolution of marriage by divorce is a matter to be decided by the national law of the husband,⁽¹⁷⁰⁾ it follows that this law should also govern the form of financial relief.

It seems clear that the main defect of the application of the national law of the husband, besides the need to ascertain and in full understanding to give effect to it, is that it would cause hardship to the wife if this law was less generous than her personal law. If the

¹⁶⁸- Ibid, Art.39 (3).

¹⁶⁹- Art.19(3) of the 1951 Civil Code.

¹⁷⁰- Supra, Chapter Three.

national law of the husband is considered as the law of Iraq, then the courts can make the following orders.

A- Dower (*Mahr*)

The Iraqi law does not define this term but it is generally accepted that it means a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage.⁽¹⁷¹⁾ Contrary to a widely held misconception in the west, dower is not a bride-price. In fact dower is a marriage gift from the bridegroom to his bride and becomes her exclusive property. Islam has elevated the status of women as dower is given as a mark of respect for her and this is the reason why dower is neither an essential nor a condition for the validity of the marriage. A marriage is deemed valid without any mention of dower. ⁽¹⁷²⁾

The dower may consist of anything that can be valued in money and it is the sole property of the woman which she can dispose of the way she likes. Any condition to the contrary shall be void. The dower can be either specified or unspecified.⁽¹⁷³⁾ The specified dower is the amount settled by the parties at the time of the marriage or after the marriage is solemnized. It may be increased or reduced under certain conditions. The husband may increase the dower after the marriage and the wife may reduce it provided that they possess full legal capacity of disposition. This shall be attached to the original contract if it is accepted by the other at the sitting where the increase or reduction has been afforded. The specified dower can be either prompt or deferred.⁽¹⁷⁴⁾ When the dower is prompt it is payable on demand. If it is the deferred dower it is payable at the dissolution of marriage either by death of the husband or when the wife is divorced.⁽¹⁷⁵⁾

The unspecified dower is the dower which is not settled at the time of the marriage or

171- Mhammed Abbas, op.cit.p. 102; Nasir, op.cit.p. 78.

172- Nasir, op.cit.p. 78.

173- Art.19 (1) of the 1959 Personal Status Code.

174- Ibid, Art.20 (1).

175- Ibid, Art.20 (2);*Shahnaz v Rizwan* [1965] 1Q.B.390.

immediately after the marriage and is fixed according to the social position of the wife's family. The social position of the husband is of little account. In fixing the amount of unspecified dower the judge must take into account the age, beauty, wealth, education and virginity of the woman.⁽¹⁷⁶⁾ The wife shall be entitled to the whole specified dower if the divorce occurs after the actual consummation of marriage. If the divorce occurs before consummation, the wife shall be entitled to half of the specified dower.⁽¹⁷⁷⁾ In the case of unspecified dower, the wife shall not be entitled to the half dower but the *Mutat* or present. In other words, the husband is required to give a suitable amount to her according to his own capacity.⁽¹⁷⁸⁾

B- Maintenance (Nafaqah)

Maintenance is the lawful right of the wife and children under a valid marriage contract on certain conditions. The responsibility of maintenance by the husband is not only when she lives as a legal wife and towards his children by that wife, but it is important to maintain her even in the event of divorce.⁽¹⁷⁹⁾ Maintenance consists of food, clothing, housing, medicine, the necessary servants where the wife is of a social position which does not permit her to dispense with such services, or when she is sick.⁽¹⁸⁰⁾ The responsibility of the husband to maintain his wife will be continued on the same scale after the dissolution of marriage by divorce and until the expiry of the period of *Idda*. However, that is not a long period (3 months) and thereafter the divorced woman whose social status is not high must look to her own family for support. Maintenance may be increased or decreased in accordance with the change of the husband's condition and market prices, and in fixing the sum by way of maintenance the judge will consider the rank and circumstances of both spouses.⁽¹⁸¹⁾

¹⁷⁶-- Nasir, op.cit.p. 82.

¹⁷⁷- Art. 21 of the 1959 Personal Status Code.

¹⁷⁸- Ibid, Art.22.

¹⁷⁹- Nasir, op.cit.p. 93.

¹⁸⁰- Art.24 (2) of the 1959 Personal Status Code.

¹⁸¹- Ibid, Art.28.

If the divorce occurs after the actual consummation of marriage the court can make maintenance order to the wife for the period of *Idda*. This order will be ceased either on the death of the husband or the expiry of the period of *Idda*.⁽¹⁸²⁾ In the case where the divorce occurs before consummation the courts have no power to make an order for maintenance because the wife needs not to observe the *Idda* in this case. When the courts make a maintenance order this will include the right of the wife to stay during her *Idda* at the home in which the parties have lived together before divorce.⁽¹⁸³⁾ In certain conditions the Iraqi law extends the Islamic rule to allow the wife to stay in the matrimonial home for the period of three years commencing from the date when the order was made. The wife will lose this right if she accepts the divorce or the cause for divorce was her adultery or the dissolution of marriage was by *khula*.⁽¹⁸⁴⁾ The court can make a maintenance order to a child(for this is the father's obligation, whether the marriage still is in existence or not). This order will continue until the girl marries, and the boy reaches the age at which he can earn a living, unless he is a student.⁽¹⁸⁵⁾

C- Compensation

In 1985, the Personal Status Code was amended to give the courts power to make an order for compensation in the case where the husband divorced his wife by *talaq* in an arbitrary manner, e.g.without a reasonable cause, and the wife would suffer misery and hardship therefrom.⁽¹⁸⁶⁾ The compensation shall not be in excess of the equivalent of the maintenance due to her for two years. In deciding the amount of compensation the courts must take into account the conditions of the husband in respect of affluence or poverty.

¹⁸²- Ibid, Art.50 and order No.1000 of 1983.

¹⁸³- Art.24 (2) of the 1959 Personal Status Code.

¹⁸⁴- Order, No. 77 of 1983; Order, No. 145 of 1988.

¹⁸⁵- Art.59 of the 1959 Personal Status Code and order No.1000 of 1983.

¹⁸⁶- Ibid, Art. 39 (3).

CONCLUSION

Approaches to the solution of conflict rules in matters of divorce are fundamentally different within the legal systems treated here. What they have in common is that they give greater weight to the achievement of internal harmony and less to the achievement of international harmony and uniformity of status. However, the English and Scots rules are more developed than the Iraqi rules, reflecting to some extent the development in contemporary conflict of laws rules. The Iraqi rules are rather rudimentary leaving many gaps and suffering from lack of clarity. This is not surprising for the choice of principles in divorce is ultimately a policy issue and is therefore, inevitably influenced by the religion and social conditions as well as the traditions prevailing in each country.

Jurisdiction

It is fair to say that if the relations of husband and wife are regulated with reference to a legal system with which they are connected, there will be greater reason to hope that the worst cases of 'forum-shopping' and 'limping marriages' would vanish and that justice would be done between the parties.

Domicile or nationality are proper grounds of jurisdiction in divorce actions. They are capable of ensuring that only those persons whose case has a sufficient connection with the country are entitled to invoke its jurisdiction. Clearly, the country of domicile or nationality to which the parties or one of them belonged has an interest in their marital status strong enough to warrant the assumption of jurisdiction. It is equally clear that this exercise of jurisdiction normally meets the needs of the parties themselves, since the alternative is that of having to go to some other country with all the hardship, inconvenience and costs that may be involved therein.

Certainly there are cases in which domicile and nationality may not necessarily indicate a sufficient connection between the parties and the country concerned to justify invoking its

jurisdiction. Most notably, under the present rules both of domicile and nationality, a person may be regarded as domiciled in or a national of a country which he has never visited, and one of the difficulties about nationality is that it may result in stateless persons and persons with dual nationalities. Nevertheless, there is a powerful policy of convenience in the continued use of domicile in English and Scots law and nationality in Iraqi law as bases of divorce jurisdiction. The decrees emanating from such jurisdiction are worthy of recognition.

The present reform of domicile as far as this discussion is concerned (if it is implemented by legislation) would have a positive effect on the law of jurisdiction. It would remove the anomalies of the current domicile rules and would ensure that only those persons who have a genuine connection by domicile can raise divorce actions in England and Scotland. The present English and Scottish jurisdiction of domicile ended a long period of hardship facing the parties in the past. The domicile of the husband or that of the wife at the time of the proceedings founds one ground of jurisdiction in a divorce action brought by either party. The current Iraqi jurisdiction on the ground of nationality is somewhat defective. In its present text article 14 of the 1951 Civil Code reveals that only the Iraqi nationality of the respondent at the time of the proceedings is sufficient to confer jurisdiction on the Iraqi courts. This formulation of words may lead to unacceptable and illogical results in that the Iraqi nationality of the petitioner is never a ground of jurisdiction. A change in this article is required to the effect that the nationality of either party should be sufficient. The automatic preference for Iraqi nationality as a basis of jurisdiction in cases where a person has several nationalities is difficult to justify. The Iraqi nationality in such cases should not be sufficient unless it is considered to be the effective nationality.

Domicile or nationality as a sole basis of jurisdiction would provide too narrow a rule and would exclude too many cases in which there might be a sufficient connection between the parties and the country to justify conferring jurisdiction on its court. Accordingly, one

year's habitual residence of either party in English and Scots law and unqualified residence in the context of Iraqi law were introduced to meet such cases. What is notable about the current rules of 'residence' is that they give greater weight to the interest of the parties over the international concerns of the state.

The requirement of residence previous to actions of divorce should indicate stability of ties within the jurisdiction and should be sufficiently stringent to discourage 'forum-shopping' and secure so far as reasonably possible that the divorce will be recognised abroad. The lapse of time guarantees that the individual has become a participant in the life of that state and serves as evidence of establishing strong ties with that state. Could the present jurisdictional rules of 'residence' be said to be sufficiently stringent to meet that aim and standard? Is it reasonable to suggest that they be harder to satisfy? The term 'habitual residence' has not yet been settled beyond all doubt. There is no broad agreement as to the degree of importance which is to be given to intention in determining whether residence is habitual; nor is it clear how long residence must persist to become habitual. Another difficulty about 'habitual residence' is that it may result in circumstances in which a person may have no habitual residence or possibly have more than one. Hence, habitual residence would share the disadvantage of nationality in that it may lead to more than one court having jurisdiction to dissolve the marriage or could conceivably lead to absence of remedies although admittedly a person must have some type of residence and the courts do not seem hard to satisfy on the matter of the requirement of 'habitual'. The problems arising from the existence of more than one competent court may be solved by the use of a system of mandatory and discretionary sists, as used in the United Kingdom but unknown in Iraq. Of course, in principle, there is no necessary problem. A pursuer may have a choice of forum, but if there is no clash, there is no problem. However, in the light of the recent decisions, in which habitual residence was equated with ordinary residence, there is now much force in the fear that one year qualification is not a long period of time and does not denote a substantial connection and this is significant, when to this is added the fact that

English and Scottish courts always apply their own laws in matters of divorce.

The Iraqi jurisdictional rule, based on a few days residence of the respondent, is irrational. It runs contrary to the basic function of the assumption of jurisdiction, viz, that divorce should not be granted to persons without real and substantial ties with a forum. It provides no solution in cases where only the petitioner is residing in Iraq even if for a long period of time. It could be said that the current United Kingdom and Iraqi jurisdictional rules of 'residence' are not difficult to satisfy with the result that a divorce petition may be brought by a person with very limited connection, a matter which may lead to denial of recognition of decrees in the country of domicile or nationality. Since most petitioners will rely on 'residence' as a basis of divorce jurisdiction because it is easier to establish more clarification over the meaning of 'habitual' is required. Alternatively, two years qualification is reasonable. The Iraqi rule of 'residence' should be read to mean 'habitual' (domicile) and should be extended to cover cases brought by the petitioners as well.

Obviously, one consequence of the widening of the jurisdictional bases is the likelihood of concurrent proceedings in different jurisdictions in relation to the same marriage. This new problem has led to the introduction of statutory grounds requiring or enabling the English and Scottish courts to stay or sist proceedings. The conclusion to be drawn from the decided cases is that the courts have adopted different ways in determining the balance of fairness and convenience, a fact which led to different decisions and made the law unpredictable. This attitude, however, was later changed in favour of extension of the principle of *forum non conveniens* to statutory power to stay divorce proceedings. Although *forum non conveniens* does not require the courts to assess the balance of fairness as between the parties but to identify the forum with which the dispute is most closely connected, and one might have thought that there is a conflict between the tests, the difference is in form rather than real because both tests clearly involve the same purpose of determining where the case can appropriately be tried for the ends of justice. Nevertheless,

the *forum non conveniens*' approach seems to be more flexible since it enables the courts to look at a whole range of relevant factors to determine the most appropriate court to hear the case, and it is obviously difficult to assess the balance of fairness when (as is usual for why else has the dispute about jurisdiction arisen?) the interests of the parties are opposed. The application of *forum non conveniens* to divorce cases represents the unity of principle in jurisdictional discretion in both matrimonial and non matrimonial cases. Clearly, the system of staying or sisting proceedings has not only the merits of discouraging 'forum-shopping' but also of avoiding conflicting decisions and rendering the proceedings less costly in terms both of time and finance.

Choice of Law

Although English and Scots law are silent on the question of choice of law in divorce, it is generally agreed that only the *lex fori* should be applied. In Iraq a statutory choice of law was introduced to apply in cases of divorce principally the national law of the husband. The system centered around the *lex fori* is of tempting simplicity and maintains the public policy of the forum. The Iraqi approach offers a more effective safeguard against evasion of laws and a little hope towards international concerns. Neither approach, however, is without substantial criticism. The *lex fori* approach may defeat the reasonable expectations of the parties and makes the result of any litigation depend upon where the action was brought. It carries with it the risk of 'forum-shopping' and 'limping marriages'. With the broadening of the jurisdictional rules on which English and Scottish courts now assume jurisdiction over spouses with little connection (one year's habitual residence of either party), the argument of public policy to justify the application of the *lex fori* becomes dubious.

Certainly, the *lex fori* approach provides us with rules that are easy to apply, that do not lead to problems of obtaining expert evidence and that of determining what law to apply where the parties have different personal laws. Nevertheless in cases involving a foreign element the interests of simplicity should not be given great weight over justice and

international harmony of decision. The Iraqi approach gives no weight to the national law of the wife. It also provides no objective solution to cases of stateless persons or cases where the husband has two or more foreign nationalities. It has become subject to several exceptions in favour of applying Iraqi law, which fact may destroy the main choice of law process and bring anomalies and uncertainties.

Yet, it is desirable to have a choice of law rule which aims at solutions which eliminate 'forum-shopping' and facilitate recognition of divorces abroad as well as provide justice. It may be fair to say that choice of law rules should be subject to the common personal law of the parties. If, however, the parties do not have a common personal law, reference should be made to the petitioner's personal law on condition that divorce should not be granted unless there is a strong possibility of its recognition by the respondent's personal law or the interest of both parties requires the dissolution of marriage.

Recognition

In view of the criticisms that had been levelled against the previous law of recognition, part II of the Family Law Act 1986 was enacted to set up new divorce recognition rules aiming to remove the uncertainty and complexity which characterized the previous law, and enabling the courts to give wider recognition. The common law rules have been abandoned, and the Recognition of Divorces and Legal Separations Act 1971 repealed. All depends on the provisions of this Act which contains three different sets of recognition rules depending either on the place, or the method, in which the divorce was obtained, namely, (1) divorce granted by civil court in the British Islands, (2) foreign divorces obtained by proceedings comprising all judicial divorces and some extra-judicial divorces and (3) foreign divorces not obtained by proceedings, which category consists solely of extra-judicial divorces.

Undoubtedly, the Act made significant changes in the law of recognition, but not to the point of removing all the uncertainties created by previous law. There are still problems

and 'limping marriages' will continue to be created with all their evil effects. Accepting that there is force in providing specific rules for recognition in the United Kingdom of other British divorces, in the author's submission it is regrettable that different types of foreign divorce are treated differently in the Act.

The approach of section 44 (2) in providing for automatic recognition in the United Kingdom of divorces granted within the British Islands is strongly effective. It has the merit of simplifying the law and promoting international certainty. The courts now need not consider whether there was sufficient jurisdictional link between the parties and the country granting divorce. An English court is bound to recognise a decree of divorce granted by a court of civil jurisdiction in Scotland and vice versa. What is notable here is that the 1986 Act did not provide for a mandatory recognition throughout the United Kingdom of other British divorces. This means that a British divorce may still be denied recognition on some limited grounds i.e no subsisting marriage and *Res judicata*. This attitude may be justified on the ground that the substantive law of marriage and divorce is not the same throughout the United Kingdom.

The recognition throughout the U.K. of other British divorces is limited to those granted by a court of civil jurisdiction. Section 44 (1) ended many years of problems caused by the earlier section 16 (1) of the Domicile and Matrimonial Proceedings Act 1973 by the use of the term 'proceedings', which led to doubts as to the scope of the denial of recognition to extra-judicial divorces obtained in the British Isles, and in particular as to whether it applied only to wholly informal divorces such as 'bare' *talaq*. There is now no longer any scope for recognition of non-judicial divorces obtained within the British Islands. Looking at the wording of the 1986 Act as a whole, and in particular to section 44 (2), it seems that the existence of section 44 (1) in the context of the 1986 Act is unnecessary. For the purpose of recognition under this Act all divorces whether or not obtained by proceedings must be effective in the country where obtained. Since an extra-

judicial divorce does not form part of the U.K. family law then this section appears redundant, but perhaps as a policy matter it is justifiable to place the matter beyond doubt.

The 1986 Act dealt with recognition of foreign divorces obtained by "proceedings" in a more suitable manner than the previous law. The dichotomy between "overseas divorces" and "divorces obtained outside the British Isles" contained in the 1971 Act was obviously unsatisfactory and served only to create confusion. Its meaning was not immediately apparent. It gave rise to difficulties of knowing exactly which types of divorces would be recognised under section 6. Moreover, it created an anomalous rule in that it gave a wider recognition to divorces obtained in the country of nationality or habitual residence and less to those obtained in the country of the domicile in the United Kingdom's sense. Thus, a divorce could not be recognised if one party was domiciled in the foreign country unless it would be recognised in the country where the other party was domiciled, whereas a divorce could be recognised on the basis of habitual residence or nationality of either party even if the law of the other would not recognise it. Such a rule could not be justified for the domicile in the United Kingdom's sense is no less a strong connecting factor than is habitual residence or nationality.

The abolition of this distinction is certainly desirable since it simplifies the law and makes it easier to understand and apply. The rule now is simply that no foreign divorce obtained by proceedings will be recognised unless it is obtained and effective in a country with which at least one party has an adequate connection. Therefore, the common law rule that a divorce which was void in the country where it was obtained could in some circumstances be recognised is now no longer law.

Certainly, the requirement of effectiveness would have the merit of bringing about a harmony of decisions between different legal systems. What remains difficult is what law should decide upon the meaning of divorce and its effectiveness to dissolve the marriage. The difficulty has stemmed from the absence of the definition of this term in the 1986 Act.

It would be undesirable to require the law of the recognition court to determine whether or not the foreign decree would constitute divorce. Such an approach may lead (as in *Viswalingham v. Viswalingham* [1980] 1 F.L.R.15) to a refusal to accept some foreign decrees as being divorces despite the fact they validly dissolve the marriage according to the granting state. It is fair to say that the foreign decree should be within the meaning of the 1986 Act so long as it is considered as a divorce according to the granting state even if it cannot be fitted into the concept of divorce in the recognition court.

The jurisdictional grounds of recognition of foreign divorces obtained by "proceedings" set out by the 1986 Act are more realistic than those in the 1970 Hague Convention. Nationality of, or habitual residence or domicile in, the country in which the divorce was obtained will ensure as many as possible recognitions of foreign divorces in the United Kingdom. What is notable about the present recognition rules is that they do not cover all foreign divorces. A divorce granted in Iraq on the ground of unqualified residence would not be within the scope of those recognition rules. If it is accepted that the purpose of the Act is to seek a reduction in 'limping marriages', it could be said, so far as the conscience of the court will allow, that it should be prepared to grant recognition to divorces where they have been validly pronounced by the foreign court even where the recognition court would not itself have granted a decree in the same circumstances. This would keep to a minimum uncertainties and inconsistencies of status as between different legal systems.

Extra-Judicial Divorces

The law governing recognition of foreign extra-judicial divorce in the 1986 Act appears to be more difficult than it was at common law whereby foreign extra-judicial divorces were recognised as valid as long as they were recognised as such in the country of the parties' domicile. The method and even the place in which the divorce had been obtained had no logical bearing on its recognition. The 1986 Act has abandoned the common law's approach in favour of varying the recognition rules depending on the method by which the

divorce was obtained. The recognition now depends upon whether or not the divorce was obtained by 'proceedings'. The validity of an extra-judicial divorce obtained otherwise than by proceedings would be recognised if it is obtained in the country of the common domicile or obtained in the domicile of one of the parties and recognised in that of the other, provided that neither party had been habitually resident in the United Kingdom for the year preceding the date of divorce.

Since the law of extra-judicial divorces may be interpreted and applied by immigration staff, social security, marriage registrar and lawyers, it is important that the law should be clear. The current state of the 1986 Act does not fulfil those aims because of the lack of clarity that shadows the basis of classification between extra-judicial divorces obtained by proceedings and those not obtained by proceedings. Although 'proceedings' are defined in section 54 as 'judicial or other proceedings', it is submitted that the Act does not advance a clear criterion as to what constitutes 'other proceedings'. The reference to the case law in this point is not conclusive because the courts dealt only with limited divorces and they gave no clear answer whether or not some other extra-judicial divorces are within the meaning of 'proceedings'. Moreover, the decided cases showed that the courts' approach in considering what constitutes proceedings was confused. For instance, in the *Fatima* case the pronouncement of *talaq* was considered part of proceedings, whereas in *Chaudhary* it was not considered as proceedings at all.

It is submitted that there is no policy reason that might justify the variation of recognition rules according to the method by which the divorce was obtained. The distinction not only has created confusion and uncertainty amongst the immigrant communities but also attempted to impose British standards of justice on them. It is strange that the insertion of the distinction in the 1986 Act comes at a time when the major practical reason for the retention of the restrictive rules of recognition has been removed by the enactment of the Matrimonial and Family Proceedings Act 1984. It is equally strange that the state of distinction comes at a time when so much criticism has been placed upon it.

What the 1986 Act has achieved is to put into legislative form the arbitrary distinction which had been made by *Quazi* and *Chaudhary* between *talaq* obtained in Pakistan and *talaq* obtained in Kashmir or Iraq, a distinction which cannot be justified by the limited nature of the Pakistani reform. It is true that the recent statutory formalities in some Muslim countries will delay the *talaq* coming into effect for some period and will prevent the wife from being divorced without her knowledge, but the fact remains that *talaq* is still in the hand of the husband who can divorce his wife at any time. It is hard to agree with the view that a bare *talaq* is arbitrary and offers no protection to the wife and children. It is also hard to say that the existence of proceedings is a guarantee of protection. Indeed, social and economic circumstances produced pressure on the Iraqi legislature to place the wives to a *talaq* in a stronger position than wives to a judicial divorce in term of financial relief. It is regrettable that the present law emphasises some degree of formality rather than the avoidance of 'limping marriages' and the promotion of international uniformity.

Undoubtedly, the reason for the use of domicile in section 46 (2) as the sole connecting factor for the recognition of extra-judicial divorces not obtained by proceedings is that the parties' connection to the law of that country must be sufficiently strong to override the doubts as to whether these divorces should be recognised in the particular case. The real significance of this domiciliary rule has subsequently been diminished by habitual residence when section 46 (2) (c) provides that a divorce obtained in the country of domicile will not be recognised if either party was habitually resident in the United Kingdom for the year preceding the date of divorce. There is here a clash between domicile and habitual residence as a connecting factor to test the validity of divorce and the Act makes the latter the decisive test, a fact which cannot be accepted in principle, for habitual residence for one year hardly suggests a strong connection with a given country.

In any event the residence limitation postulated in section 46 (2) (c) can be seen as denying to foreign domiciliaries or nationals the right to divorce under their personal law

and forcing them to go to the United Kingdom court to obtain divorce. There is no convenience reason in forcing an Iraqi national who wishes to rely on his personal law to come to the United Kingdom, with all hardship, inconvenience and costs that may be involved therein, to obtain divorce simply because his wife has a parallel connection to a legal system within the United Kingdom, while the Pakistani can rely on his personal law to obtain divorce, even if the parties have both been habitually resident and domiciled here, merely because his *talaq* involves some empty formalism. Moreover, the real policy of the residence limitation is somewhat confused. Indeed, if the policy, as Lord Hailsham in the debates of the Family Law Bill suggested, is to give greater protection to wives resident in the United Kingdom, then why should a divorce be denied recognition in the case where the Iraqi divorcing husband is the United Kingdom resident, and the wife is both resident and domiciled in Iraq? Is it right to deny recognition to a divorce obtained validly in the country of domicile and undermine international harmony just to protect a wife who has never been in the United Kingdom? What is the interest of the United Kingdom law in protecting such a wife? This might be understood as rather imposing on the parties the British standards of justice.

A more restrictive approach against the recognition of divorces not obtained by proceedings is section 51(3) (b) which gives the courts a discretion to refuse recognition to such divorces on the ground of want of documentation. This new ground certainly forms a considerable stumbling block since it may often involve the parties in going to the court of the other country to obtain appropriate certification of validity of divorce. Such a certificate may not be easily obtained since under the 1986 Act the official document has to be issued by a person or body appointed under the country's law for the purpose of certifying the validity of divorce. The effect of this ground is to increase the burden of proof and would provide more discretion to the courts to refuse recognition, whatever the motive. Moreover, the provision was not present at common law, nor in the 1971 Act, nor in the Law Commission recommendations. The adoption of more restrictive recognition rules in

relation to divorces not obtained by proceedings indicates clearly that the 1986 Act has failed to fulfil its aims of giving a wide recognition to foreign divorces. Therefore, sections 46 (2) and 51 (3) (b) should be abolished. A reform is required to return at least to the underlying principle of the proposal of the Law Commissions in having one set of rules governing recognition of all foreign divorces

With the enactment of the Matrimonial and Family Proceedings Act 1984, it is expected that the discretion to refuse recognition to a foreign divorce, ostensibly on public policy but truly on financial grounds, will be used less frequently (*Tahir v. Tahir*, 1993 S.L.T.194). Nevertheless, the courts still have a wide discretion to allow divorce to be attacked on the ground of public policy. This can be seen from the absence of the definition of this term in the 1986 Act. Since the factors of public policy are so various and wide, a foreign divorce may be denied recognition on unpredictable grounds. Clearly a widespread policy refusal to recognise divorce would be unfortunate and vitiate the aims of the 1986 Act. It is, therefore, emphasised that the discretion should be exercised sparingly and divorce should not be refused recognition unless the facts of the case showed that there is some strong reason to justify non recognition.

Transnational Divorces

The decision of the House of Lords in the *Fatima* case in relation to transnational divorces created as many problems in the field of extra-judicial divorces as it solved. It imposed a new condition on to the definition of overseas divorce in addition to the two given by section 2 of the 1971 Act in that for a divorce to qualify as an overseas divorce it must be obtained in the country in which the proceedings were instituted. The effect of this condition was not only to deny recognition to the divorce in the *Fatima* case but to all transnational divorces including those in which all of the proceedings took place abroad, even if they were effective in each of the countries where some of the proceedings took place.

The 1986 Act does not deal directly with transnational divorces and it seems that the draftsman had not intended to affect the law as stated in *Fatima*. Nevertheless, *Fatima* is not necessarily authority for non recognition of transnational divorces in the context of the 1986 Act because the wording of the provisions of this Act was not drafted in identical terms with the wording of the corresponding sections of the 1971 Act. The 1986 Act emphasises the place where the divorce was actually obtained and not where the proceedings took place. It follows that it is not necessary that the whole of the proceedings must take place in the same country.

If the facts of *Fatima* recurred in a case considered under the 1986 Act, it is unlikely that recognition would still be refused, since the Act does not require the proceedings to be instituted in the country where the divorce was obtained. A possible ground to rely on to refuse recognition to such divorces is section 44 (1). Section 44 (1) however, is far from being a ground for refusal because its effect is to deny recognition only to divorces obtained in the British Islands by means other than from a court of civil jurisdiction. A divorce in a *Fatima*-type case is not one obtained in the British Islands where the pronouncement of *talaq* took place, but one obtained abroad where the proceedings were completed and effected. It could also be added that it would be curious if the courts were to apply this section since the House of Lords had refused to make section 16 (1) [now 44 (1)] a basis for the refusal of the *talaq* in the *Fatima* case itself. Moreover, If a United Kingdom court is unwilling to recognise an unfamiliar alien concept of law in dissolving marriages because to do so would offend its notion of justice, then it is unnecessary to rely on section 44 (1) to refuse recognition to divorce in a *Fatima*-type case, since the 1986 Act itself provides in section 51 (3) (c) that courts may refuse recognition of the divorces if "its recognition would be manifestly contrary to public policy".

Section 44 (1) would create a precedent in denying recognition of all transnational divorces obtained in such circumstances, a policy which is hard to justify. The United

Kingdom court has no interest in denying recognition to divorces where the pronouncement of *talaq* in the United Kingdom was merely incidental and the parties are nationals of a foreign country and have no strong connection with the United Kingdom. It is hard to say that the recognition of such a divorce would undermine fundamental policies of the United Kingdom or would infringe its sovereignty. Yet the use of the public policy discretion in section 51 (3) (c) would be a fair approach and an appropriate way in which to distinguish cases where the *locus divortii* is merely incidental from those where there is clear offence to the United Kingdom law.

This approach does not deny recognition in the way that *Fatima* does to all transnational divorces. It is clear that this approach would promote the natural expectations of the parties that a divorce obtained in accordance with their personal law will be effective and in that way would minimize the number of 'limping divorces'. It is possible, therefore, to say that subject to discretion to refuse recognition, a transnational divorce should be recognised if either party was domiciled, habitually resident in, or a national of, a country in which the divorce was obtained and the divorce was effective there irrespective of where the constitutive acts have taken place.

Iraqi Rules of Recognition of Foreign Divorces

It is difficult to find out when the Iraqi law will recognise a foreign divorce. All we have is speculative views based on the analogy of enforcement of civil and commercial judgments. It has been argued in the course of this thesis that the validity of foreign divorce cannot be established by reference to the Enforcement of Foreign Judgments Code 1928. The wording of this Code reveals clearly that its provisions are confined only to civil and commercial matters and have nothing to do with judgments affecting status.

If, however, one agrees with the view that the 1928 Code is wide enough to cover foreign divorces, one must say that numerous problems still remain to be resolved. The adoption of such a view will only bring uncertainty and will make the task of the judges

difficult in the matter of recognition. The position with regard to recognition rules of divorces granted within the Arab league states may look a little better. Nevertheless, the Arab treaty is still inadequate because there is confusion over the scope of some of its provisions. Moreover, since it is a general treaty it remains doubtful whether its provisions are capable of solving the problems which might arise in this area of law. What is more surprising is that article 2 (d) requires Iraqi courts to refuse recognition to a divorce granted within the Arab states if the parties had begun divorce proceedings in Iraq before they raised proceedings in the granting court even if the result of the foreign divorce is compatible with the Iraqi decree. It is hard to understand the logical policy behind this rule. It seems quite clear that the result is more 'limping marriages' if the Iraqi courts dismiss the action on the merits. This article should be removed in favour of giving a power to the forum court to stay its proceedings if it thinks that the interest of the parties and the ends of justice require the case to be tried elsewhere.

It seems urgently necessary for the Iraqi government to pass legislation to clarify the law of recognition of foreign divorces. It is to be hoped that future legislation takes into account the modern tendency towards universal recognition of foreign divorces in order to avoid the problem of 'limping marriages' and to ensure certainty in the family relationship.

Capacity to Re-marry After Divorce

The state of uncertainty as to whether an individual possesses capacity to marry when his foreign divorce is recognised in England or Scotland but not by his domiciliary law has now been removed. It has become clear that the 1986 Act regards as valid any subsequent marriage celebrated in these circumstances. The Act makes an essential qualification to the rule that legal capacity to marry depends on the law of the domicile. The divorce granted or recognised in England or Scotland prevails over the choice of law rule. This solution combines the merits of consistency and relative simplicity; it ensures the unity of decisions within the forum and makes the law much easier to understand, particularly to ordinary persons. For them the divorce carries with it the right to marry. It avoids the possibility of

conflicting decisions in the same case which might arise from the application of a different choice of law to capacity to marry. It also promotes freedom to marry and works well to avoid the illogical result that a person who is single in the eyes of English or Scots law has no capacity to remarry.

It remains doubtful whether the same solution should be applied to the converse situation, viz, where divorce is recognised by the relevant foreign law but not by English or Scottish law. This uncertainty has stemmed from lack of authority and legislative provision. The Canadian case of *Schwebel v. Ungar*, (1964) 48 D.L.R.(2d)644, should not be encouraged as a general rule for application by the United Kingdom law so as to validate a marriage celebrated in these circumstances because it runs contrary to the domestic rule that a marriage celebrated in England and Scotland is void if the party lacks capacity to marry by English or Scots law. It also produces an unacceptable result in that a person is validly and monogamously married to two persons at the same time, and the possibility of difficulties which might arise from this fact in relation to succession and matrimonial relief.

It is not illogical, therefore, to suggest that the problem caused by the incidental question in respect of divorces not recognised by English and Scots law and capacity to marry should be subject to the same rule enacted in section 50 to the effect that a person in such a situation should not have the capacity to remarry notwithstanding that the law of his domicile recognises the divorce. Clearly the ideal solution to the problem posed by the incidental question is the unification of the various system of private international law. Until this hope becomes a reality, the solution now depends on the underlying policies of the forum. Since the nature of marriage in Iraq is different from that in the United Kingdom law, it would be, therefore, difficult to suggest that the United Kingdom's approach should be adopted as a general rule in Iraq to solve all the clashes between the rules governing capacity to marry and those governing the recognition of a foreign divorce.

Instead, the determination of the problem should depend on the nature of the individual case and the policy thereto. Having regard to the fact that the husband is allowed to have more than one wife at the same time, it is possible to say that he should have capacity to enter into a second marriage even if his prior marriage is still valid and subsisting in the eyes of Iraqi law. But a woman whose divorce is not recognised by Iraqi law should lack capacity to enter into a second marriage because to hold otherwise would imply the recognition of a kind of legal bigamy a fact which would be inconsistent with the domestic rule that a woman who is bound by a prior, valid and subsisting marriage, cannot contract another until the first marriage is ended by death or annulled or dissolved.

As regards the point where a foreign divorce imposes a prohibition or restriction on the right of one or both parties to marry, such a prohibition or restriction should be disregarded if it is considered as penal and contrary to public policy and therefore, a divorced person has capacity to marry even if he is under such a (penal) prohibition according to his law or according to the terms of the foreign divorce. The prohibition is regarded as penal when its object is to forbid the guilty party to the divorce from marrying for a determinate or indeterminate period. If, on the other hand, the object of the prohibition is to avoid doubt about the paternity of any child that might be born after the divorce, it is submitted that this prohibition should be applied if it forms a part of the law governing the capacity of the parties to the new marriage or is part of a divorce decree worthy of recognition. When both parties are subject to the prohibition it is submitted that such a prohibition must be applied so long as it is not an everlasting prohibition even if it does not form part of the law governing the capacity of the divorced person to remarry.

Financial Relief After Foreign Divorce

The Matrimonial and Family Proceedings Act 1984 now provides that courts have jurisdiction to make financial relief notwithstanding the existence of foreign divorce. The Act contains separate provisions for England and Scotland to deal with applications for

financial relief after foreign divorce. The same end has been achieved by different means for the different legal systems. This difference reflects the conflicting views of the two Law Commissions in providing a solution to the situation existing before 1984. The scope of the discretion combined by wide jurisdictional rules which characterize English law are notably absent in Scots law, which adopts a more restrictive approach which may exclude cases which would be found in England to be meritorious and appropriate. While the Scots law concentrated on discouraging 'forum-shopping' and providing relief only in cases where there is a strong connection between the marriage and Scotland, the English law paid little attention to these matters being in favour of providing relief to those who had suffered financially abroad even if they have little connection with England.

Although the filter system is necessary in the context of English law to prevent tactical applications, it makes the law uncertain and unpredictable, while certainty and predictability are obvious in Scots law. The opportunity for enforcement of an order under Scots law is greater in practice than an order made under English law, since the Scots law requires that there must be a connection between the respondent and Scotland before the Scottish court can have jurisdiction and before the order will be made. There can be no doubt that the unjustifiably harsh results of the situation existing before 1984 have now been removed. The Act will achieve not only a greater measure of justice for a party to a foreign divorce but a considerable saving of time and money. The temptation to challenge the foreign divorce purely for financial reasons will have gone and the number of 'limping marriages' will be reduced.

Nevertheless, a party to a foreign divorce is still treated less well to that of an English or Scottish divorcee since he (she) requires to meet the filter system in English law and the strict conditions in Scots law before the court can make an order. The phrase 'judicial or other proceedings' in English section 12 is regrettable as it places the English law in a state of uncertainty. It is now not clear whether the English provisions apply to all foreign divorces or only to divorces entitled to recognition under section 46 (1). The object of the

reform to the situation existing before 1984 Act would be defeated if the power of the English court to make financial relief is limited to divorces entitled to recognition under section 46 (1). A party to a foreign divorce not obtained by 'judicial or other proceedings' will continue to challenge the recognition of such divorces and this would absorb a quite excessive amount of time and money. The reform is all the more needed in cases where the divorce which has been obtained is other than judicial, since it is less likely that financial matters have been adequately treated. It is therefore possible to say that the phrase 'judicial or other proceedings' in English section 12 should be removed to the effect that the power of the English courts to make financial relief should be the same as the power of the Scottish court to cover all the recognised divorces whatever the method in which they were obtained.

It is also regrettable that the ability to make an application in Scots law is restricted to those who were not pursuers (or joint pursuer) in the foreign proceedings. In some legal systems as in Iraq the parties to the dissolution of marriage by *khula* must apply jointly to the court to confirm their agreement to dissolve the marriage. In this situation it is not clear which party is the pursuer and which is the defender. The Scottish condition would work to withdraw the court's power to make financial relief for such persons. Surely, the Scottish Law Commission did not intend to reach this result. It is, therefore, fair to say that such a condition should be removed, to the effect that the Scottish court should be given the same power as the English courts to make financial relief to either party to the foreign divorce. This would not encourage 'forum shopping', since, it is submitted, that the Scottish provisions contain within themselves sufficient protection against this problem.

The question of financial relief after the recognition of divorce has no place in Iraqi law. This is a natural result based on the fact that the Iraqi law contains no specific provisions concerning the recognition of foreign divorces themselves. Although a wife to a divorce granted within Arab states will not face hardship because the grounds for divorce and

financial relief in those states are substantially similar to that in Iraq, it is submitted that a wife to a non-Arab foreign divorce recognised in Iraq will be destitute if no relief is available abroad. It is difficult to suggest that the Iraqi courts can rely on the 1928 Code to make financial relief because the provisions of this Code have nothing to do with judgments affecting status and, in any event, there is no authority supporting this view. If, however, one accepts the opposite view that the courts can rely on the 1928 Code to make financial relief, then the form of the relief which the courts can make is decided by the national law of the husband according to the general choice of law rule. Where this law is considered to be the law of Iraq, then the order which the courts can grant depends on whether the divorce occurs before or after the consummation of marriage. If it occurs after the consummation of marriage, the wife will be entitled to the whole specified dower, maintenance during the period of *Idda*, the occupation of the matrimonial home for three years, whereas if the divorce occurs before the consummation, she will only be entitled to half of the specified dower.

General Recommendation

In the light of our discussion of Iraqi law, it seems that there is no longer any justification for continuing to maintain the confusion and uncertainty in the present law. A legislative reform is clearly justified, and highly desirable. The aim of this thesis has been to set forth in an informed way, and in a comparative manner, conflict rules concerning the recognition of foreign divorces and important related matters. It is respectfully suggested that certain amendments should be made to the English and Scottish rules so as fully to take account of the different cultures with which today British courts may have to deal. There is a dearth of authority and guidance in this area in Iraqi law. Legislation is needed, and its authors should take into account, where appropriate, the experience of the United Kingdom law, and the aims and terms of the Hague Convention on the Recognition of Foreign Divorces and Legal Separations 1970. A complete reconsideration of Iraqi rules is advocated.

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