The Law Commission

Working Paper No. 89

and

The Scottish Law Commission

Consultative Memorandum No. 64

Private International Law
Choice of Law Rules in Marriage

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The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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It does not represent the final views of the two Law Commissions.

The Law Commissions would be grateful for comments on the consultative document before 31 July 1985.

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PART I
INTRODUCTION

Background

1.1 Over the past decade or so, the Law Commission and the Scottish Law Commission have made proposals for reform of many of the private international law rules in the field of family law. The one remaining major private international law topic in this field on which the two Commissions have yet to make proposals is the choice of law rules relating to marriage. Preliminary work on this topic was undertaken by the Law Commission in 1971, under Item XIX of their Second Programme of Law Reform,[1] but this work was suspended in 1973 because by then the

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1 This requires the Law Commission to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification: Law Com. No. 14 (1968): Item XIX: Family Law. Specific reference to the recognition of foreign marriages is made in the Law Commission's Third Programme (Law Com. No. 54(1973): Item XXI: Private International Law). The Scottish Law Commission similarly included general proposals for an examination of family law in their Second Programme of Law Reform (Scot. Law Com. No. 8 (1968): Item No. 14) and again as part of their suggested review of private international law in their Third Programme (Scot. Law Com. No. 29 (1973): Item No. 15).

two Commissions had formed the view that satisfactory reform of the choice of law rules relating to marriage could best be achieved by international agreement.[2]

1.2 The opportunity for the negotiation of internationally agreed solutions came with the decision that "questions relating to the recognition abroad of decisions in respect of the existence or validity of marriages" should be placed on the agenda of the Hague Conference on Private International Law. Both Commissions took part in the briefing of the United Kingdom delegation to the Hague negotiations. At its Thirteenth Session in 1976, the Hague Conference completed the Convention on Celebration and Recognition of the Validity of Marriages. This Convention was opened for signature in October 1977 and was finally concluded in March 1978.[3]

1.3 Unfortunately, this has not proved to be one of the more successful of the Hague Conventions. So far it has been signed by only five states[4] and ratified by none.[5] It has received a somewhat critical reception in both the common law[6] and civil law worlds;[7] and we understand that the Government does not propose that the United

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2 Eighth Annual Report (1972 - 1973), Law Com. No. 58, para. 49.

3 The provisions of this Convention are examined in Appendix A.

4 Australia, Egypt, Finland, Luxembourg and Portugal.

5 However, in Australia legislation has recently been introduced to enable Australia to ratify the Convention. The main purpose of the Marriage Amendment Bill (introduced on 4 April 1984) is to amend the Marriage Act 1961 to give legislative effect in Australia to the Convention.

6 E.g., Reese, (1979) 20 Virginia J. of Int. Law 25, 35-36; and see (1977) 25 Am. Jo. Comp. Law 393, 394; North, (1980) 166 Hague Recueil, 92-98; (1981) 6 Dalh. L.J. 417, 430-433.

7 E.g. Batiffol, (1977) Rev. crit. dr. int. privé 66, 451, 467-482; Lalive (1978) 34 Annuaire suisse de droit international 31.

Kingdom should sign or ratify the Convention. This decision means that reform of the choice of law rules relating to marriage must be undertaken independently of the Convention; and in 1982[8] we indicated that it was our intention to return to this topic when resources permitted.

Preparation of this paper

1.4 In February 1984 we set up a small Working Party to assist us in our review of the choice of law rules relating to marriage. The membership of the Working Party is set out in Appendix B and we are very grateful for the advice they have given us. We should mention, however, that the provisional views and conclusions expressed in this consultative document are not, as such, those of the Working Party. The general policy of the paper was agreed by both Commissions at a joint meeting in June 1984 and responsibility for the actual preparation of the paper was delegated to three Commissioners from each Commission.[9] In the light of the response to this consultative document, the two Law Commissions will prepare a joint final report.

1.5 It is desirable that the rules involving private international law issues should be uniform throughout the United Kingdom. Accordingly, this review of the law has been conducted on the basis that any changes in the law will be implemented not only in England and Wales and in

8 Law Commission Working Paper No. 83; Scottish Law Commission Consultative Memorandum No. 56, on Polygamous Marriages (1982) para. 5.31.

9 These Commissioners are: the Hon. Mr. Justice Ralph Gibson, Mrs B.M. Hoggett and Dr. P.M. North (Law Commission); the Hon. Lord Maxwell, Dr. E.M. Clive and Mr. R.D.D. Bertram, W.S. (Scottish Law Commission). Dr.P.M. North left the Law Commission on 30 September 1984 but has continued to be involved with this project in an advisory capacity.

Scotland, but also in Northern Ireland,[10] so that the same rules will apply throughout the United Kingdom. Although Northern Ireland was not represented on the Working Party, the Office of Law Reform in Belfast was kept in touch with the matters considered at the meetings and with the conclusions which the Working Party reached as work progressed.

The main issues

1.6 A marriage may be connected with one or more foreign countries in a number of ways. For instance, it may have been celebrated abroad; either or both of the parties may be domiciled or resident in, or nationals of, a foreign country at the date of the ceremony. Which country's law determines whether a valid marriage has been created in cases involving a foreign element? Is it the law of England and Wales, Scotland or Northern Ireland (as the case may be) as the law of the country in which proceedings affecting the validity of the marriage are brought (lex fori), the law of the country where the marriage was celebrated (lex loci celebrationis) or the law of the country of domicile (lex domicilii) or nationality (lex patriae) of one or other of the parties and, if so, of which? It is with this "choice of law" problem in the field of private international law that we are concerned in this paper. It may be noted that, for choice of law purposes, England and Wales, Scotland and Northern Ireland are treated as separate countries. Thus a choice of law problem may arise where a marriage is connected with one or more law districts in the United Kingdom in the same way as where the connections are with wholly foreign countries.

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10 Sect. 1(5) of the Law Commissions Act 1965 precludes the Law Commission from considering "any law of Northern Ireland which the Parliament of Northern Ireland has power to amend". Read with section 40(2) of the Northern Ireland Constitution Act 1973, the Law Commission's remit is limited (in so far as Northern Ireland is concerned) to matters over which the Northern Ireland Parliament did not have legislative competence under the Government of Ireland Act 1920: that is, "excepted" and "reserved" matters. The subject-matter of choice of law rules in marriage is outside the competence of the Parliament of Northern Ireland as it deals, inter alia, with nationality and domicile - "excepted" and "reserved" matters respectively.

1.7 For the purpose of determining the validity of a marriage, the legal systems in the United Kingdom draw a distinction between the formal validity of the ceremony and the essential validity of the marriage, or capacity to marry as it is sometimes described. For a valid marriage to be created two conditions must be satisfied: the parties must comply with the formal requirements prescribed by the appropriate law and they must have capacity by the appropriate law to marry each other. In general the law governing the formal validity of a marriage is the law of the country of celebration; and the law governing the issue of legal capacity is, in general, the law of the parties' domicile. While those principles are well established, our examination of the law reveals that their detailed application has resulted in a complex and, in a number of respects, uncertain body of rules.

1.8 The question of the validity of a marriage may arise in almost any context and can affect matters as diverse as immigration and citizenship, tax liability, social security benefits, the ability to enter into a subsequent marriage, matrimonial relief, inheritance and legitimacy. The issue may have to be determined not only by the courts but by a whole range of public bodies and officials, such as British immigration officials abroad and in the United Kingdom, the Passport Office, the General Register Office and the Department of Health and Social Security. It is clearly desirable that, when so many issues depend upon whether persons are married or unmarried, the rules governing the validity of marriage should be as certain as possible and readily ascertainable. The proposals in this paper are directed at achieving this objective.

Arrangement of this paper

1.9 This paper is organised in the following way. In Part II we examine the present choice of law rules relating to the formal validity of a marriage. This is followed by an account, in Part III, of the choice of law rules governing capacity to marry. In both these Parts we consider the criticisms that may be made of the present law and we put forward proposals for reform. Part IV contains a discussion of two specific

problems: (a) whether a rule requiring parental consent to the marriage should be regarded as a matter of form or of capacity; and (b) the effect of a retrospective change in the applicable law after the date of the celebration of the marriage. In Part V we examine the choice of law rules in nullity proceedings. Part VI contains a summary of our provisional conclusions and proposals for reform on which we seek views and comments.

PART II

CHOICE OF LAW RULES GOVERNING FORMAL VALIDITY OF MARRIAGES

Introduction

2.1 This Part of the consultative document is divided into three sections. Section A gives an account of the present law in England and Wales,[11] Scotland and Northern Ireland,[12] and of the criticisms that may be made of it. In Section B we outline what seem to us to be the general policy considerations for reform of this area of the law. Section C contains our provisional conclusions and proposals for reform.

A. THE PRESENT LAW

(a) The general rule: locus regit actum

2.2 It is well-established, both in England[13] and Scotland,[14] that the formal validity of a marriage is governed by the law of the place of celebration, i.e., the lex loci celebrationis.[15] This rule is an application of the maxim locus regit actum and there are two aspects to it. Positively, if a marriage complies with the formal requirements of the law of the place of celebration, it will be recognised as formally valid in

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11 For the sake of brevity, we will hereafter generally use the term "England" to refer to England and Wales.

12 We understand that in Northern Ireland the choice of law rules governing the validity of marriages are similar to those in England, and that English case law would be followed by the courts in Northern Ireland. Accordingly, where in this paper we refer to English law, it should be taken to include also a reference to the law of Northern Ireland. Where however the law of Northern Ireland differs from that of England we shall make specific reference to the Northern Ireland provisions.

13 Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395, 161 E.R. 782; Sottomayor v. De Barros (No. 1) (1877) 3 P.D. 1, 5; Berthiaume v. Dastous [1930] A.C. 79, 83; Starkowski v. A.-G. [1954] A.C. 155.

14 Johnstone v. Godet (1813) Fergusson's Consistorial Law, App. of Reports, p. 8; Bliersbach v. MacEwen 1959 S.C. 43.

15 For convenience, we refer to this rule as the lex ioci rule.

England and Scotland.[16] This is so even though the marriage does not comply with the formal requirements of the personal law of the parties[17] and they went to the foreign country of celebration with the purpose of evading the formalities imposed by their personal law.[18] The positive aspect of the rule is an absolute one: it applies, without exception, to all marriages wherever celebrated.

2.3 The converse and negative aspect of the locus regit actum maxim is that a marriage formally invalid by the law of the country of celebration is formally invalid in England and Scotland. But here it is necessary to distinguish between cases where the marriage is celebrated in England or Scotland, as the case may be, and where it is celebrated abroad. In the former case a marriage which does not comply with the formal requirements prescribed by the domestic law of the forum will, without exception, be void. Where, however, the marriage is celebrated outside the forum, the locus regit actum maxim is only true as a general rule, subject to a number of exceptions created by statute and by the courts.[19]

2.4 There are two preliminary matters to which reference should be made at the outset. First, what is meant by the formalities of a marriage? This question of characterisation is important, given that different choice of law rules apply to formal validity and to essential

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16 The law of the country of celebration may, of course, prescribe special rules for the marriage of foreign residents or foreign domiciliaries: see, e.g., the Marriage (Scotland) Act 1977, s.3(5).

17 Berthiaume v. Dastous [1930] A.C. 79; Bliersbach v. MacEwen 1959 S.C. 43.

18 Simonin v. Mallac (1860) 2 Sw. & Tr. 67, 164 E.R. 917; Compton v. Bearcroft (1769) 2 Hag. Con. 443n. Whilst our courts have not, unlike the French courts, developed a specific doctrine of evasion of law (fraude à la loi), some control over evasion is exercised by the distinction drawn between formal and essential validity; the latter question is governed by the law of the domicile and thus the requirements of that law cannot be evaded by marrying elsewhere.

19 See para. 2.14 below.

validity.[20] Secondly, what is meant by the law of the country of celebration? This question is important only in relation to some exceptional situations, such as marriages in embassies.

(b) Formalities: characterisation

2.5 Rules relating to the actual ceremony itself or to the preliminaries to marriage are clearly formal in character. These include a wide variety of matters, such as the time and place of the ceremony, the nature of the ceremony (religious or civil) required, whether the presence of the parties is necessary or whether a marriage by proxy is permitted,[21] the need for witnesses or registration, and requirements as to residence, notice of intention to marry, publication of banns and pre-marital blood tests.

2.6 The main problem in this context relates to the classification of parental consent to the marriage. Both English[22] and Scottish[23] courts have held that this issue is to be classified as one of form, a conclusion which has been subjected to vigorous academic criticism.[24]

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20 Capacity or essential validity is at present governed by the law of the domicile, i.e., the law of the ante-nuptial domiciles of the parties or, perhaps, by the law of their intended matrimonial home. The choice of law rules relating to essential validity are considered in Part III below.

21 Apt v. Apt [1948] P. 83 (C.A.). The validity of proxy marriages raises an issue as to the method of giving consent and the question whether the parties must be physically present at the ceremony. The reality of consent as distinct from the mode of giving it is not, however, a matter of form.

22 Simonin v. Mallac (1860) 2 Sw. & Tr. 67, 164 E.R. 917; Ogden v. Ogden [1908] P. 46.

23 Bliersbach v. MacEwen 1959 S.C. 43.

24 See, e.g., Falconbridge, Essays on the Conflict of Laws, 2nd. ed., (1954), pp. 74-86; Cheshire and North, Private International Law, 10th ed., (1979) p. 50: Anton, Private International Law (1967) pp. 275-276. The question whether lack of parental consent should be characterised as a matter of form or of essential validity is considered in Part IV below.

(c) Law of the country of celebration: three problems

2.7 Three aspects of the lex loci rule call for comment:

(i) What is the place of celebration in the case of marriages performed in embassies and consulates?

(ii) What effect, if any, is to be given to changes in the law of the country of celebration after the date of the ceremony?

(iii) Is the reference to the law of the country of celebration a reference to the whole law of that country including its choice of law rules?

In the absence of any clear Scottish authority on these questions, the discussion is confined to a consideration of English decisions. However, it seems probable that these decisions would also be followed in Scotland.[25]

(i) Marriages celebrated in diplomatic premises

2.8 It has been held that a foreign embassy or consulate is part of the territory of the receiving state and not of the sending state,[26] so that the law of the country of celebration of a marriage in an embassy or consulate abroad is the law of the receiving state.[27]

2.9 As regards marriages celebrated in foreign diplomatic premises in England, there is some early authority to the effect that such

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25 See Anton, Private International Law, (1967) p. 284; Clive, Husband and Wife, 2nd. ed., (1982) pp. 146-148.

26 Radwan v. Radwan [1973] Fam. 24.

27 Radwan v. Radwan (No. 2) [1973] Fam. 35 (Egyptian Consulate-General in Paris regarded as part of French territory; accordingly, formal validity of marriage celebrated there fell to be determined by French law).

marriages are valid if they comply with the law of the foreign state and the parties are nationals of and, perhaps, domiciliaries of that state.[28] It would appear, however, that these decisions were based on the then prevailing fiction of extra-territoriality and that they cannot be regarded as good law in the light of Radwan v. Radwan.[29] Whilst the specific issue in that case was whether the Consulate-General of the United Arab Republic in England was territorially part of the foreign state for purposes of divorce recognition, Cumming-Bruce J. rejected the alleged rule of extra-territoriality in general terms and indicated that "marriages may be celebrated [in an embassy] only if conditions laid down by the local law are met".[30] It is therefore reasonably clear that, in the absence of any agreement between the foreign state and the United Kingdom Government, marriages celebrated in foreign embassies or consulates in England which do not comply with the local law (i.e., English law) will be regarded as invalid by English law.

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28 In Pertreis v. Tondear (1790) 1 Hag. Con. 136, 161 E.R. 502, Sir William Scott held invalid a marriage celebrated in the Bavarian Embassy in London between "persons not being of the ambassador's household, nor of his country". In Bailet v. Bailet (1901) 17 T.L.R. 317, Gorell Barnes J. upheld a marriage between two domiciled French subjects celebrated at the French Consulate-General in London in accordance with the formalities of French law. A reasoned judgment was not given.

29 [1973] Fam. 24.

30 [1973] Fam. 24, 32, quoting with approval Fawcett, The Law of Nations, p. 64. Cumming-Bruce J. did not accept the proposition in Rayden on Divorce, 11th ed. (1971) p. 132 that "[t]he only marriages in England clearly outside the provisions of [the Marriage Act 1949] are those celebrated at foreign embassies ...".

(ii) Effect of changes in the law of the country of celebration

2.10 In Starkowski v. Attorney-General[31] the House of Lords held that a marriage which is formally invalid by the law of the country of celebration which has been subsequently validated by retrospective legislation in that country will be recognised as valid by English law. Their Lordships expressly left open the question as to what the position would have been if the parties, or one of them, had entered into another marriage prior to the validating legislation. However, the balance of academic opinion[32] is that the legislation should not be given effect so as to invalidate either the second marriage[33] or an English nullity decree annulling the first marriage for informality before the foreign legislation took effect: it would be unjust to deprive a person of a status acquired by him or her on the basis of the then existing state of the law.

2.11 It is to be noted that Starkowski does not deal with the converse case where the law of the foreign country of celebration purports retrospectively to invalidate a marriage initially valid in point of

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31 [1954] A.C. 155. The foreign retrospective legislation was given effect, even though this led to the invalidation, as bigamous, of a marriage entered into by the wife in England after the date of the legislation, and to the bastardisation of a child of the parties to the second marriage. The fact that the parties to the first marriage were not, and never had been, domiciled in the foreign country of celebration or that they were domiciled in England at the time when the foreign validating legislation took effect was not considered to be relevant.

32 See, e.g., Dicey and Morris, The Conflict of Laws, 10th. ed., (1980) pp. 263-4; Cheshire and North, Private International Law, 10th. ed., (1979) p. 315; Mann, (1954) 31 B.Y.B.I.L. 217, 243; Mendes Da Costa, (1958) 7 I.C.L.Q. 217, 257; Thomas, (1954) 3 I.C.L.Q. 353.

33 This view is indirectly supported by a Canadian decision: Ambrose v. Ambrose (1960) 25 D.L.R. (2d) 1: criticised by Castel (1961) 39 Can. Bar Rev. 604; Hartley, (1967) 16 I.C.L.Q. 680, 699-703, and Grodecki, International Encyclopedia of Comparative Law, vol. III, Ch. 8, sect. 34(1).

form. There is no direct English or Scottish decision on this question, but the preponderance of academic opinion is against recognising the foreign invalidating legislation on grounds of public policy.

(iii) Renvoi

2.12 Such English authority as there is suggests that a reference to the law of the country of celebration will be taken as a reference to the whole of that law (including its choice of law rules) and not merely to its domestic law.[34]

2.13 It is not entirely clear whether the renvoi doctrine can only be used to sustain a marriage. If the law of the country of celebration demands that the parties celebrate their marriage in accordance with their personal law, will our courts likewise insist upon compliance with that law or will compliance with domestic requirements of the law of the country of celebration suffice? There is no clear authority on this question,[35] though the leading English academic commentators[36] suggest that the reference to the law of the country of celebration is an alternative reference to either its conflicts or domestic rules.

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34 In Taczanowska v. Taczanowski [1957] P. 301, Karminski J. and the Court of Appeal were prepared to follow the reference by the lex loci (Italian) to the national law of the parties (Polish), but found that Polish law did not recognise the marriage. See also Hooper v. Hooper [1959] 1 W.L.R. 1021, where Stevenson J. applied English law because that was the law referred to by the conflict rules of the law of the country of celebration. There is, however, no English case in which a marriage has actually been upheld as formally valid by applying the renvoi doctrine.

35 In Hooper v. Hooper [1959] 1 W.L.R. 1021 a marriage celebrated in the English Church in Baghdad between two British subjects domiciled in England was held void because no banns had been duly published as required by English law. It is not clear from the extremely brief report whether or not the marriage was also formally defective according to the law of Iraq.

36 Dicey and Morris op. cit., p. 76; Cheshire and North, op. cit., p. 76.

(d) Exceptions to the locus regit actum rule

2.14 There are two statutory and two common law exceptions to the rule that a marriage formally invalid by the law of the country of celebration is formally invalid in England and in Scotland. These exceptions, which only apply where the marriage is celebrated outside the forum, relate to -

(a) Consular marriages celebrated under the Foreign Marriage Act 1892;[37]

(b) Marriages of members of British Forces celebrated under the Foreign Marriage Act 1892;[38] and

(c) Marriages celebrated in circumstances where compliance with the local law is virtually impossible, and marriages celebrated in countries under belligerent occupation where one of the parties is a member of the occupying forces. In such cases, English law will recognise a marriage as formally valid if it complies with the requirements of the English common law. The position in Scots law is unclear.

These exceptions will be considered in turn.

(1) Consular marriages celebrated under the Foreign Marriage Act 1892

2.15 The Foreign Marriage Act 1892 (as amended) recognises the validity of what is more commonly known as a "consular marriage", i.e., a marriage celebrated in any foreign country[39] by or before a British

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37 As amended by the Foreign Marriage Act 1947. The legislation also applies to Northern Ireland.

38 Ibid.

39 This means any country outside the Commonwealth. The Act may, however, be extended by regulations to marriages solemnised within the Commonwealth (s.11(2)(c)) but no such regulations have been made.

"marriage officer"[40] in the statutory form. Section 1 of the 1892 Act (as amended by the 1947 Act) provides that such a marriage between parties, one of whom at least is a British subject, shall be as valid as if it had been solemnised in the United Kingdom with a due observance of all forms.

2.16 The 1892 Act prescribes requirements as to notices,[41] parental consents,[42] the taking of an oath[43] and registration of marriages.[44] But all these requirements are directory; non-compliance with them will not render a marriage invalid, provided that the mandatory requirements as to the form of solemnisation prescribed by section 8 have been complied with.[45] Section 8 provides that the marriage must be solemnised at the official residence of the marriage officer with open doors between the hours of 8 a.m. and 6 p.m., in the presence of two or more witnesses, either by the marriage officer or by some other person in his presence, according to the rites of the Church of England[46] or in such

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40 Marriage officers include British ambassadors, High Commissioners, and consular officers, provided that they hold a marriage warrant from the Secretary of State. Marriage warrants have been granted to consular officers in Afghanistan, Bahrain, Belgium, Burma, Egypt, Greece, Iran, Iraq, Israel, Jerusalem, Jordan, Kuwait, Lebanon, Libya, Morocco, Nepal, Oman, Qatar, Saudi Arabia, Senegal, Somalia, Spain, Sudan, United Arab Emirates, Yemen Arab Republic and People's Democratic Republic of Yemen. The number of consular marriages performed in 1981, 1982 and 1983 was 172, 218 and 195 respectively.

41 Sects. 2 and 3.

42 Sect. 4. A feature of this provision, which we consider further in paras. 2.49-2.50 below, is that the same consents are required as for marriages solemnised in England, even if the parties are domiciled in Scotland.

43 Sect. 7.

44 Sect. 9.

45 Collett v. Collett [1968] P. 482.

46 Sect. 8 does not expressly refer to solemnisation of a marriage according to the rites of the Church of Scotland. We return to this matter in para. 2.51 below.

other form as the parties see fit to adopt. In the latter case, however, the parties must at some stage declare that they know of no lawful impediment to the marriage and utter the statutory words of consent.

2.17 Once the marriage has been solemnised no evidence may be given in any legal proceedings that the parties have not complied with the preliminary requirements as to residence or consents.[47] Moreover, the authority of the marriage officer cannot be challenged after the solemnisation and registration of the marriage.[48]

2.18 If section 8 of the Act is complied with, the marriage will be formally valid in the United Kingdom, even though it may be void by the law of the country of celebration.[49] However, a marriage officer under the Act is entitled to refuse to solemnise a marriage or to allow it to be solemnised in his presence if in his opinion it would be "inconsistent with international law or the comity of nations".[50] This provision has been criticised as being unclear and imprecise,[51] but it would appear that it is designed to prevent "limping marriages", i.e., marriages which would be void under the law of the country of celebration or perhaps under the domiciliary laws of the parties.[52] That this is the probable purpose of this provision is shown by the regulations made under section 21 of the Act. This section enables Orders in Council to be made to restrict the solemnisation of a marriage where it would be "inconsistent with international law or the comity of nations" or where adequate facilities

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47 Sect. 13(1).

48 Sect. 13(2).

49 See Hay v. Northcote [1900] 2 Ch. 262.

50 Sect. 19.

51 Dicey and Morris, op. cit., p. 276.

52 See n. 54 below. It may also be that the provision is intended to cover the situation where the authorities in the foreign country of celebration raise an objection to consular marriages.

already exist. The Foreign Marriage Order 1970,[53] made pursuant to section 21, provides that a marriage officer must not solemnise a marriage under the Act unless he is satisfied -

> "(a) that at least one of the parties is a British subject; and
>
> (b) that the authorities of [the foreign] country will not object to the solemnisation of the marriage; and
>
> (c) that insufficient facilities exist for the marriage of the parties under the law of that country; and
>
> (d) that the parties will be regarded as validly married by the law of the country to which each party belongs."[54]

(2) Marriages of members of British Forces serving abroad[55]

2.19 Section 22(1) of the Foreign Marriage Act 1892, as amended by section 2 of the Foreign Marriage Act 1947, provides that a marriage solemnised in any foreign territory[56] by a chaplain serving with any part of the naval, military or air forces of the Crown, or by a person authorised by the commanding officer of any part of these forces, shall be as valid as if celebrated in the United Kingdom. This provision only applies if at least one of the parties is a member of the Forces serving in that territory or a person employed there in such other capacity as may

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53 S.I. 1970 No. 1539.

54 Art. 3(1). It is not entirely clear what is meant by the phrase "the law of the country to which each party belongs". Does this mean the national law of each party or the law of their domicile(s)? In para. 2.52 below we propose that the Order should be amended to resolve this uncertainty.

55 This matter was originally dealt with by a statute of 1823, which was substantially reproduced by s. 22 of the Foreign Marriage Act 1892. As from 1 February 1948, this section was replaced by s. 2 of the Foreign Marriage Act 1947.

56 This term excludes any part of the Commonwealth but includes ships in foreign waters: s. 22(2) and (3).

be prescribed by Order in Council,[57] and provided that certain prescribed conditions are satisfied.[58] It is not necessary, however, that either party should be a British subject.[59]

(3) Common law exception

(a) England and Wales

2.20 As indicated above,[60] the English courts will in certain circumstances exceptionally recognise as formally valid a marriage which complies with the requirements of the English common law,[61] even though it does not satisfy the formal requirements of the law of the place of celebration. Before considering these exceptional situations, the formalities required at common law, i.e., the law as it stood before Lord Hardwicke's Marriage Act 1753, will be examined.

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57 The capacities prescribed by the Foreign Marriage (Armed Forces) Order 1964 (S.I. 1964 No. 1000) cover women serving in certain auxiliary or nursing services. Sect. 22 of the 1892 Act does not extend to dependants of a member of the forces or of civilian personnel designated by Order in Council. In para. 2.53 below we consider whether s.22 should be extended to cover dependants.

58 Before a marriage is solemnised the chaplain must receive a certificate that the commander of the territory has no objection to the marriage and the chaplain must celebrate the marriage in the presence of at least two witnesses: Foreign Marriage (Armed Forces) Order 1964, art. 3 (S.I. 1964 No. 1000).

59 Taczanowska v. Taczanowski [1957] P. 301, 319-320.

60 Para. 2.14 above.

61 English courts have also recognised marriages formally valid at common law in cases where the local form has been held to be inapplicable, i.e. (a) in the case of colonies where the British settlers were deemed to take with them so much of the English common law as was applicable to local conditions: Lautour v. Teesdale (1816) 8 Taunt. 830, 836, 129 E.R. 606, 608; Catterall v. Catterall (1847) 1 Rob. Ecc. 580, 163 E.R. 142; and (b) where the Crown by capitulatory agreement exercised extraterritorial jurisdiction over British subjects: Wolfenden v. Wolfenden [1946] P. 61; Isaac Penhas v. Tan Soo Eng [1953] A.C. 304. However, these cases are, strictly speaking, not exceptions to, but applications of, the locus regit actum rule: in each case English common law was applicable as the local law: see Taczanowska v. Taczanowski [1957] P. 301.

The common law formalities

2.21 Originally the only formal requirement for a common law marriage[62] was that the parties should take each other for man and wife in the presence of each other (per verba de praesenti) but in 1843 R. v. Millis[63] added the further requirement that an episcopally ordained priest should perform the ceremony. There are, however, three decisions which suggest that this requirement does not apply to marriages celebrated abroad.[64] But in each of these cases the English common law was applied as the law of the place of celebration,[65] and the decisions proceeded not so much on the basis that the presence of an episcopally ordained priest was not required at common law as that only such provisions of the common law applied in the colonies as were suitable to local conditions.[66] The requirement clearly does not apply where

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62 A more accurate term, perhaps, is a canon law marriage "since it derives its origin from the canon law at the time when the canon law was the common law of Western Europe": Lazarewicz v. Lazarewicz [1962] P. 171, 177 per Phillimore J.

63 (1844) 10 Cl. & F. 534, 8 E.R. 844; see also Beamish v. Beamish (1861) 9 H.L.C. 274. This requirement "though of course binding law, is now agreed to be historically erroneous": Merker v. Merker [1963] P. 283, 294 per Sir Jocelyn Simon P.; Pollock and Maitland, History of English Law, vol. 2, pp. 369-372; Lord Hodson (1958) 7 I.C.L.Q. 205, 208-209.

64 Catterall v. Catterall (1847) 1 Rob. Ecc. 580, 163 E.R. 142; Wolfenden v. Wolfenden [1946] P. 61; Isaac Penhas v. Tan Soo Eng [1953] A.C. 304.

65 See n. 61 above.

66 See, e.g., Isaac Penhas v. Tan Soo Eng [1953] A.C. 304, 319 where the Privy Council held that "in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary" that a marriage between a Jew and a non-Christian Chinese should be contracted in the presence of an episcopally ordained priest.

compliance would be impossible or extremely difficult.[67] But does it apply where there is no difficulty in securing the services of an episcopally ordained priest? The position is not entirely clear. Taczanowska[68] suggests that in such circumstances the requirement must be complied with, but in Preston[69] Russell L.J., albeit obiter, took a contrary view.[70]

2.22 Finally, it is to be noted that the domicile or nationality of the parties is irrelevant for the purpose of the common law exception: "the common law conception of marriage knows no distinction of race or nationality".[71]

(i) Marriages in situations where compliance with the local law is impossible

2.23 The first situation in which compliance with the common law formalities will suffice arises where there is some "insuperable difficulty" in complying with the local law.[72] Inconvenience or embarrassment in

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67 Or, perhaps, where it would be unreasonable to expect compliance, e.g. where the parties are non-Christians. Isaac Penhas, n. 66 above, would appear to afford some support for this view.

68 [1957] P. 301, 326; see also Collett v. Collett [1968] P. 482, 487.

69 [1963] P. 411, 436.

70 In Australia, the balance of authority favours the view that the presence of an episcopally ordained priest is required: Nygh, Conflict of Laws in Australia, 4th ed., (1984) p. 309.

71 Taczanowska v. Taczanowski [1957] P. 301, 326 per Hodson L.J.

72 There does not appear to be any reported English decision this century in which this principle has been applied, but it is clear from recent dicta that the exception is well-established: Taczanowska v. Taczanowski [1957] P. 301, 327, 328-329; Preston v. Preston [1963] P. 141, 155.

observing the local law will not suffice;[73] what has to be shown is that the parties found it impossible or virtually impossible[74] to comply with that law. Such would be the case, for instance, if they were in an uninhabited region of the world or in a country where there was no appropriate local form available[75] or where the local forms could not be complied with following a period of anarchy or war.[76]

2.24 A related problem concerns marriages celebrated aboard merchant ships.[77] There is very little direct authority on this question, but the English courts have apparently recognised common law marriages celebrated aboard British merchant ships outside foreign territorial

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73 Kent v. Burgess (1840) 11 Sim. 361, 59 E.R. 913 (no insuperable difficulty in complying with Belgian requirements as to residence).

74 See Preston v. Preston [1963] P. 411, 432 per Russell L.J.

75 E.g., where the parties are domiciled in England and the only available local form is geared to polygamy. In Lord Cloncurry's case (1811), referred to in Cruise on Dignities and Titles of Honour and cited in the Sussex Peerage Case (1844) 11 Cl. & F. 85, 92, 8 E.R. 1034, 1037 Lord Eldon held that a marriage solemnised by a Protestant priest in Rome, contrary to the law of the country of celebration, was valid since no Catholic priest would be allowed to perform the ceremony. In Ruding v. Smith (1821) 2 Hag. Con. 371, 161 E.R. 774 one of the reasons given by Lord Stowell for upholding a common law marriage entered into at the Cape of Good Hope was "the insuperable difficulties" of complying with the law of the country of celebration. That law required the guardian of each party to consent to the marriage, but the husband's father was in England and no guardian had been appointed for the wife on her father's death.

76 Savenis v. Savenis [1950] S.A.S.R. 309 (marriage between two domiciled Lithuanians in Germany in 1945 at a time when there were no registrars functioning upheld as valid by the South Australian court).

77 There is now no statutory provision which contemplates the celebration of marriages on board a British merchant vessel. The Merchant Shipping Act 1894, ss. 240(6) and 253(1)(viii) required marriages celebrated on British merchant ships to be entered in the official log, but these provisions have been repealed, without replacement, by the Merchant Shipping Act 1970: see ss. 100(3), 101(4), Sch. 5.

waters.[78] But it would appear that the English common law was applied as the law of the place of celebration and on this basis this is not a real exception to the locus regit actum principle.[79] It would also appear that this view was based on the then prevailing theory that British ships are "floating islands" and, as such, notionally to be regarded as extensions of English territory on which English law prevailed.[80] But it has since been held that this fiction is not well founded in law.[81]

2.25 However, the application of the common law to a marriage celebrated on board a British ship registered in England[82] may be supported on a different basis, i.e., the lack of any local forms or the impossibility of complying with the law of the place of celebration. This would bring the exception into line with the exception considered at paragraph 2.23 above, and it is thought that the court would have regard to all the circumstances of the case in applying the exception, for example the duration of the voyage and the impossibility of complying

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78 See Merker v. Merker [1963] P. 283, 294 per Sir Jocelyn Simon P.

79 Ibid., and see n. 61 above.

80 See Forbes v. Cochrane (1824) 2 B.& C. 448, 464, 107 E.R. 450, 456 per Holroyd J.; R. v. Anderson (1868) L.R. 1 C.C.R. 161, 168 per Byles J.

81 R. v. Gordon-Finlayson [1941] 1 K.B. 171, 178-79; Oteri v. R. [1976] 1 W.L.R. 1272, 1276. The fiction of extra-territoriality of diplomatic premises has also been rejected: see paras. 2.8-2.9 above.

82 The general view is that the formal validity of a marriage celebrated on board a merchant ship on the high seas is governed by the law of the country where the ship is registered: Dicey and Morris, op. cit., p. 271; Cheshire and North, op. cit., p. 329.

with the local law at a port en route.[83] Given the relatively brief duration of sea voyages today and that difficulty in complying with the residential qualifications at a port is unlikely to be held to constitute an insuperable difficulty,[84] the circumstances would have to be quite exceptional for the common law marriage principle to be invoked.

(ii) Marriages in countries under belligerent occupation

2.26 The common law exception also applies in another type of situation. This is where the marriage is celebrated in a country under the belligerent occupation of military forces and at least one party is a member of the occupying force or other associated military force[85] or of an organisation necessarily or at least commonly set up for the purposes of hostile occupation.[86]

The doctrinal basis of the common law exception

2.27 In the situations envisaged in (i) and (ii) above, the English common law is applied as the law of the forum and the domicile and

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83 Dicey and Morris, op. cit., p. 271 suggests that the marriage would only be valid if it was impracticable for the parties to wait until the ship reached a port where sufficient facilities were available either by the law of the country of celebration or under the Foreign Marriage Acts 1892-1947. Cheshire and North, op. cit., p. 330 takes the view that the marriage would be recognised "provided, probably, there is some element of urgency about the marriage".

84 See n. 73 above.

85 Taczanowska v. Taczanowski [1957] P. 301; Preston v. Preston [1963] P. 411. The exception is not confined to members of British forces.

86 Preston v. Preston [1963] P. 411. Ormerod and Russell L.JJ. indicated that this exception should not be extended beyond the military context, and they cast doubt on Kochanski v. Kochanska [1958] P. 147 where Sachs J. appeared to extend the exception to a "marooned" displaced persons' camp, irrespective of whether it existed as part of the organisation set up for the purposes of hostile occupation.

nationality of the parties are irrelevant.[87] But, unlike situation (i), situation (ii) is not limited to cases where there is some difficulty in complying with the local law;[88] and the doctrinal basis of the common law exception is different in the two situations. In situation (i) the intention of the parties is irrelevant: the parties are deemed to have submitted themselves to the local law which, because it cannot be complied with, is replaced by the common law.[89] On the other hand, situation (ii), which is confined to a limited class of individuals, rests on the assumption that members of a conquering army cannot be expected to submit themselves to the law of the conquered.[90] The exception does not apply if the parties elect to submit to the local law but in fact fail to comply with it.[91]

Criticisms

2.28 The common law marriage exception has been subjected to vigorous criticism by academic commentators.[92] What has been criticised is not the idea that in exceptional cases the parties need not comply with the law of the place of celebration, but the conclusion that in

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87 Taczanowska v. Taczanowski [1957] P. 301; see para. 2.22 above.

88 In Taczanowska, above, compliance with the law of the country of celebration would not have presented any particular difficulty.

89 See Preston v. Preston [1963] P. 411.

90 Ruding v. Smith (1821) 2 Hag. Con. 371, 161 E.R. 774; Taczanowska v. Taczanowski [1957] P. 301.

91 Lazarewicz v. Lazarewicz [1962] P. 171. In this case, a marriage (between a Polish soldier stationed in Italy and an Italian woman) which did not comply with the local Italian form was held to be void. Phillimore J. held, at p. 180, that the evidence indicated that "they deliberately submitted themselves to Italian law, and there is, therefore, no room for the importation of any other law".

92 See, e.g. Dicey and Morris, op. cit., p. 273; Cheshire and North, op. cit., pp. 325-327; Mendes Da Costa, (1958) 7 I.C.L.Q., 217, 226-235; Andrews, (1959) 22 M.L.R. 396, 403-407. The criticisms have been directed to the Taczanowska line of decisions, but they also apply in substance to the first exception (para. 2.23 above).

these exceptional cases the formal validity of a marriage should be tested by reference to the English common law of the early eighteenth century.

> "It is indeed a remarkable proposition that a marriage celebrated in a foreign country between persons domiciled in another foreign country who have never visited England in their lives can derive formal validity from compliance with the requirements of English domestic law as it existed 200 years before the marriage".[93]

Further, "[a] marriage that is void by the lex loci celebrationis and by the personal law of the parties will scarcely attract universal recognition merely because it satisfies the law of England, a country with which they had no connexion at the time of the ceremony, more especially when it is not the existing law of England that is called in aid, but that which was abolished in 1753 by Lord Hardwicke's Act."[94]

(b) Scotland

2.29 It is probable, though not certain, that the Scottish courts would hold that the lex loci rule does not apply in cases where compliance with the local law is virtually impossible or extremely difficult.[95] What is less clear is whether in these exceptional cases the Scottish common law would be applied to test the formal validity of a marriage. There is some early suggestion in the Scottish authorities that, where the use of local forms is precluded by the circumstances, compliance with the forms of "the native or of the fixed actual domicile"[96] would suffice. However, it is to be noted that, in view of the abolition of marriages by declaration

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93 Dicey and Morris, op. cit., p. 273.

94 Cheshire and North, op. cit., p. 327.

95 See Clive, Husband and Wife, 2nd ed., (1982) p. 147.

96 Fraser, Husband and Wife, 2nd ed., (1876-78), Vol. II, p. 1314; and see Barclay v. Barclay (1849) 22 Scot. Jur. 127, 131.

de praesenti, this suggestion would be of little help to Scottish domiciliaries marrying abroad in circumstances where the lex loci rule is held to be inapplicable.[97]

2.30 There is also uncertainty as to whether Scots law would excuse compliance with the local law in the belligerent army situation envisaged in the English authorities.[98] There is no Scottish authority on this matter.

B. POLICY CONSIDERATIONS FOR REFORM

Jurisdiction-selecting or rule-selecting approach?

2.31 In this section of the paper we outline the main policy objectives considered relevant in this area of the law. However, it is convenient first to consider briefly and dispose of the question whether, in the light of the recent American "revolution" in the conflict of laws, some fundamental rethinking of our approach to choice of law is desirable. Should we continue to adopt a "jurisdiction-selecting" choice of law approach or would the "rule-selecting" approach favoured by some American writers, most notably Brainerd Currie[99] and David Cavers[100] and adopted by some American courts, be preferable?

2.32 Our primary choice of law rules governing the formal validity of marriage (like all our present choice of law rules) are jurisdiction-selecting, pointing the court to a particular legal system (in the present context, the law of the country of celebration) without any evaluation of the content of the applicable rule of that system and without any

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97 Clive, op. cit., p. 147.

98 See para. 2.26 above.

99 Selected Essays on the Conflict of Laws (1963).

100 The Choice of Law Process (1965); (1970) 131 Hague Recueil 75.

evaluation of the competing claims of that rule as against that of any other legal system.[101] Theoretically, at least, the court does not need to know the content of the foreign rule until it has been selected.

2.33 The rule-selecting approach, on the other hand, requires the court to identify the particular issue and the legal systems whose rules might be regarded as "interested". This involves an examination of the purposes and policies underlying the individual rules and also of the interests of the states whose rules are in issue. If this investigation reveals that the rule of only one legal system is applicable, then there is a "false conflict" and that rule is applied. If, however, the court concludes that the rule of more than one legal system has an interest in being applied, then there is a "true conflict" and various methods have been suggested for resolving such a conflict. For example, Currie would apply the law of the forum, whilst Cavers' approach would involve the court in working out "principles of preference" i.e., in essence, detailed choice of law rules for "true conflict" situations.

2.34 It is our view that the rule-selecting approach is not suitable for adoption in this country. Little purpose would be served by discussing in detail all the objections to such an approach,[102] but the more

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101 It is to be noted, however, that the initial selection and the evolution of a jurisdiction-selecting choice of law rule will be guided by policy considerations. Thus, e.g., in Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395, 412, 416-7, 161 E.R. 782, 788, 790, the court, in selecting the lex loci rule, was clearly influenced by two policy factors: the desirability of uniformity of decisions in matters of status, and the policy of upholding the reasonable expectations of the parties. And once a choice of law rule has been established, policy will influence its interpretation and application, as is shown by cases such as Starkowski (para. 2.10 above) and Taczanowska (para. 2.26 above).

102 For a detailed analysis, see North, (1980) 166 Hague Recueil, Ch. II; Morris, The Conflict of Laws, 3rd ed., (1984) pp. 512-516; and the Law Commissions' consultation paper on Choice of Law in Tort and Delict (1984) Working Paper No. 87; Consultative Memorandum No. 62, paras. 4.35-4.54.

fundamental of these may be noted:

(a) The approach assumes that the court in the forum will be able to determine the interests and policies underlying the conflicting rules; and also to balance the governmental interests of the states whose rules conflict. It is sometimes difficult enough to identify the policies behind one's own rules and it is, of course, more difficult accurately to identify and evaluate the policies underlying conflicting foreign rules.[103]

(b) The approach pays little heed to certainty and predictability, values which are of particular importance in marriage, where the law has a prospective role to play. Reliable advice cannot be given without recourse to litigation.[104]

(c) In the field of marriage, the rule-selecting approach is likely often to lead to the same rule of law being applied as would be the case under our jurisdiction-selecting rules,[105] which are themselves the product of a balancing of various policy considerations.[106] Why, it may be asked, bother with interest-analysis when it is likely to lead one to the same result in many, perhaps most, cases?

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103 Such analysis may be possible when dealing with the policies of the component states of a federal union, as in the U.S.A., though even there the cases often seem to proceed on little more than judicial "hunches" as to what the policies must have been.

104 Cavers envisages that more specific and detailed guidance will emerge as a result of judicial development but it may be thought that 50 years is too long for most people to wait for the establishment of rules to determine whether their marriage is valid.

105 North has exemplified this by applying the rule-selecting and the jurisdiction-selecting approaches to the facts of decided English and American cases: see (1980) 166 Hague Recueil, Ch. III.

106 Morris, op. cit., pp. 515-516; and see n. 101 above.

Criteria for evaluating choice of law rules

2.35 Before considering whether our present rules are satisfactory, it might be helpful to identify the policy objectives which choice of law rules in this area of the law should seek to achieve.[107] These, it is suggested, should include the following, though they are not listed in any particular order of priority:

(a) Certainty and predictability. It is obviously desirable that the parties should know, or be able to ascertain, without the necessity of litigation, the applicable law. This consideration is of particular importance in the field of marriage where the interest of the parties is essentially prospective ("what formal requirements must we satisfy in order to marry?") and points to the need for definite choice of law rules rather than a vague or flexible rule such as that "the validity of a marriage will be determined by the local law of the state which, with respect to that particular issue, has the most significant relationship to the spouses and the marriage under [certain specified] principles."[108]

(b) Convenience. The choice of law rules should point to a law which is convenient for the parties and about which they can readily obtain professional advice. A related factor is the convenience of marriage officials in the country of celebration: they cannot reasonably be expected to solemnise marriages in accordance with the law of other countries.

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107 For recent discussion of this topic, see American Restatement of the Conflict of Laws (Second) (1971) § 6 and § 283; Hartley, (1972) 35 M.L.R. 571; North, (1980) 166 Hague Recueil, Ch. III; and Jaffey, (1982) 2 Oxford Journal of Legal Studies, p. 368.

108 American Restatement of the Conflict of Laws (Second) 283(1). For a discussion of the approach adopted in the American Restatement, see North, op. cit., pp. 43-45.

(c) International uniformity of decisions. The aim here is to prevent "limping marriages" (i.e., marriages which are regarded as valid in one country but not in another) and thus to promote uniformity of status. This is not a matter upon which the United Kingdom can legislate as such, but in the selection of a choice of law rule considerable weight should be given to its international acceptability. This points to the exclusion of the law of the forum as the applicable law since that is the one law which makes it impossible to achieve uniformity.

(d) Protecting the reasonable expectations of the parties. It is unjust to upset the parties' expectations by applying a law which they could not reasonably have contemplated.[109] This objective is linked with criteria (a) and (c) for unless the objectives of certainty and uniformity of result are achieved the expectations of the parties are unlikely to be fulfilled.

(e) Presumption in favour of validity of marriage.[110] Marriages should be held to be valid unless there is some good reason to the contrary.

(f) Domestic policies of the forum. Choice of law rules should be so formulated as to accommodate the forum's domestic policies relating to marriage. The interest of the forum is of course particularly strong in the case of marriages celebrated within the forum; in general, it may be thought that the forum state has a limited interest in having its rules as to formalities applied to marriages celebrated abroad. So far as English domestic

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109 This factor is most apparent where all the relevant facts are exclusively connected with one country. The position is more difficult in other cases since it may not always be easy to say what law the parties, as reasonable laymen, would expect to be applicable.

110 This policy is more important when the validity of a marriage is being considered retrospectively.

policy is concerned, the formal requirements of the Marriage Act 1949 apply to all marriages celebrated in England, even if one or both parties are foreigners; but the legislation does not have extra-territorial effect.

(g) Domestic policies of "interested" foreign states. Choice of law rules should give due regard to the interest of a foreign country, most affected by the question of formalities, in the application of its own laws.

(h) Ease in the determination and application of the law to be applied. Choice of law rules should, so far as is practicable and consistent with achieving desirable results, be simple and easy to apply.

To some extent these criteria compete with each other, in that if greater weight is attached to one rather than another different choice of law rules will be selected. But while different views may be held as to the relative weight to be attached to these criteria, it is thought that some weight should be attached to each of them.

C. PROPOSALS FOR REFORM

Should the lex loci rule be retained?

2.36 The various factors listed at paragraph 2.35 above suggest that the law of the country of celebration (lex loci celebrationis) should be retained as the applicable law in matters relating to formalities.[111] Certainty, predictability and uniformity of result are achieved by the application of that law. It is convenient for the parties to be able to resort to the law of the place where they are at the time of the ceremony: the local formalities can readily be ascertained and the parties can rely upon local legal advice; the rule is a simple one which in

111 The lex loci rule is almost universally accepted: Palsson, Marriage and Divorce in Comparative Conflict of Laws, (1974) pp. 189-191; and it has also been adopted in various international conventions, e.g. the 1902 Hague Convention on Marriage, Article 5(1), and the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages, Article 2.

most cases is easy to apply;[112] it is likely to accord with the reasonable expectations of the parties. The rule protects the public interest of the country most significantly connected with the question of formalities -the country of celebration - and it does not, so far as English and Scots law is concerned, infringe any particular policy in the case of marriages celebrated abroad. Not surprisingly, there has been no criticism of the lex loci rule or any suggestion, judicial or academic, that the rule should be abolished. For these reasons, we provisionally recommend that the formal validity of a marriage should continue to be governed by the law of the country of celebration.

Further questions for consideration

2.37 If, as we have proposed, the lex loci rule is to be retained, a number of questions require consideration:

(a) Should the problem of identifying the country of celebration (locus celebrationis) in certain exceptional cases be dealt with in any reforming legislation, or should the matter be left to judicial development?

(b) Should the reference to the law of the country of celebration (lex loci celebrationis) in the case of marriages celebrated abroad be a reference to the whole of that law (including its choice of law rules) or only to its domestic rules? In other words, should renvoi apply to the formal validity of marriage?

(c) Should a rule of alternative reference to the law of the domicile (lex domicilii) of the parties be introduced? Such a rule would mean that a marriage would be formally valid if the parties complied with the formalities prescribed by either the law of the country of celebration or the law of the domicile.

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112 The identification of the country of celebration may present difficulties in certain exceptional cases: see para. 2.38 below.

(d) Should there be exceptions to the lex loci rule? If so, what should be the nature of these exceptions and what should be the applicable law in those cases?

These issues will be considered in turn.

(a) Country of celebration

2.38 In the great majority of cases no difficulty arises in identifying the country of celebration (locus celebrationis) since both parties are present at the marriage ceremony. In the case of a proxy marriage, it has been held that the locus is the country where the proxy takes part in the ceremony, and not the country where he was appointed.[113] However, the problem of identifying the locus does present difficulties in those (presumably rare) cases where a marriage is contracted merely by an exchange of promises and the parties are in different countries at the time. There is no English or Scottish authority on this question. The courts might follow the rules relating to commercial contracts concluded by correspondence or over the telephone, i.e., in the case of exchange of promises by correspondence, the country of celebration would be the country where the acceptance is posted; and in the case of instantaneous means of communication the locus would be the place where notification of the acceptance is received by the other party. It has been suggested, however, that in this situation the courts would probably require to be satisfied that a marriage could be concluded by an exchange of promises by the law of each of the two countries.[114] Should detailed statutory rules be created to resolve this uncertainty? Provisionally we think not. We see no pressing need for legislative intervention and would leave the matter to judicial development should the need ever arise.

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113 Apt v. Apt [1948] P. 83.

114 Dicey and Morris, op. cit., p. 265.

(b) Renvoi[115]

2.39 The main objection to renvoi is that its application can give rise to theoretical problems,[116] as well as to practical inconvenience: proof of the choice of law rules of the country of celebration and, possibly, of another country will be required and this could result in additional delay and cost in litigation. These considerations, however, must be balanced against the following:-

(a) The application of renvoi would tend to promote greater uniformity of status. It would prevent a marriage "limping"[117] between the country of celebration and our own,[118] and it would also promote uniformity of decisions with a number of European countries (where English and Scottish domiciliaries are likely to get married) which allow compliance with either the law of the country of celebration or the personal law of the parties.[119]

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115 The existing authorities suggest that the reference to the law of the country of celebration is a reference to the whole of that law, including its choice of law rules: see para. 2.12 above.

116 See Dicey and Morris, op. cit., Ch. 5.

117 See para. 2.35(c) above.

118 It would be odd for the forum to invalidate a marriage on the ground that the law of the country of celebration has not been observed when the marriage is regarded as valid in the country of celebration.

119 Dicey and Morris, op. cit., p. 75. "The acceptance of renvoi ... will tend to relax the imperative nature of the rule locus regit actum and thereby also to bring about a certain rapprochement to those countries whose conflicts systems admit a choice between the lex loci and the personal law". Palsson, International Encyclopedia of Comparative Law, Vol. III, p. 30. Under the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages the law of the country of celebration is to be interpreted as including the choice of law rules of that country: see Appendix A, para. 1.

(b) Renvoi might allow more marriages to be upheld (thus supporting a policy in favour of marriages) and it would be convenient for the parties. If the law of the country of celebration allows people the choice of following its own civil law or the forms of their personal law, it would be unreasonable to hold a marriage invalid merely because the parties had availed themselves of this privilege.[120]

On the whole, we think that these arguments should prevail. Our provisional recommendation is that the reference made by our choice of law rules to the law of the country of celebration should in the case of marriages celebrated abroad be construed as a reference to the whole law of that country (including its choice of law rules) and not merely to its domestic rules.

2.40 A further question for consideration (on the assumption that renvoi is not to be excluded) is whether the reference to the law of the country of celebration is to be regarded as an alternative reference to either its domestic rules or its choice of law rules. There is no clear judicial decision on this matter, but the leading textbooks suggest that the courts would adopt a rule of alternative reference.[121]

2.41 An alternative reference rule would mean that the parties would have a choice of complying with the formalities prescribed by either the domestic rules of the country of celebration or whatever system of domestic law was referred to by the choice of law rules of the country of celebration, and this would be so even where the law of the country of celebration insisted upon compliance with the latter. In other words, renvoi can only be used to validate a marriage, never to invalidate it.

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120 Clive, op. cit., p. 148.

121 See para. 2.13 above.

2.42 Such an alternative reference rule would be convenient for the parties and would obviously support the policy in favour of validity of marriages, but it would do so at the expense of producing a "limping marriage" as between the country of celebration and our own. In principle, the relevant question in any given case should be whether the formalities prescribed by the law of the country of celebration have been complied with for that case; and there would seem to be something odd in upholding a marriage on the ground that it complies with the law of the foreign country of celebration when the courts of that country would regard the marriage as void. There would also seem to be something odd in distinguishing between the case where the law of the country of celebration itself contains special rules for the marriage of foreigners (in which case compliance with the rules for non-foreigners would not suffice) and the case where the law of the country of celebration provides special rules for foreigners by reference to some other system (in which case compliance with the rules for non-foreigners would suffice). It does not seem satisfactory to make the validity of a marriage depend on the form which a special rule for foreigners happens to take in the country of celebration. For these reasons, we think that an alternative reference rule should not be adopted. In other words, a marriage should not be held to be formally valid on the ground that it complies with the domestic rules of the law of the foreign country of celebration if the choice of law rules of that country require the parties to observe the formalities prescribed by some other legal system.

(c) A rule of alternative reference: the law of the domicile

2.43 In some countries, for example, the Federal Republic of Germany[122] and France,[123] a rule of alternative reference obtains: if

122 EGBGB, Arts. 11(1) and 13.

123 Trib. Grasse, 5 December 1967: (1969) 96 Journal de droit International 82; and see Batiffol and Lagarde, Droit International Privé 7th ed., Vol. II, p. 58.

the marriage is celebrated within the area of the forum, the requirements of the law of the country of celebration (the law of the forum) must be satisfied; but if it is celebrated elsewhere, compliance with the formal requirements of either the law of the country of celebration or the personal law of the parties is sufficient. Other countries apply a truly alternative rule, holding a marriage (wherever celebrated) to be formally valid if it complies with the forms of either the law of the country of celebration or the parties' personal law.[124]

2.44 There would seem to be little room for the view that a truly alternative rule should be adopted in this country. To allow compliance with the forms of the law of the domicile would enable foreign domiciliaries who marry here to evade the mandatory formal requirements imposed by our marriage legislation.[125]

2.45 A quasi-alternative rule on the German model might be more acceptable. The arguments in favour of such a rule are that it would support the policy in favour of validation of marriages and, perhaps, that of upholding the reasonable expectations of the parties; and it would be convenient for the parties. Another reason put forward for an alternative test is that an imperative locus regit actum rule causes hardship to, for example, members of the Roman Catholic and Orthodox Churches, which only recognise religious marriages,[126] and for nationals

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124 See Palsson, Marriage and Divorce in Comparative Conflict of Laws (1974) p. 174.

125 The United Kingdom's domestic rules as to form are, in part, designed to protect the public interest: clandestine marriages must be prevented and valid marriages must be properly recorded. This would be jeopardised if foreign domiciliaries were permitted to marry in a private ceremony according to their personal laws. The matter is of some importance since the validity of a marriage can affect matters such as immigration, citizenship, income tax liability and social security benefits. The general public policy nature of our marriage laws has been emphasised by the House of Lords in Vervaeke v. Smith [1983] 1 A.C. 145, esp. pp. 152-153 per Lord Hailsham of St. Marylebone, L.C.

126 Wolff, Private International Law, 2nd ed., (1950) pp. 342-343.

and domiciliaries of countries which refuse to recognise civil marriages. Some countries may only provide for a civil form of marriage.

2.46 The arguments against adopting a rule of alternative reference, even where the marriage has been celebrated abroad, appear to us to be more cogent. They are as follows:

(a) An alternative reference rule would mean that a marriage celebrated abroad would be recognised as formally valid in this country even though the parties have not complied with the mandatory formal requirements of the law of the country of celebration;[127] compliance with the formal requirements prescribed by the parties' personal law (i.e., the law of their domicile) would suffice. Considerations of international comity[128] indicate that we should recognise the strong and legitimate interest of the foreign country of celebration in the application of its own formal requirements to marriages celebrated within its borders, particularly when we ourselves insist upon compliance with our own standards in respect of marriages celebrated here.

(b) Such a rule would result in a 'limping' marriage, void in the country of celebration, valid in our own; and it would not necessarily be recognised in other continental

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127 If the law of the country of celebration permits compliance with the formalities prescribed by the parties' domiciliary law(s), the marriage would be formally valid under the lex loci rule, i.e., by virtue of the operation of renvoi: see para. 2.39 above.

128 "The canons of international comity demand that, on questions of form, one country should recognise the marriage laws of another ..." Preston v. Preston [1963] P. 141, 427 per Ormerod L.J.; "... order and comity are particularly required" in the field of formalities: Merker v. Merker [1963] P. 283, 295 per Sir Jocelyn Simon P.

countries which adopt an alternative reference rule since the relevant connecting factor in those countries is usually the law of the nationality.[129]

(c) There is no evidence to suggest that the lex loci rule causes any hardship. The answer to the point raised at paragraph 2.45 above is that, apparently, none of the countries which only have a civil form of marriage prohibits an additional religious ceremony in accordance with the personal or religious law of the parties.

(d) A person's domicile is not always easily ascertainable and it may therefore be difficult to determine the law whose formalities may be followed.

(e) A rule of alternative reference would be difficult and costly to apply. If such a rule were to be adopted, provision would have to be made for cases where the parties have different domiciles at the time of the ceremony. In such cases the formal validity of the marriage would, presumably, have to be referred to the law of each party's domicile. This would mean that the domiciles of both parties would have to be ascertained and each domiciliary law might have to be proved. Further, in cases where a litigant relies on the law of the country of celebration and the law of the domicile in the

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129 However, it has to be conceded that not a great deal of weight can be placed on this argument since it is likely that most people are nationals of the country in which they are domiciled. The 1902 Hague Convention on Marriage adopts a quasi-alternative rule: in the case of marriages celebrated outside the forum, reference is permitted either to the law of the country of celebration or to the national law of the parties (Article 7). However,under the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages the question of formal validity is referred exclusively to the law of the country of celebration (Article 2: "The formal requirements for marriages shall be governed by the law of the State of celebration.").

alternative, three different laws might have to be proved.

2.47 Our provisional conclusion is that a rule of alternative reference, whereby the formal validity of a marriage would be tested by reference to either the law of the country of celebration or the parties' domiciliary law, should not be adopted in this country. A marriage celebrated in the United Kingdom should be formally valid if, and only if, the parties have complied with the formal requirements prescribed by the law of the country of celebration. The same rule should also apply to marriages celebrated abroad, except insofar as the law of the forum in the United Kingdom excuses compliance with the formal requirements of the law of the foreign country of celebration.[130]

Exceptions to the lex loci rule

(1) Statutory exceptions

2.48 As we have already indicated,[131] there are two statutory exceptions to the general rule that a marriage celebrated abroad is void if it is formally invalid by the law of the country of celebration. Both these exceptions are contained in the Foreign Marriage Act 1892.[132] The Act lays down a procedure for a British subject to marry abroad before a British marriage officer. If the procedure prescribed for such "consular marriages" is complied with the marriage will be regarded as formally valid notwithstanding that it is formally invalid under the law of the country of celebration. Provision is also made by section 22 for the formal validity of marriages of members of Her Majesty's Forces serving abroad. Our provisional conclusion is that these statutory exceptions should be retained, but that the relevant provisions should be amended on the lines indicated in the following paragraphs.

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130 For the present exceptions to the lex loci rule, see para. 2.14 above. We consider in paras. 2.48-2.68 below whether these exceptions should be retained.

131 Paras. 2.14-2.19 above.

132 As amended by the Foreign Marriage Act 1947.

(a) Consular marriages

(i) Foreign Marriage Act 1892, section 4(1)

2.49 Section 4(1) of the Foreign Marriage Act 1892 (as amended) provides that "the like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England." This provision applies both to persons domiciled in England and to persons domiciled in Scotland or Northern Ireland. Thus, for example, a Scottish domiciliary under the age of eighteen as well as the other party to the marriage would have to comply with the provisions as to consent required by English law,[133] even though no consent to marriage is required under Scots law. Should section 4(1) be amended to make it clear that the provision as to consent does not apply in the case of a person domiciled in Scotland, and that a person domiciled in Northern Ireland must comply with the Northern Ireland[134] (rather than the English) provisions as to consent?

2.50 The case for retaining section 4(1) in its present form is that it is simpler and easier for marriage officers (who generally have no legal background) to refer to one law only, that is, English law. Whilst this consideration is entitled to some weight, we do not think that it justifies the retention of an inappropriate provision which appears to be based on the assumption that the law of England applies throughout the United Kingdom. Nor do we think that the amendments which we shall propose would unduly complicate the task of marriage officers under the Foreign Marriage Act; they would, in practice, act on the oath of the party concerned just as they would do if the party swore that there was no

133 The English rules relating to consent to marriage are contained in s.3 of the Marriage Act 1949 and its Second Schedule.

134 The Northern Ireland provisions as to consent (contained in the Marriages Act (Northern Ireland) 1954) are similar to the provisions in England.

person whose consent was required by the law of England.[135] We accordingly provisionally propose that the requirement as to parental consent in section 4(1) of the Foreign Marriage Act 1892 should not apply to a person domiciled in Scotland, and that a person domiciled in Northern Ireland should be required to comply with the Northern Ireland, rather than the English, provisions as to consent.

(ii) Foreign Marriage Act 1892, section 8

2.51 Section 8(2) of the Foreign Marriage Act 1892 (as amended) provides that the marriage ceremony may be performed according to the rites of the Church of England or in such other form as the parties see fit to adopt. Section 8(3) provides that, if the marriage is not solemnised according to the rites of the Church of England, the parties must at some stage declare that they know of no lawful impediment to the marriage and utter the statutory words of consent. While section 8 does not preclude the solemnisation of a marriage according to a form of ceremony recognised by the Church of Scotland, it would appear to give a certain preference to the solemnisation of a marriage according to the rites of the Church of England. We think it would be more appropriate if both forms of solemnisation were to be placed on an equal footing in the legislation. This result could be achieved by:

(a) deleting the reference to the Church of England rites in section 8(2) and (3) of the 1892 Act (as amended); the subsections would then simply state that a marriage may be solemnised in such form and ceremony as the parties see fit to adopt, provided that at some stage in the ceremony they declare, in the presence of each other, the marriage officer and witnesses, that they accept each other as husband and wife; or

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135 See Foreign Marriage Act 1892, s.7(c). At present internal administrative regulations require any necessary consents to be given in writing.

(b) expressly stating in section 8(2) that a marriage may be solemnised according to a form of ceremony recognised by the Church of Scotland and also excepting such a form from the requirements of section 8(3).

We invite views on which of the two options outlined above should be adopted.

(iii) Foreign Marriage Order 1970

2.52 There is one other matter which we should mention. The Foreign Marriage Order 1970[136] provides that a marriage officer must not solemnise a marriage under the Foreign Marriage Act 1892 unless he is satisfied that a number of conditions are satisfied, including the condition that the parties will be regarded as validly married by the law of the country to which "each party belongs".[137] Does this mean, for example, the national law, or the law of the domicile, of each party? The matter is not clear, though it is arguable that what is intended is the law of the domicile of each party.[138] It is desirable, in our view, that this uncertainty should be resolved, and accordingly we provisionally recommend that Article 3(1)(d) of the Foreign Marriage Order 1970 should be amended to refer expressly to the law of the domicile[139] of each party.

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136 S.I. 1970 No. 1539.

137 Article 3(1)(d); see para. 2.18 above.

138 This interpretation is supported by the fact that Article 3(1)(a) expressly refers to the law of nationality: see para. 2.18 above. Further, it would appear that Article 3(1)(d) encompasses the essential validity of a marriage, and it is clear that this issue is governed by the law of the domicile rather than the law of nationality.

139 The two Law Commissions have recently put forward proposals to simplify and rationalise the law of domicile: Working Paper No.88; Consultative Memorandum No. 63 (1985).

(b) Marriage of members of Her Majesty's Forces serving abroad

2.53 As we have seen,[140] the special facilities for marriage provided by section 22 of the Foreign Marriage Act 1892 (as amended) are available only to members of Her Majesty's Forces serving in a foreign territory, and to persons employed in the foreign territory in one of the four capacities listed in Article 2 of the Foreign Marriage (Armed Forces) Order 1964.[141] It has been suggested to us by the Ministry of Defence that there is a practical need for extending these provisions to cover two further categories of people: (a) civilian personnel, such as United Kingdom civil servants and school teachers, accompanying the Forces abroad; and (b) dependent children of members of the Forces and of the civilian personnel. So far as category (a) is concerned, there would be no need to amend section 22. Employed civilian personnel could, in our view, be brought within the scope of section 22 by amending the 1964 Order or by introducing a fresh one. However, section 22 would need amendment to cover category (b) above. We provisionally propose that the facilities for marriage provided under section 22 of the Foreign Marriage Act 1892 should also be made available to:

(a) United Kingdom civil servants and sponsored civilians accompanying the Forces abroad. The civilian personnel to whom section 22 would apply would be specified by Order in Council.

(b) Children[142] of members of the Forces and of the specified civilian personnel depending upon him or her for support. We invite views, however, on whether the

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140 Para. 2.19 above.

141 S.I. 1964 No. 1000. The prescribed capacities include women serving in certain auxiliary or nursing services.

142 I.e., a child whether born in or out of wedlock, an adopted child and a child, who in the case of any marriage to which the member of the Forces or the specified civilian personnel was at any time a party, was treated by him or her as a child of the family in relation to that marriage.

facilities for marriage under section 22 of the 1892 Act should be made available to any other person who is related to the member of the Forces or the specified civilian personnel by blood or marriage and who is dependent upon him or her for support. We would also welcome comments on whether the requirement of dependence for support should not apply to a child or should only apply to a child over a certain age.[143]

(2) Common law exception

(a) Should the common law exception be retained?

2.54 As we have seen,[144] in a number of limited circumstances foreign marriages may be recognised as formally valid in England if they comply wth the English common law, that is, the law prior to the enactment of Lord Hardwicke's Marriage Act 1753. The types of situation contemplated are where the use of the local form is impossible, or virtually impossible, or where the marriage is entered into abroad by a member of occupying forces in time of war. It is unclear whether similar exceptions to the lex loci rule are recognised by Scots law. The question arises whether the common law marriage exception should be abolished or whether the law should continue to provide a 'safety net' for exceptional cases. We set out below the case for and against retaining the common law exception to the lex loci rule.

2.55 The original purpose of the common law exception was to enable parties, having some connection with England, to marry in uninhabited parts of the world or in countries where the local form was not available to foreigners or where, though available, it was of such a

143 E.g., that the facilities for marriage under section 22 should be made available to: (a) children (as defined in n.142 above) of the members of the Forces or the specified civilian personnel under the age of 21; and (b) any member of the family who is dependent upon the member of the Forces or the specified personnel for support.

144 See paras. 2.20-2.28 above.

nature as to be completely alien to the social, cultural and religious background of the parties. Whilst this exception fulfilled a practical need until the twentieth century it is arguable that there is no real need or scope for it in the world of today; indeed there does not appear to be any reported English decision this century in which the 'impossibility' exception has been applied as such. Insofar as exceptions to the lex loci rule are needed to cover cases where compliance with the local law is virtually impossible or not reasonably to be expected, the Foreign Marriage Act 1892 already makes provision for the celebration of consular marriages abroad in such circumstances.[145] So far as the exception relating to marriages of members of an occupying force is concerned, the view may be taken that those cases which deserve to be covered would come within the statutory exception provided by section 22 of the Foreign Marriage Act 1892[146] and that there is no strong reason for providing an exception to cater for those cases where the provisions of section 22 are not applicable or have not been complied with.

2.56 On the other hand, the case for retaining the common law exception may be stated as follows:

(a) The statutory exceptions provided by the Foreign Marriage Act 1892 do not cover all the circumstances in which the common law exception may be applicable.[147]

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145 See paras. 2.15-2.18 above.

146 See para. 2.19 above.

147 Facilities for consular marriage are only available in certain countries and can only be availed of where at least one of the parties is a British subject. The common law 'insuperability' exception, on the other hand, applies irrespective of the nationality or domicile of the parties, and may be invoked not only where proper facilities are not available in the foreign country of celebration but also where proper facilities exist but cannot be availed of because of, e.g., war or anarchy. Further, unlike s.22 of the 1892 Act, the common law exception for marriages in countries under belligerent occupation is not confined to members of British forces: see paras. 2.19 and 2.26 above.

(b) The probability that the common law safety net will only be called into play on rare occasions does not make it less valuable to a person who needs to avail himself of it. It might be thought unreasonable to expect compliance with the local law when, ex hypothesi, such compliance is impossible or extremely difficult.

(c) There is nothing to suggest that the application of the common law exception has caused harm or produced undesirable results.

We make no proposal on whether the common law exception to the lex loci rule should be retained, but invite views.

(b) Possible solutions if the common law exception is to be retained

2.57 If the view is taken that the law should continue to make provision for exceptional cases where compliance with the local law is virtually impossible or not reasonably to be expected, the question arises as to whether the present law needs to be changed and, if so, how such a change should be achieved. There are three main possibilities on which we invite views:

(i) Preserve the common law marriage exception without any amendment.

(ii) Provide a statutory restatement of the common law exception, subject to any reform which might be thought desirable.

(iii) Replace the present common law exception with a statutory provision to the effect that a marriage which does not comply with the formal requirements of the law of the foreign country of celebration should nevertheless

be held to be formally valid if it would be contrary to the public policy of the forum not to recognise its validity.

We shall discuss each of these possibilities in turn.

(i) Preserve the common law exception without amendment

2.58 There are two main arguments in favour of this approach. First, it would avoid the difficulty of providing a statutory definition of the exceptional circumstances in which the lex loci rule would not apply. At present compliance with the law of the foreign country of celebration may be dispensed with in a number of different situations,[148] viz., where there are no local forms available or where local forms, though available, cannot reasonably be used by foreign domiciliaries; or where a party is a member of occupying forces, or of forces associated with them, or perhaps of an organised body of escaped prisoners of war.[149] To attempt to cover all these situations might be thought to require a complex statutory provision which, arguably, would introduce an undesirable rigidity into this area of the law. On the other hand, a general statement of principle might not provide adequate guidance to the parties or the courts. Further, the adoption of any statutory formulation, whether in detailed or general terms, might serve to create fresh problems of interpretation and result in an increase in litigation. Secondly, it may be said that there is no practical need for reforming the choice of law rules for these exceptional situations. Whatever theoretical objections there may be to referring the formal validity of a marriage celebrated abroad in exceptional circumstances to the English common law, no practical difficulties appear to have arisen in this particular area of the law. The courts may be thought to have reached satisfactory and just results by

148 See paras. 2.23-2.26 above.

149 See Merker v. Merker [1963] P. 283; Preston v. Preston [1963] P. 411.

applying the common law test.[150] Finally, it may be noted that the common law exception has been preserved in Australian legislation.[151]

2.59 On the other hand, this approach would have a number of disadvantages. As we have indicated,[152] there is some uncertainty in Scots law both as to the circumstances in which compliance with the local law may be dispensed with and as to the law by reference to which the formal validity of the marriage should be tested in such situations. This uncertainty would be perpetuated if the legislation continued to leave the matter to the operation of the common law.[153] Further, it might be considered unfortunate if the application of the common law were to be preserved in the legislation and if a Scottish court were then to hold that the common law of Scotland did not recognise an exception to the general rule or that the common law exception in Scotland and the applicable law in such a situation were not the same as in England. It is desirable that the law on this matter should be the same in all jurisdictions within the United Kingdom. There is a further reason why it might be thought desirable to clarify and reform the law. To preserve the common law rules on this matter would mean that in exceptional cases the English courts would test the formal validity of a contemporary marriage by reference to pre-1753 English domestic law. It may be thought inappropriate and unnecessary that a modern statute should countenance this possibility.

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150 For the common law formalities, see para. 2.21 above. If the courts are prepared to hold that a common law marriage need not be performed by an episcopally ordained priest, the only formalities required would be the exchange of voluntary consents to take one another for husband and wife. This requirement may be supported on the basis that it constitutes the essence of the marriage contract: see para. 2.61 below.

151 Family Law Act 1975, s. 42(2). See Finlay, Family Law in Australia, 3rd ed., (1983) p. 117.

152 Paras. 2.29-2.30 above.

153 It has to be conceded, however, that this uncertainty does not seem to have led to practical difficulties, given the dearth of reported cases in Scotland on this matter.

(ii) Statutory restatement and rationalisation of the common law exception

2.60 On this approach, the statute would specify the circumstances in which compliance with the formalities of the law of the foreign country of celebration may be dispensed with, the law to which reference should be made to test the formal validity of the marriage in such cases, and the formal requirements which must be complied with where the applicable law is the law of any part of the United Kingdom. The general merits and demerits of this approach have, in effect, been considered in paragraphs 2.58 and 2.59 above. In the paragraphs that follow we consider how, if this approach were to be adopted, the rules for determining the applicable law might be reformed and rationalised.

2.61 It is convenient to consider first what formalities would have to be complied with where the applicable law is the law of any part of the United Kingdom. While we have formed no firm view on this issue, we are inclined to think that all that should be required is the exchange of voluntary consents to take one another for husband and wife. This requirement may be supported on the basis that it constitutes the "basic essence" of the marriage contract,[154] and that only the minimum of formalities should be required in what ex hypothesi are exceptional circumstances. However, we invite views as to whether some additional formality, such as the presence of two witnesses, should be prescribed. It remains to consider what should be the applicable law in these exceptional

154 See Preston v. Preston [1963] P. 411, 436 per Russell L.J.: "Once the lex loci is rejected ...[it] may well leave it open to a court in this country to recognise as a marriage ... that which by the general law of Christendom was recognised as constituting the basic essence of the marriage contract - the contract per verba de praesenti without further formalities". See also Collett v. Collett [1968] P. 482, 492-493 per Ormrod J.: "... the traditional concept both of the common law and of the canon law [is] that the essence of marriage is the formal exchange of voluntary consents to take one another for husband and wife." It may be that there is a further requirement at common law that an episcopally ordained priest should perform the ceremony: see para. 2.21 above. There can, however, be little contemporary justification for this requirement, and we do not recommend that it be introduced in any legislation.

situations. The obvious contenders are the law of the forum and the law of the domicile.

2.62 The arguments in favour of the law of the forum are as follows:

(a) It is simpler and easier (and less costly) to apply.

(b) The application of the requirement, as the law of the forum, that the parties need only exchange consents, would support the presumption in favour of upholding the validity of marriages.

(c) As a matter of reality, the issue of validity of the marriage is most likely to arise in this country at a time when the parties are domiciled or habitually resident here; if this is so, what matters, in practice, is not international recognition of the marriage as such, but the recognition of the marriage in the country where the parties are resident or domiciled.

The main argument against the law of the forum is that uniformity and predictability will suffer if it is chosen as the governing law: the parties will not know in advance the forum with whose laws they must comply. However, it may be thought that these considerations have less weight in the unexpected and exceptional circumstances under consideration. The parties are unlikely to seek (or to be able to obtain) legal advice, or to give a great deal of advance thought to what formal requirements their marriage must comply with in such circumstances. Further, the reality of the situation is that the validity of a marriage celebrated in such exceptional cases would have to be established in a court before it could be relied on, and for this reason the application of the law of the forum is less objectionable than it might be in other circumstances.

2.63 There is, however, strong academic support for referring the question of formal validity, where the law of the country of celebration is

inapplicable, to the law of the parties' domicile.[155] Until the decision of the Court of Appeal in Taczanowska v. Taczanowski,[156] this view was also commonly held by judges and practitioners.[157] In rejecting the domicile test, both Hodson and Parker L.JJ. were influenced by the complications which would arise in cases where the parties were domiciled in different countries at the date of the marriage. It has been suggested, however, that this problem could be resolved by referring the formal validity of the marriage to the law of each party's domicile.[158]

2.64 The arguments in favour of the domicile test are based on considerations of principle, international comity[159] and, perhaps, upholding the reasonable expectations of the parties. There are, however, a number of difficulties with this test:

(a) The test would be difficult to apply: the domiciles of both parties would have to be ascertained and, if it were found that they were not domiciled in the forum but in different countries, the law of each of those countries might have to be proved. This would, of course, add to the cost of litigation.

(b) Where the parties are domiciled in different countries, the marriage ceremony would have to comply with the

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155 Dicey and Morris, op. cit., p. 273; Cheshire and North op. cit., p. 327.

156 [1957] P. 301.

157 See Kochanski v. Kochanska [1958] P. 147, 153-154 per Sachs J. In the older cases where the validity of a marriage was referred to the common law, the judges stressed that the parties were British subjects, a connecting factor which in modern times would normally be replaced by domicile.

158 Cheshire and North, op. cit., p. 327.

159 "On principle, and for the sake of international comity, there is much to be said for judging the validity of a marriage, which is a matter of status, by the lex domicilii": Preston v. Preston [1963] P. 141, 152 per Cairns J.

requirements of each domiciliary's law. This is likely to lead to more marriages being invalidated, and may be thought to be undesirable, particularly where the parties have lived for some years in the belief that they are validly married.

2.65 Another possibility is to have an alternative test: in cases where compliance with the law of the country of celebration is excused, the marriage would still be formally valid if so by either the law of the domicile or the law of the forum.[160] However, it may be thought that there would be little point in this alternative, given that the minimal formal requirements of the law of the forum would (with the exception of proxy marriages) cover almost every marriage which would be valid by the foreign domiciliary law.

2.66 In the final analysis, the decision on the determination of the applicable law, in cases where the law of the country of celebration is inapplicable, depends on whether greater importance is to be attached to principle (which would seem to suggest the law of the domicile) or to convenience and other practical considerations (which favour the law of the forum). On balance, we think that the latter considerations should prevail in these exceptional cases. Accordingly, our provisional conclusion (on the basis that the preferred approach is the one identified at paragraph 2.60 above) is that the formal validity of a marriage, in cases where the law of the country of celebration is inapplicable, should be referred to the law of the forum; and that any legislation should make it clear that what is required by the law of the forum, where that is the law of any part of the United Kingdom, is merely the exchange of voluntary consents.

(iii) Leave the matter to public policy

2.67 This approach envisages that the doctrine of public policy would be used as a device for sustaining the formal validity of a marriage in circumstances where compliance with the formal requirements of the

160 See Kochanski v. Kochanska [1958] P. 147, 154 per Sachs J.

law of the country of celebration was impossible or extremely difficult or not reasonably to be expected. In this context public policy would have a two-fold role: first, to exclude the application of the lex loci rule in exceptional circumstances; secondly, to uphold the formal validity of a marriage in circumstances where the lex loci rule is held to be inapplicable. A possible advantage of this approach is that it avoids having to preserve or create special rules for cases which are likely to arise only rarely; the matter would be left to the law's general safety net of public policy and it might be thought that this would avoid the problems referred to in paragraph 2.58 above. There are, however, a number of arguments against adopting such a solution. First, it would involve using public policy in a positive way so as to give an act validity which it would otherwise lack. This would be an unusual application of the doctrine of public policy and one contrary to precedent.[161] Secondly, the public policy test would be an inherently vague and unpredictable test, which would introduce what might be thought to be an unacceptable degree of uncertainty into the law.[162] There could be uncertainty both as to the circumstances in which compliance with the formalities of the local law could be dispensed with, and as to the formal requirements which must be complied with in place of the local formalities. More detailed guidance on these matters might emerge as a result of judicial development, but some may think that it would take a very long time for the establishment of specific rules on these matters. Further, it may well be that the rules which would emerge as a result of any such judicial development would be the same as those which are at present applicable.

(c) Summary

2.68 In summary, therefore, the questions which arise for consideration in relation to the common law marriage exception to the lex

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161 See Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248, 263-264 per Devlin J.

162 For a recent expression of concern at the tendency to place reliance on a vague and ill-defined concept of public policy, see Carter, [1982] B.Y.B.I.L. 297, 302-306.

loci rule are:

(a) Should the exception be retained? The case for and against retention is set out at paragraphs 2.56 and 2.55 respectively.

(b) If the exception is to be retained, should it be reformed and if so, how? The three main solutions which might be adopted are as follows:-

(i) Preserve the common law exception without amendment.[163]

(ii) Provide a statutory restatement of the common law exception, subject to any reform which might be thought desirable.[164]

(iii) Leave the matter to public policy.[165]

We ourselves do not make any proposals on these questions at this stage but invite views.

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163 See paras. 2.58-2.59 above.

164 See paras. 2.60-2.66 above.

165 See para. 2.67 above.

PART III
CHOICE OF LAW RULES GOVERNING CAPACITY TO MARRY

3.1 If a valid marriage is to be created, two conditions must be satisfied:

(a) the parties must have capacity to enter into the marriage according to the appropriate law(s); and

(b) the marriage must comply with the formal requirements of the applicable law(s).

The choice of law rules relating to formal validity of marriages have been considered in Part II. We must now consider the choice of law rules relating to capacity or essential validity.[166]

A. THE PRESENT LAW

(1) England and Wales

(a) General rule: capacity is governed by the law of the domicile

3.2 Until about the middle of the nineteenth century the validity of a marriage was, in all its aspects, governed by the law of the country of celebration (lex loci celebrationis).[167] However in 1861 in Brook v.

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166 In this Part of the paper capacity is used in the sense of legal capacity, and relates to such issues as consanguinity and affinity, lack of age and bigamy; and the term is used interchangeably with essential validity. The choice of law rules relating to other issues, such as the consent of the parties and their physical capacity, are considered in Part V below.

167 See Scrimshire v. Scrimshire (1752) 2 Hag. Con. 395, 161 E.R. 782; Dalyrymple v. Dalyrymple (1811) 2 Hag. Con. 54, 161 E.R. 665; Ruding v. Smith (1821) 2 Hag. Con. 371, 389-392, 161 E.R. 774, 780-781.

Brook[168] the House of Lords distinguished between matters of form and matters of essential validity or capacity. The former question was (as before) to be governed by the law of the country of celebration, but the latter question was held to be governed by the law of the domicile (lex domicilii).

> "[W]hile 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."[169]

This remains the basic structure of the English, Scottish[170] and Northern Ireland[171] choice of law rules today.

(b) The dual domicile and intended matrimonial home theories

3.3 Although it is well established that capacity to marry is governed by the law of the domicile, there is some controversy as to the precise test to be applied in determining that law. Which domicile is decisive if the parties are domiciled in different countries at the time of the ceremony or propose to acquire a fresh domicile immediately afterwards? There are two theories. The traditional theory (the 'dual domicile' theory) is that capacity to marry is governed by the law of the parties' ante-nuptial domiciles: each party must have capacity, according to the law of his or her domicile at the time of the ceremony, to marry

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168 (1861) 9 H.L. Cas. 193.

169 Ibid., at p. 207 per Lord Campbell L.C. Thus, in this case a marriage celebrated in Denmark between two English domiciliaries and which was valid by Danish law was held void by the House of Lords on the ground that the parties were within the prohibited degrees of affinity under the law of their English domicile. The main policy consideration behind this decision was to prevent the parties evading the essential requirements of their domiciliary law by marrying elsewhere: ibid. at p. 212.

170 See para. 3.13 below.

171 See n. 12 above.

the other.[172] The alternative theory is that the parties' capacity to marry is determined by the law of their intended matrimonial home. More fully, this test is as follows:

> "The basic presumption is that capacity to marry is governed by the law of the husband's domicil at the time of the marriage, for normally it is in the country of that domicil 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."[173]

3.4 Although the balance of authority[174] supports the dual

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172 The test is not a cumulative one. Thus it is not necessary that each spouse must have capacity both by his or her own as well as the other spouse's ante-nuptial domiciliary law. Pugh v. Pugh [1951] P.482 (where a marriage celebrated in Austria between an English domiciliary and a girl of 15 domiciled in Hungary was held to be void, even though the girl had capacity under Hungarian law and the English domiciliary was not under age under English law), might at first sight be read as supporting a cumulative choice of law rule; but Pearce J. held the marriage to be void not because the Hungarian domiciliary lacked capacity under the law of the other party's English domicile, but because the English domiciliary lacked capacity under English domestic law (Age of Marriage Act 1929, s.1) to marry a girl under 16.

173 Cheshire and North, Private International Law, 10th ed. (1979) p. 331.

174 Re Paine [1940] Ch. 46; Pugh v. Pugh [1951] P. 482; R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956; Padolecchia v. Padolecchia [1968] P. 314; Szechter v. Szechter [1971] P. 286; and see Dicey and Morris, The Conflict of Laws, 10th ed. (1980) pp. 285-296. Many of the earlier decisions do not afford conclusive support for either test, e.g. in Brook v. Brook, n. 168 above, Lord Campbell merged both tests into one: see para. 3.2 above.

domicile test (and two recent statutory provisions[175] appear to be based on the assumption that this is the correct test) there is not inconsiderable support for the intended matrimonial home test,[176] including a recent decision[177] at first instance, in which this test was adopted and applied in

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175 Marriage (Enabling Act) 1960, s.1(3) and Matrimonial Causes Act 1973, s.11(d). The 1960 Act changed English domestic law by enabling a valid marriage to be contracted between a man and his former wife's sister, aunt or niece, or between a woman and her former husband's brother, uncle or nephew; but s.1(3) provides that the Act shall not validate such a marriage if either party to it is domiciled at the time of the celebration in a country outside Great Britain and the law of that country prohibits the marriage. Sect. 11(d) of the Matrimonial Causes Act 1973 provides that no person domiciled in England and Wales has the capacity to contract a polygamous marriage, whether that marriage is actually or potentially polygamous, but cf. Radwan v. Radwan (No. 2) [1973] Fam. 35; see n. 177 below. Sect. 11(d) is currently under review by the two Law Commissions: Working Paper No. 83, Consultative Memorandum No. 56 on Polygamous Marriages (1982). It is expected that the Commissions' joint report on this topic will be ready for publication in the near future. Article 18(3) of the Draft Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 also proceeds on the assumption that the dual domicile test is the accepted test in Northern Ireland.

176 De Reneville v. De Reneville [1948] P. 100, 114 (Lord Greene M.R.), 121-122 (Bucknill L.J.) but these observations were made obiter as the question of capacity to marry was not directly in issue; Kenward v. Kenward [1951] P. 124, 144-146 (Denning L.J.); Cheshire and North, op. cit., pp. 330-331.

177 Radwan v. Radwan (No. 2) [1973] Fam. 35 (Cumming-Bruce J.); the adoption of the intended matrimonial home test, as Cumming-Bruce J. himself conceded, would render s.11(d) of the Matrimonial Causes Act 1973 largely otiose. This decision has been subjected to considerable academic criticism: see, e.g., Dicey and Morris, op. cit., pp. 316-319; Cheshire and North, op. cit., pp. 349-350; Karsten, (1973) 36 M.L.R. 291; Pearl, [1973] C.L.J. 43; Wade, (1973) 22 I.C.L.Q. 571; but it is not without support: see Jaffey, (1978) 41 M.L.R. 38; Stone, (1983)13 Family Law 76; see also Hassan v. Hassan [1978] 1 N.Z.L.R. 385, 389-390.

relation to capacity to contract a polygamous marriage.[178] In the light of these conflicting authorities, the matter cannot be regarded as conclusively settled.[179]

(c) Exceptions to the general rule

3.5 The general rule that each party must have capacity by the law of his or her ante-nuptial domicile (or perhaps by the law of their intended matrimonial home) is subject to a number of exceptions or qualifications. These are considered below.

(i) The rule in Sottomayer v. De Barros (No. 2)

3.6 The essential validity of a marriage celebrated in England between a party domiciled in England and a party domiciled elsewhere is governed by English law. Such a marriage will be upheld as valid by the English courts if each party has (under English domestic law) capacity to marry the other, even if the marriage is invalid under the foreign

178 Cumming-Bruce J. was careful to limit his decision to capacity to contract a polygamous marriage: "Nothing in this judgment bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous union": [1973] Fam. 35, 54. Consequently this decision does not detract from and might even be construed as affording indirect support for the view that as a general rule capacity is determined by the dual domicile test.

179 There is no decision which prevents the Court of Appeal or the House of Lords from adopting either test. It may be noted that there is some support for applying a "real and substantial connection" test to some issues of essential validity. In Vervaeke v. Smith [1983] 1 A.C. 145, 166, Lord Simon of Glaisdale suggested that such a test might be "useful and relevant in considering the choice of law for testing, if not all questions of essential validity, at least the question of the sort of quintessential validity in issue in this appeal - the question which law's public policy should determine the validity of the marriage." See also Lawrence v. Lawrence, [1985] 2 W.L.R. 86 (Lincoln J.); and n. 190 below.

domiciliary law on the ground of incapacity.[180] Thus in Sottomayer v. De Barros (No. 2), which is the principal authority for this exception, the court upheld the validity of a marriage celebrated in England between first cousins, one of whom was domiciled in England and the other in Portugal, even though the law of Portugal prohibited marriage between first cousins. The reason for ignoring the foreign incapacity is said to be the injustice which would otherwise be done to an English party; "no country is bound to recognise the laws of a foreign State when they work injustice to its own subjects ...".[181]

(ii) Capacity by the law of the country of celebration

3.7 It would seem that a marriage celebrated abroad will be void if either party lacks capacity by the law of the foreign country of celebration, even if the parties have capacity by the law of their domicile. The principal judicial authority for this proposition is Breen v.

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180 Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94; Chetti v. Chetti [1909] P.67, 81-88; Ogden v. Ogden [1908] P. 46, 74-77 (C.A.); R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956, 968-969: Vervaeke v. Smith [1981] Fam. 77, 122 (C.A.). The scope of this exception has been reduced by the Marriage (Enabling) Act 1960: n.175 above. See also Article 18 of the Draft Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984. Article 18 codifies and consolidates the law in Northern Ireland on the prohibited degrees of relationship along the lines of the Marriage Act 1949 and the Marriage (Enabling) Act 1960. Article 18(3) of the 1984 Order provides that a marriage between persons not within the prohibited degrees of relationship is void if either of those persons is at the time of the marriage domiciled in a country other than Northern Ireland and under the law of that country there cannot be a valid marriage between them because of their relationship to each other.

181 Sottomayor v. De Barros (1877) 3 P.D. 1, 7 per Cotton L.J. The rule however applies to persons domiciled in England who may not be British subjects.

Breen[182] where Karminski J. was apparently prepared to hold that the parties' incapacity to marry by the law of the foreign country of celebration would be fatal to the validity of the marriage. Since, however, he concluded that there was in fact no such incapacity, this decision cannot be regarded as a conclusive authority on the point;[183] and there are decisions in Australia[184] and Canada[185] which suggest that incapacity by the law of the foreign country of celebration should be ignored.

3.8 So far as marriages celebrated in England are concerned, (i.e., where the law of the country of celebration is also the law of the forum) it seems very likely that such a marriage would be held to be void by an English court if the parties lacked capacity to marry under English domestic law, for example, if either of them was under 16 years of age or they were within the prohibited degrees of English law, even if they had

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182 [1964] P. 144. Dicta in other decisions might be construed as supporting the view that the parties must also have capacity by the law of the country of celebration: see, e.g., Berthiaume v. Dastous [1930] A.C. 79, 83 ("If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere" per Viscount Dunedin) and Starkowski v. A.-G. [1954] A.C. 155, 174 ("... a marriage, even if valid by the law of the domicile, is regarded as invalid if not in conformity with the law of the place of celebration ... " per Lord Tucker). But these observations were made in the context of the law governing formalities, and it is perhaps unlikely that they were intended to cover the question of capacity.

183 This decision has been criticised by academic commentators on the ground that incapacity by the law of the foreign country of celebration should be irrelevant. Cheshire and North, op. cit., p. 343; Unger, (1961) 24 M.L.R. 784; see also, Dicey and Morris, op. cit., p. 299 where this exception to the general rule is confined to cases where the law of the country of celebration is English law; see para. 3.8 below.

184 In the Will of Swan (1871) 2 V.R. 47.

185 Reed v. Reed (1969) 6 D.L.R. (3d) 617.

capacity by the law of their domicile.[186] However, in the absence of binding authority, the role of the law of the country of celebration, especially where it is foreign, in matters of capacity is not entirely clear.

(iii) Capacity to marry after a divorce or annulment

3.9 A person whose divorce is entitled to recognition in England under the Recognition of Divorces and Legal Separations Act 1971 is free to re-marry in the United Kingdom, notwithstanding that the law of that person's domicile does not recognise the divorce and therefore regards the previous marriage as still subsisting.[187] In other words, the divorce recognition rule prevails over the general capacity rule. It would appear that the position is, in essence, the same in relation to a foreign annulment[188] which is entitled to recognition under the common law rules.[189] It is not clear whether a party to a divorce or annulment entitled to recognition in England would be regarded as capable, under English law, of re-marrying abroad, if the divorce or annulment was not

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186 It is extremely unlikely that our courts would uphold the validity of a marriage celebrated in England which was prohibited by English law.

187 Sect. 7 of the 1971 Act (as amended by s.15(2) of the Domicile and Matrimonial Proceedings Act 1973). Sect.7 reverses the decision in R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956 (where the capacity rule prevailed over the divorce recognition rule).

188 Perrini v. Perrini [1979] Fam. 84. In this case, Sir George Baker P., having decided that a foreign nullity decree was entitled to recognition in England, went on to hold, at p. 92, that "the fact that [the husband] could not marry in Italy, the country of his domicile... is ... no bar to his marrying in England ... No incapacity existed in English law". No reference was made to the Arias decision or (by analogy) to s.7 of the 1971 Act.

189 The two Law Commissions have recently recommended that the existing nullity recognition rules should be placed on a statutory footing: see Report on Recognition of Foreign Nullity Decrees and Related Matters: Law Com. No. 137; Scot. Law Com. No. 88 (1984).

entitled to recognition in the country of the domicile.[190] There is also some uncertainty as to whether a person whose marriage has been the subject of an English divorce or nullity decree would be regarded as capable of re-marrying, whether in England or elsewhere, if the law of his or her domicile did not recognise the English decree.[191] The two Law Commissions have recently made recommendations which, if implemented, would remove these uncertainties.[192]

(iv) Public policy

3.10 An English court will not give effect to a capacity or incapacity under the law of the foreign domicile[193] if to do so would be contrary to English public policy.[194] Thus the court will not recognise a foreign incapacity of a penal or discriminatory nature, such as an

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190 Sect. 7 of the 1971 Act only applies to persons re-marrying within the United Kingdom after a foreign divorce. The courts might, however, apply the principle of this section by analogy and hold the subsequent re-marriage to be valid; or apply the common law principle laid down in the Arias case (n. 187 above) and hold the re-marriage to be void on the ground that the divorce or annulment was not entitled to recognition by the law of the domicile; or apply the law of the country with which the marriage had a real and substantial connection. The latter test was adopted by Lincoln J. in Lawrence v. Lawrence, [1985] 2 W.L.R. 86, in relation to the capacity of a divorced spouse to remarry abroad.

191 It is probable that an English court would avoid reaching the conclusion that the capacity to marry rule had primacy over the effect to be given to its own divorce or nullity decree and would, on the analogy of s.7 of the 1971 Act, hold that a spouse was free to re-marry in these circumstances.

192 See para. 3.50 below.

193 Or, presumably, under the law of the foreign country of celebration, on the assumption that the parties must also have capacity by that law: see para. 3.7 above.

194 Cheni v. Cheni [1965] P. 85, 98.

incapacity which is based on grounds of race,[195] caste,[196] religion[197] or on any other classification[198] which discriminates against or penalises a particular section of the population.[199] Conversely, in exceptional circumstances, the court may refuse to recognise a capacity conferred by the law of the domicile and thus hold the marriage to be void. Possible examples might be a marriage between persons so closely related that their relationship was incestuous under English criminal law,[200] or a marriage involving a girl below the age of puberty.[201]

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195 Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94, 104 (incapacity imposed on coloured persons).

196 Chetti v. Chetti [1909] P. 67 (prohibition against marrying outside Hindu caste).

197 Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94, 104 (prohibition under the law of the domicile to prevent priests or nuns from marrying); Papadopoulos v. Papadopoulos [1930] P. 55 (incapacity to marry otherwise than in accordance with the rules of the Greek Orthodox Church).

198 E.g., a prohibition against remarriage on the 'guilty' party to a divorce: Scott v. A.-G. (1886) 11 P.D. 128 as explained in Warter v. Warter (1890) 15 P.D. 152. But a prohibition on remarriage for a certain period of time after the decree will be recognised since "this is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage.": Warter, supra, at p. 155.

199 There is some slight doubt as to whether the court's power to disregard a foreign incapacity is confined to marriages celebrated in England: see Dicey and Morris, op. cit., pp. 303-304. Although such a limitation is not inconsistent with the decided cases, it is in principle undesirable: see Halsbury's Laws of England, 4th ed., (1974) para. 470; and there does not appear to be any decision where it has been held that the public policy exception cannot be invoked where the marriage takes place abroad.

200 See Brook v. Brook (1861) 9 H.L.C. 193, pp. 227-228; Cheni v. Cheni [1965] P. 85, 97.

201 Dicey and Morris, op. cit., p. 304.

3.11 It is clear that the public policy exception is to be sparingly invoked.[202] The mere fact that the foreign capacity or incapacity is unknown to English domestic law is not a ground for refusing to apply it. The "true test", as stated by Sir Jocelyn Simon P. in Cheni v. Cheni,[203] is "whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law"; and "[i]n deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance". That the court will exercise this public policy jurisdiction with considerable caution,[204] especially if the effect would be to invalidate a marriage, is made clear by two fairly recent decisions - Cheni v. Cheni[205] and

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202 Varanand v. Varanand (1964) 108 S.J. 693: "The court's discretion to refuse recognition to foreign status was one to be most sparingly exercised" per Scarman J.; Cheni v. Cheni, supra, at pp. 98-99; R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956, 968-969; see also Vervaeke v. Smith [1983] 1 A.C. 145, 164 where, in the context of a decision on the recognition of a foreign nullity decree, Lord Simon of Glaisdale said that "the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved" and that in the former situation the court will exercise the public policy power with "extreme reserve"; in the circumstances of the case, however, the House of Lords invoked the doctrine of public policy to deny recognition to a Belgian decree annulling a sham marriage.

203 [1965] P. 85, 99. See also Russ v. Russ [1964] P. 315, 327 per Willmer L.J.: "The court retains a residual discretion not to apply the law of the domicile where it is not proper to do so in the circumstances of a particular case"; and In the Estate of Fuld (No. 3) [1968] P. 675, 698: "an English court will refuse to apply a law which outrages its sense of justice or decency." per Scarman J.

204 See n. 202 above.

205 [1965] P. 85.

Mohamed v. Knott.[206] In the former case the court recognised[207] a marriage between uncle and niece celebrated in Egypt where both parties were domiciled and by whose law the marriage was valid. In the latter, a marriage celebrated in Nigeria between two Nigerian domiciliaries, one of whom was 13 years of age, and which was valid by Nigerian law, was recognised as valid in England.

(v) The Royal Marriages Act 1772

3.12 For the sake of completeness, a further and, in practical terms, minor exception to the domicile rule may be noted. The Royal Marriages Act 1772 provides that no descendant of King George II (other than the issue of princesses who have married into foreign families) shall be capable of marrying without the previous consent of the Sovereign formally granted under the Great Seal and declared in Council, but that such persons, if over 25 years of age, may marry if twelve months notice of the intended marriage is given to the Privy Council and Parliament does not object. A marriage which does not comply with these provisions is void. The policy of the Act is that "no marriage of any branch of the Royal Family should be contracted which might be detrimental to the interests of the State"[208] and it has been held[209] by the House of Lords that the Act applies to a marriage celebrated abroad. The policy consideration referred to above would seem to indicate that the Act will be applied irrespective of the domicile of the propositus[210] and it is probable that the decision in the Sussex Peerage Case would have been the same had the propositus been domiciled abroad.

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206 [1969] 1 Q.B. 1.

207 In doing so, Sir Jocelyn Simon P. pointed out that the court had also to look to the results of non-recognition of the particular marriage which in this case had stood unquestioned for 35 years.

208 Sussex Peerage Case (1844) 11 Cl. & Fin. 85, 147, 8 E.R. 1034, 1058.

209 Ibid.

210 See Dicey and Morris, op. cit., p. 298. Foreign domicile is not a bar to succession to the throne.

(2) Scotland

3.13 The position in Scotland in relation to the choice of law rules relevant to capacity to marry is broadly similar to that in England. The weight of authority, both judicial[211] and academic,[212] is in favour of the dual domicile test; and recent statutory provisions proceed on the basis that this is the correct test.[213] The exceptions or qualifications to the domicile rule are, more or less, the same as those in England.[214]

(a) It may be that a marriage celebrated in Scotland between a party domiciled in Scotland and a party domiciled elsewhere is not affected by any incapacity which, though existing under the law of the foreign domicile, does not exist under Scots law.[215]

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211 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. (Sh. Ct.) 24. But Lord Sorn's obiter remarks in Bliersbach v. MacEwen, above, at p. 55 may be construed as expressing support for the intended matrimonial home test.

212 See Anton, Private International Law, (1967) pp. 276-283; Clive, Husband and Wife, 2nd ed. (1982) p. 148.

213 Marriage (Scotland) Act 1977, ss. 1(1), 2(1) and (3) and 5(4)(f).

214 The minor exception under the Royal Marriages Act 1772 has already been noted: see para. 3.12 above.

215 MacDougall v. Chitnavis 1937 S.C. 390. In this case Lord President Normand cited Chetti v. Chetti [1909] P. 67 and said that "the law of Scotland is in conformity with it" (p. 404) and Lord Moncrieff (p. 407) endorsed this view. The court did not follow the decision of Lord Mackay on this point in Lendrum v. Chakravarti 1929 S.L.T. 96, in which he declined to follow the second Sottomayer case and Chetti. However, the precise status of this exception is a matter of some doubt. Thus, it is not given any recognition in the provisions of the Marriage (Scotland) Act 1977 on legal impediments for the purpose of issuing a marriage schedule; and it would appear that a registrar could not, e.g., issue a marriage schedule to a man who was subject to an incapacity which rendered his marriage void ab initio by the law of his domicile even if that incapacity was not found in Scots law and the woman was domiciled in Scotland.

(b) Probably, each party must have capacity by the law of the place of celebration[216] (whether Scots or foreign), in addition to having capacity by the law of the domicile.

(c) A person whose divorce is recognised in Scotland under the Recognition of Divorces and Legal Separations Act 1971 is free to marry in the United Kingdom, notwithstanding that the law of that person's domicile does not recognise the divorce and regards him or her as still married.[217] The position is uncertain where a spouse whose divorce is entitled to recognition in Scotland remarries abroad; or where the issue is as to the validity of a re-marriage (whether in Scotland or elsewhere) following an annulment which is entitled to recognition in Scotland.[218]

(d) It would appear that the Scottish courts will not recognise a capacity or incapacity under the applicable law if to do so would be contrary to public policy.[219]

B. CRITICISMS OF THE PRESENT LAW

3.14 The first and principal criticism of the present law is that there is uncertainty as to the basic choice of law rules in matters of

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216 Lendrum v. Chakravarti 1929 S.L.T. 96, 103. The Marriage (Scotland) Act 1977 contains provisions which are in accordance with, and reinforce, this rule: see ss.1 and 2.

217 See 1971 Act, s.7; and para. 3.9 above.

218 In either case, the court could apply the common law rule and hold the subsequent marriage to be void (Rojas, Petr., 1967 S.L.T. (Sh. Ct.) 24; R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias [1968] 2 Q.B. 956) or s.7 of the 1971 Act by analogy in which case the subsequent marriage would be regarded as valid; and see para. 3.9 above.

219 See MacDougall v. Chitnavis 1937 S.C. 390 (Scottish courts will not recognise incapacities based on religion).

capacity to marry.[220] It has not yet finally been resolved whether the test for determining the applicable law is the dual domicile test or the intended matrimonial home test;[221] and there is some uncertainty as to whether, in addition to having capacity by the law of the domicile, the parties must also have capacity by the law of the country of celebration.[222] In Scotland, the precise status of (what may conveniently be called) the rule in Sottomayer v. De Barros (No. 2) is a matter of some doubt.[223] Such uncertainty is particularly undesirable in a field where certainty and predictability are of vital importance; "not least in matters relating to marriage is it incumbent on the law to speak with a clear, consistent and unequivocal voice".[224]

3.15 Both the main choice of law rules have been subject to criticism. The dual domicile test has been criticised on the ground that it leans too heavily in favour of invalidity,[225] while the intended matrimonial home test is open to the objection that it would create uncertainty as to status.[226]

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220 The uncertain and confused state of the authorities is even more pronounced in relation to the issue of physical incapacity. The choice of law rules on this question are considered in Part V below.

221 Paras. 3.4 and 3.13 above.

222 Paras. 3.7, 3.8 and 3.13(b) above.

223 Anton, op. cit., p. 281; Clive, op. cit., pp. 153-154; and see n. 215 above.

224 Lepre v. Lepre [1965] P. 52, 64 per Sir Jocelyn Simon P.; see also Estin v. Estin (1947) 334 U.S. 541, 553 per Jackson J.: "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."

225 Hartley, (1972) 35 M.L.R. 571, 578. Thus, whenever the domiciliary laws of the parties differ as to the validity of a marriage (celebrated abroad) on a matter of capacity, the law less favourable to the marriage prevails.

226 The merits and demerits of the two tests are considered more fully in paras. 3.34-3.36 below.

3.16 The present law is also open to a number of other criticisms. On the assumption that Radwan v. Radwan (No. 2)[227] was correctly decided, the question of capacity to enter into a polygamous marriage is governed by the law of the parties' intended matrimonial home. However, other issues of capacity, such as consanguinity, affinity and bigamy, are, on the basis of the existing authorities, governed by the dual domicile test.[228] Thus, if Mrs Radwan had been the niece of Mr Radwan the marriage would have been held to be void. A woman's capacity to marry her uncle raises the same sort of issues as her capacity to marry a man who is already married, and it is difficult to see what social or policy factors there are for applying different choice of law rules in these two situations.

3.17 The rule in Sottomayer v. De Barros (No. 2)[229] has been judicially described as "anomalous"[230] and has been criticised by academic commentators,[231] most notably by Falconbridge, who stigmatised it as being "unworthy of a place in a respectable system of the conflict of laws".[232] The rule seems hard to justify in principle since

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227 [1973] Fam. 35; and see para. 3.4 and n. 177 above.

228 See para. 3.4 above. In Radwan v. Radwan (No. 2) [1973] Fam. 35, Cumming-Bruce J. expressly confined his decision to capacity to contract a polygamous marriage (see n. 178 above) and indicated that differing policy factors may point to differing choice of law rules for differing types of incapacity.

229 See paras. 3.6 and 3.13(a) above.

230 Radwan v. Radwan (No. 2) [1973] Fam. 35, 50 per Cumming-Bruce J. In Lendrum v. Chakravarti 1929 S.L.T. 96, 102-103, Lord Mackay declined to follow the rule; and in Miller v. Teale (1954) 92 C.L.R. 406, 414 the High Court of Australia referred to the "dubious guidance" to be derived from the Sottomayer decision.

231 See, e.g., Dicey and Morris op. cit., p. 302; Cheshire and North, op. cit., p. 342; Anton, op. cit., p. 281; and Clive op. cit., p. 153. However, the rule has the merit that it upholds the validity of a marriage in the country of the forum: see para. 3.46 below.

232 Essays on the Conflict of Laws, 2nd ed., (1954) p. 711.

it shows a unilateral preference for the English (or Scots) law of the forum. Thus, English (or Scots) law prevails when it is both the law of the place of celebration and the law of the domicile of one of the parties, but no corresponding preference is shown where the marriage is celebrated abroad. In practical terms, the major defect of the rule is that it gives rise to limping marriages, valid under the (English) law of the domicile of one of the parties but void under the (foreign) law of the domicile of the other. The illogical nature of the rule and the complexity in the structure of the choice of law rules which it produces may be illustrated as follows. Where the marriage is celebrated in England and neither party is domiciled here, the law applicable to questions of capacity is the law of the domicile. Thus, if one (or both) of the parties is domiciled in a country where first cousin marriages are prohibited, the marriage will be void, even though such incapacity does not exist under English law.[233] If, however, one party is domiciled in England and the marriage takes place here, the issue of capacity will be governed by English law. Thus, in the example given above, the marriage will be valid, even though it is void under the foreign domiciliary law of the other party.[234] Further, if the marriage takes place abroad, its essential validity will be determined by the parties' domiciliary laws. Thus, English law will not recognise the validity of a marriage between an English domiciliary and a person domiciled in the foreign country of celebration if the former lacks capacity by English law, even though that incapacity is not recognised by the law of the country of celebration.[235]

C. POLICY OPTIONS FOR REFORM

3.18 The criticism of the domicile rule referred to in paragraph 3.15 above raises the question whether domicile is an appropriate connecting factor for determining the personal law of the parties. Is some other link, such as nationality or habitual residence, more

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233 Sottomayor v. De Barros (1877) 3 P.D. 1 (C.A.).

234 Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94.

235 Re Paine [1940] Ch. 46.

appropriate? More fundamentally, the question arises whether the parties' personal law (however defined) should be discarded altogether as the applicable law in matters of capacity and replaced by the law of the forum, or the law of the country with which the marriage has the most real and substantial connection, or the law of the country of celebration. These questions will be considered below in the light of the various policy objectives for choice of law rules which we have outlined at paragraph 2.35 above.

Law of the forum

3.19 The law of the forum, i.e., the lex fori, cannot, in our view, be regarded as a realistic option as the basic choice of law rule in matters of capacity. To adopt such a rule would mean sacrificing the advantages of certainty, predictability and uniformity of result, values which are of particular importance in the field of marriage. The law of the forum cannot operate in the prospective situation, where the question is "what rules must we satisfy in order to enter into a valid marriage?" because the parties cannot predict what is to be the future forum with whose law they must comply. And it does not provide an answer in the retrospective situation unless the parties choose (or are forced) to litigate. Further, the law of the forum as the basic choice of law rule would promote limping marriages, i.e., marriages regarded as valid in one country but not in another; and it would provide an encouragement to forum-shopping, i.e., the deliberate choice of a forum in order to attract the application of a system of law favourable to the petitioner's[236] claim. "[I]t would be unfortunate indeed if a marriage were to be held valid or

236 In this paper the terms 'petitioner' and 'respondent' are used for convenience, although in Scotland the appropriate terms would be 'pursuer' and 'defender'.

invalid according to which country's courts adjudicated on the issue ... it is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistently decided ... and that consistency cannot be attained if the test is lex fori".[237]

Real and substantial connection

3.20 On this test, the essential validity of a marriage would be governed by the law of the country with which the marriage has the most "real and substantial" connection.[238] On the analogy of the common law test for divorce recognition introduced in Indyka v. Indyka,[239] the court would be free to examine a wide variety of factors such as the parties' domicile, residence and nationality, either alone or in conjunction with others. We do not recommend the adoption of this test.[240] It is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e., a yardstick for future planning.

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237 Ponticelli v. Ponticelli [1958] P. 204, 215-216 per Sachs J. The law of the forum, of course, has an important role to play in refusing recognition, on the grounds of public policy, to a capacity conferred by, or on an incapacity imposed by, the applicable law: see paras. 3.10-3.11 above.

238 See Vervaeke v. Smith [1983] 1 A.C. 145, 166 per Lord Simon of Glaisdale; Lawrence v. Lawrence [1985] 2 W.L.R. 86 (Lincoln J.); and n. 179 above.

239 [1969] 1 A.C. 33.

240 The 'real and substantial' connection test for the recognition of foreign divorces has been abolished by the Recognition of Divorces and Legal Separations Act 1971. The two Law Commissions in their recent Report on Recognition of Foreign Nullity Decrees and Related Matters: Law Com. No. 137; Scot. Law Com. No. 88 (1984) have recommended that this test should also be abolished for foreign nullity recognition purposes.

Law of the country of celebration

3.21 Originally, both in England and in Scotland, no distinction was drawn between formality and capacity; the validity of a marriage in all its aspects was governed by the law of the country of celebration (lex loci celebrationis).[241] The lex loci rule still prevails as the basic rule for determining the formal and essential validity of a marriage in the United States of America, in most countries of Latin America and in some other countries including Denmark and South Africa.[242]

3.22 The main advantages of the lex loci rule are as follows:

(a) It provides a clear, certain and simple solution, which would work easily in practice.[243] It would be convenient for the parties since they can have recourse to the law of the place where they are at the time of the ceremony and easily seek, and rely upon, local legal advice; for legal advisers who can advise with certainty on the law with which they are most familiar; for marriage officials who will be relieved of the burden of examining foreign laws to see if parties have capacity;

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241 See para. 3.2 above.

242 Rabel, The Conflict of Laws: A Comparative Study, 2nd ed., (1958) vol. 1, p. 264; Palsson, Marriage in Comparative Conflict of Laws, (1981) p. 4.

243 The country of celebration is usually easily ascertainable. In the case of a proxy marriage, it has been held that the country of celebration is the country where the proxy takes part in the ceremony, and not the country where he was appointed: Apt v. Apt [1948] P. 83. However, the identification of the locus may present difficulties where a marriage is contracted by an exchange of promises between persons who are in different countries at the time: see Dicey and Morris, op. cit., p. 265; and para. 2.38 above.

and for the courts since only one law[244] will need to be considered; and this would also have the important result of reducing the cost of litigation. Any problem of characterisation[245] which may now arise because formal and essential validity are governed by different choice of law rules would disappear; and so would the problem of identifying the applicable law where two separate personal laws are involved. All these factors contribute to a rule which would be certain in its operation and predictable in its results.

(b) The rule would promote the policy of upholding the validity of marriages.[246]

3.23 However, although it may be conceded that the law of the country of celebration may have some role to play in matters of capacity,[247] it is suggested that we ought not to turn the forensic clock back some 120 years and revert to the lex loci as the basic applicable law for issues of capacity. The main objections to the lex loci rule are as

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244 At present three laws may need to be proved and considered where a marriage has been celebrated abroad; i.e. the separate laws of the parties' ante-nuptial domiciles (under the dual domicile test) and, possibly, the law of the place of celebration.

245 See paras. 2.5-2.6 above and paras. 4.2-4.6 below.

246 Marriages which do not comply with the law of the country of celebration will not usually be permitted (by the local authorities) to take place.

247 See paras. 3.7, 3.8 and 3.13(b) above; and paras. 3.40-3.44 below.

follows:

(a) The most serious objection to such a rule is that it would enable the parties to evade the restrictions imposed on them by their personal law,[248] i.e., the law of the country to which they "belong" and which has a more enduring concern with their marital status than the country of celebration, which may have a fortuitous or transient connection with the issue: the parties may never before have visited that country and may never again visit it.

(b) The distinction between form and capacity is right in principle. Even though the distinction may give rise to problems, for example, of characterisation, it seeks to accommodate the proper interests of the legal systems concerned with the marriage - the law of the country of celebration in relation to formalities, and the personal law in matters of essential validity.

(c) In most countries, including almost all countries in the Commonwealth and Western Europe, the essential validity of a marriage is governed by the parties' personal law(s). In general this distinction between formal and essential validity works satisfactorily in practice; to abandon it and adopt the lex loci rule would result in more limping marriages.

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248 The main policy consideration underlying the present division between formal and essential validity is that of preventing the evasion of the essential requirements of the domiciliary law. "It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.": Brook v. Brook (1861) 9 H.L.C. 193, 212 per Lord Campbell, L.C.

(d) If the lex loci rule were to be adopted in this country it would clearly be necessary to devise exceptions to deal with the problem of evasion.[249] The public policy safeguard, which is at present invoked only in exceptional circumstances, would have to be given a much wider scope, thereby largely depriving the rule of its advantages of certainty and predictability.

Our provisional recommendation is that the personal law of the parties should continue to govern their capacity to marry.

The personal law

3.24 If, as we propose, the personal law of the parties should govern their capacity to marry, the question arises as to what connecting factor should be adopted for identifying that law. The obvious contenders are domicile, nationality and habitual residence. It is convenient to deal first with nationality.

(i) Nationality

3.25 Nationality is widely adopted in many civil law countries, including almost all Western European countries, as the appropriate test for determining the personal law; and in those countries if fulfils the role assigned to domicile in common law countries of determining the legal system with which the parties are most closely connected. As a

249 In the U.S.A., e.g., the Uniform Marriage Evasion Act 1912, which was adopted in 5 States, provided that a marriage valid by the law of the place of celebration would not be recognised as valid if void by the law of the domicile, particularly if there was an intent to avoid that law. This Act was withdrawn in 1943. However, in most U.S. States the basic lex loci rule is subject to exceptions in favour of the law of the domicile; the latter law can render invalid a marriage valid by the law of the country of celebration. Under the First American Restatement, (s. 132) the role of the law of the domicile was limited to major public policy matters - polygamy, incest, miscegenation and marriages rendered void by statute in the domicile though celebrated elsewhere. The lex loci rule has been subjected to increasing criticism in the U.S.A.. The new American approach to choice of law rules has been considered at paras. 2.31-2.34 above.

connecting factor, nationality has a number of advantages over domicile. It is usually more easily ascertainable than domicile because a change of nationality involves a public act; and it is a matter which can be readily proved by the production of documentary evidence, usually and conveniently a passport. Further, the average layman is likely to be more familiar with the concept of nationality than with the notion of domicile; and it is arguable that nationality represents a more stable and enduring link than domicile in that it is more difficult to change one's nationality than one's domicile.

3.26 However, from a United Kingdom viewpoint, the disadvantages of nationality are such as to make it unsuitable[250] as the applicable law in matters of capacity:

(a) From a practical viewpoint, the most serious objection to nationality is that it would not connect a person with any particular law district (England and Wales, Scotland and Northern Ireland) in the United Kingdom.[251] Further, a person may have more than one nationality or he may be stateless.[252]

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250 Nationality as a basis of jurisdiction in divorce and nullity proceedings has been rejected by both the Law Commission and the Scottish Law Commission: see Report on Jurisdiction in Matrimonial Causes, Law Com. No. 48 (1972) and Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status, Scot. Law Com. No. 25 (1972).

251 A further objection, which may no longer be valid, was that by virtue of the British Nationality Act 1948 a large number of people were citizens of the United Kingdom and Colonies who had no real and substantial connection with the United Kingdom. The British Nationality Act 1981 has introduced a fundamental change in the concept of British nationality, by replacing citizenship of the United Kingdom and Colonies by 3 separate citizenships, i.e. (a) British citizenship (b) British Dependent Territories citizenship and (c) British Overseas citizenship. If nationality were to be adopted as a connecting factor, it would presumably be used in the narrow sense of (a).

252 Various tests could be devised to deal with this problem and with the problem of identifying a particular law district within the United Kingdom, but this would make the test a complex one.

(b) Although nationality may be a more stable connecting factor than domicile, it is in principle the wrong sort of link. "The principle of nationality achieves stability, but by the sacrifice of a man's personal freedom to adopt the legal system of his own choice. The fundamental objection to the concept of nationality is that it 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."[253]

(c) Nationality, as a connecting factor, does not necessarily point to a law with which a person has subsisting practical, as opposed to legal, connections.[254] For example, an immigrant may retain his nationality even though he has severed all practical links with the state of his nationality.

(ii) Domicile

3.27 There remain domicile and habitual residence. The basic idea of domicile is that it denotes the country in which a person has his permanent home and with which therefore he has the closest ties as a matter of choice.[255] In so far as it achieves this objective, there is much to be said for referring the question of essential validity to a person's domiciliary law, which has a direct and enduring interest in the person's marital status and which is traditionally the law which determines all other aspects of a person's status, such as his legitimacy or

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253 Anton, Private International Law (1967) p. 160. In our consultation paper on The Law of Domicile (1985) Working Paper No. 88; Consultative Memorandum No. 63, para. 2.8, we also reached the conclusion that domicile is a more appropriate concept than nationality for determining what system of law should govern a person's civil status.

254 But it must be conceded that domicile, in its present unreformed state, is equally open to the same sort of objection: see para. 3.28 below.

255 See para. 3.26(b) above.

legitimation or whether he has been validly adopted abroad. Domicile has other advantages. It accommodates the interest of the home state in the status of a person who "belongs" there, as well as the interest of a person in having his status regulated by the law of the state of his permanent home when he marries abroad. Domicile has long been accepted as the appropriate personal law in other common law countries, including (with one exception)[256] all the Commonwealth countries. As a connecting factor it has the practical advantage that no person can be without a domicile and no-one can have more than one domicile at the same time for any one purpose.

3.28 However, the concept of domicile, as developed by case law in the United Kingdom, has become overloaded with technical and complex rules: it has attracted increasing criticism.[257] The main defects[258] of

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256 Nauru has, in effect, replaced the concept of domicile by that of habitual residence: The Conflict of Laws Act 1974, s. 3. The Irish Law Reform Commission have recently recommended that domicile should be replaced as a connecting factor by habitual residence: Report on Domicile and Habitual Residence as connecting factors in the Conflict of Laws, LRC-7 (1983).

257 See, e.g., R. v. Barnet L.B.C. ex p. Shah [1983] 2 A.C. 309, 345 where Lord Scarman referred to "[t]he long and notorious existence of this difficult concept in our law, dependent upon a refined, subtle, and frequently very expensive judicial investigation of the devious twists and turns of the mind of man ...". There has also been judicial and academic criticism of the law of domicile in Scotland. "It is no great exaggeration to say, as did Lord Cooper [in Prawdzic-Lazarska v. Prawdzic-Lazarski 1954 S.C. 98, 101] that 'the classic doctrines of domicile and change of domicile elaborated against the static background of the mid-nineteenth century, have come to wear an aspect of painful unreality.' " Anton, op. cit., p. 181. Dissatisfaction with the law of domicile has also manifested itself in the Law Commission's consultations on family law matters, most recently in the comments received on the Law Commissions' working paper on Polygamous Marriages (1982) Working Paper No. 83; Consultative Memorandum No. 56. The two Law Commissions have recently published a consultation paper on the Law of Domicile (1985) Working Paper No. 88; Consultative Memorandum No. 63.

258 See First Report of the Private International Law Committee, Cmd. 9058 (1954); Law Commissions' consultation paper on The Law of Domicile, op. cit., para. 1.6.

the law of domicile are: (a) the excessive importance given to the domicile of origin, in particular the rule in Udny v. Udny[259] that the domicile of origin revives when a domicile of choice is abandoned without the acquisition of a new one, and the heavy burden of proof resting on those who assert that a domicile of origin has been changed; and (b) the difficulties involved in proof of intention to change a domicile. The effect of the latter defect is that a person's domicile is not easily ascertainable and therefore it does not always provide a satisfactory test in the prospective situation (where the question is whether a proposed marriage should be allowed to take place); and in the retrospective situation (where the question is whether a marriage which has taken place is valid) proof of a person's domicile can be a protracted and expensive business. The effect of the first defect is that a person may be held to be domiciled in a country even though, realistically, he has closer ties with another country; indeed a person may (because of the Udny rule) be domiciled in a country which he has never visited and with which he has no current connection.

(iii) *Habitual residence*

3.29 The disadvantages of domicile (in its present unreformed state) as a connecting factor have led to the emergence of habitual *residence as a major connecting factor*[260] *in the field of family law.*[261]

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259 (1869) L.R. 1 Sc. & Div. 441.

260 Another contributory factor has been its adoption in conventions of the Hague Conference on Private International Law. "The concept was given international currency when it was found impossible to reach agreement on a common definition of domicile. [In the Hague Convention on Recognition of Divorces and Legal Separations] it was intended to substitute for domicile, overloaded with legal technicalities in many systems, a concept focussing attention simply on the nature of the residence.": Law Commission Report on Hague Convention on Recognition of Divorces and Legal Separations, Law Com. No. 34; Scot. Law Com. No. 16 (1970) para. 9.

261 See, e.g. Recognition of Divorces and Legal Separations Act 1971, s.3; Domicile and Matrimonial Proceedings Act 1973, ss.5, 8; and Children Act 1975, s.24.

Habitual residence is "clearly distinguishable from domicile, a necessary element of which is a particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence ... . To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence."[262] So far as judicial interpretation of the term is concerned, Lane J. in Cruse v. Chittum[263] held that "habitual residence" indicated the quality of the residence rather than its duration; that an element of intention to reside in the country in question was required;[264] that "habitually" denoted a regular physical presence which had to endure for some time; and that habitual residence was equivalent to the residence necessary to establish

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262 Report on Jurisdiction in Matrimonial Causes (Law Com. No. 48 (1972) para. 42). Academic commentators have described 'habitual residence' as meaning much "the same thing as domicile, minus the artificial elements in that concept (e.g. the revival of the domicile of origin) and minus the stress now placed on the element of intention in domicile.": Morris, Conflict of Laws, 3rd ed. (1984) p. 35; see also Juenger, 20 Am. Jo. Comp. Law (1972) 1, 31, ("domicile minus esoterics"); de Winter, (1969) 128 Hague Recueil 345, 431 ("social domicile").

263 [1974] 2 All E.R. 940, 942-943 (construing the Recognition of Divorces and Legal Separations Act 1971, s.3(1)(a)).

264 This, however, seems a doubtful proposition. The test of habitual residence has to be capable of being applied to babies who have no capacity to form an intention to reside in a country. See, e.g., Children Act 1975, s.24(2)(b) (Adoption Act 1976 s.17(2)(b)). It may also have to be applied to mentally ill people who lack the capacity to form an intention to reside in a country. It may be thought that a person who had never had this capacity but who had lived in the same country all his life could be held to have been habitually resident there. A later dictum in Cruse v. Chittum [1974] 2 All E.R. 940, 943 to the effect that habitual residence does not contain the element of intention required for domicile would tend to support the view that an infant or mentally ill person could be held to be habitually resident in a country though lacking the capacity to form an intention to reside there.

domicile[265] without the element of intention required for the purpose of domicile. And in a subsequent case,[266] French J. said that "habitual" indicates a settled practice.

3.30 The following advantages may be claimed for habitual residence as a connecting factor in the present context:

(a) It points to a legal system with which a person has close and practical subsisting connections.

(b) A habitual residence test would be relatively easy to apply since a person's habitual residence is a question of fact rather than of law;[267] it is not subject to the stringent requirement of intention necessary for acquisition of a domicile and is therefore not subject to the same difficulties of proof. Habitual residence has been used as a test of recognition of foreign divorces

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265 It is doubtful whether this can be taken at face value. A person may (if he has the necessary intention) acquire a domicile in a country as soon as he sets foot there; something more than physical presence must surely be necessary before he can be said to be habitually resident. Lane J. in Cruse v. Chittum [1974] 2 All E.R. 940, 943 also stated that to be "habitual" the residence should not be of a temporary or secondary nature. Again, it is not clear what is meant by this. If, say, a person goes to New York on a 3 year contract and stays there for that period before returning to England, his residence in New York for those 3 years may be thought to be 'habitual', even though he is there for a temporary period. Other dicta in this case would seem to support this interpretation.

266 Oundjian v. Oundjian (1980) 1 F.L.R. 198; (1980) 10 Fam. Law 90. French J. held that a wife was "habitually resident in England and Wales throughout the period of one year" ending with the date of the divorce proceedings, as required by the Domicile and Matrimonial Proceedings Act 1973, s.5(2)(b), even though she had spent 149 days of the required 365 days abroad. In rejecting a contention that habitual residence meant continual presence minus de minimis absences, the judge had regard to the Oxford English Dictionary's definition of 'habitual' as 'in the way of habit or settled practice, constantly, usually, customarily'.

267 It is not subject to the legal artificialities of domicile, such as domicile of dependency or the Udny rule about revival of domicile of origin.

since 1971 and as a test for jurisdiction in divorce and nullity proceedings since 1973. There is nothing to suggest that this test gives rise to serious difficulties in practice.

(c) Habitual residence is an internationally accepted connecting factor and therefore is a criterion which would be readily recognised abroad.

(d) The concept is one which the average layman can be expected readily to understand.

3.31 However, habitual residence as a connecting factor has a number of disadvantages:

(a) Habitual residence does not represent such a strong connection between a person and a country as would always justify a person's civil status being determined according to the law of that country.[268]

(b) There is uncertainty as to what precisely is meant by "habitual residence". There is no authoritative definition of the term; such decisions as there are on the issue provide little clear guidance. In the absence of such guidance, a habitual residence test might be difficult to apply in the prospective situation, although it must be admitted that in practice it would probably be no more difficult to apply than domicile. A temporal qualification would introduce some degree of certainty, but it would not as such provide assistance to the parties

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268 See our consultation paper on The Law of Domicile (1985) Law Com. No. 88; Consultative Memorandum No. 63, para. 2.3. Our provisional conclusion in that paper is that it would be undesirable to abolish or discontinue the use of domicile as a connecting factor and replace it generally with habitual residence (or nationality): ibid., para. 2.9.

and marriage officials in determining whether residence for, say, one year was "habitual".[269] Further, a temporal qualification would create problems. A period of one year would (arguably) not be long enough to ensure the existence of substantial ties with the country of residence; and a longer period would increase the prospect of a person not being habitually resident in any country for the specified period. The requirement, therefore, of a fixed period of habitual residence would in many cases provide an arbitrary test.

(c) It is arguable that a person may be habitually resident in more than one country or in none.[270] In these circumstances, the test of habitual residence would be unworkable.

(d) A habitual residence test would enable a person to evade the rules as to capacity imposed by the domestic law of his or her domicile, the law of the country with which, in the normal case, he has more permanent ties and which has a greater concern with his status than the country where he may be habitually resident for a short period.

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269 'Habitual' refers to the quality of residence rather than to the period of residence: Cruse v. Chittum (see para. 3.29 above). The Irish Law Reform Commission have recently recommended that domicile should be replaced by habitual residence as a connecting factor and have proposed a set of guidelines and presumptions as to the meaning of habitual residence: see n. 256 above. But there is a risk that an attempt at a statutory definition could lead to the development of technical rules.

270 E.g., a person who led a nomadic life: see Hack v. Hack (1976) 6 Fam. Law 177. This sort of problem cannot arise under the domicile test; see para. 3.27 above.

Finally, it may be noted that, with one exception,[271] "no legal system has taken up this ... criterion [of habitual residence] as the law applicable to substantive requirements of marriage ...".[272]

The appropriate governing law: law of the domicile

3.32 For the foregoing reasons, it is suggested that habitual residence is an unsuitable connecting factor in the present context. In principle, the law of the domicile, the law of the country in which a person has his "permanent home",[273] has a stronger claim to govern the essential validity of a marriage; but, as has already been noted, domicile as a connecting factor is open to a number of serious objections: it does not always indicate the country to which a person truly "belongs" and there is the uncertainty which stems from the emphasis on intention and from the complexity of the legal rules. If, however, the law were reformed to get rid of these defects, domicile would (we suggest) be the most appropriate test for determining the personal law. The two Law Commissions have recently put forward proposals for rationalising and simplifying the law of domicile[274] and, on this basis, our provisional conclusion is that, in general, capacity to marry should continue to be governed by the law of the domicile.

The test for determining the law of the domicile

3.33 If a reformed law of domicile is to be the applicable law for matters of essential validity, what test should be applied for determining that law?[275] The parties may have different domiciles at the time of

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271 Nauru; see n. 256 above.

272 Dyer, Report on the Conflict of Laws in Respect of Marriage and Recognition Abroad of Decisions in respect of the Existence or Validity of Marriages (July 1974; Hague Conference Actes et Documents, Vol. III on Marriage, p. 30).

273 Para. 3.27 above.

274 Working Paper No. 88; Consultative Memorandum No. 63 (1985).

275 The same sort of issue would need consideration if habitual residence is chosen as the appropriate connecting factor.

the ceremony or they may be domiciled in the same country but intend to acquire a fresh domicile in another country immediately afterwards. The two main theories on this question - the dual domicile and intended matrimonial home theories - have already been noted;[276] and their respective merits and demerits have been much debated by academic commentators.[277]

(i) Intended matrimonial home test

3.34 The following arguments may be advanced in favour of this test:

(a) As a matter of social reality, the status of marriage pre-eminently affects the community of the country where the parties live together as husband and wife; and therefore the validity of the marriage should depend on the law of that country rather than that of the country which they have left for good. It seems socially undesirable, for example, that a marriage which is not regarded as detrimental to the community to which the parties belong after the marriage should be pronounced void, merely because one or other or both of the parties were formerly connected with a country in which a different view prevails.[278]

(b) The objective of giving effect to the reasonable expectations of the parties and the policy of upholding the validity of marriages may be better achieved by this

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276 See para. 3.3 above.

277 See, e.g. Dicey and Morris, op. cit., pp. 287-288; Cheshire and North, op. cit., pp. 332-335; Jaffey, (1978) 41 M.L.R. 38; Stone, (1983) Fam. Law 76, 78-80.

278 See Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para. 889.

test than by the dual domicile test. In Radwan v. Radwan (No. 2),[279] for example, the intended matrimonial home test enabled the court to uphold the validity of a marriage after the parties had lived together as man and wife for nearly 20 years and had had 8 children. To invalidate the marriage (by applying the dual domicile test) in these circumstances might be thought to be unjust. English law (the law of Mrs Radwan's pre-marital domicile) has (arguably) no sufficient interest in invalidating a polygamous marriage contracted abroad by an English domiciliary if the parties establish their matrimonial home in a country where the marriage is regarded as valid. So also with prohibited degrees of relationship: the public interest protected by the law of the country of the ante-nuptial domicile will (arguably) be damaged only if the parties establish their matrimonial home there after the marriage; an English domiciliary who marries her Egyptian uncle abroad and goes to live with him in Egypt cannot, it may be thought, be said to offend English interests in public morality or eugenics. It has been said that to apply the English domestic rule in such cases would nullify marriages quite unnecessarily.[280]

(c) The intended matrimonial home test ensures that only one law governs the question of capacity to marry.

3.35 However, the arguments against adopting[281] the intended

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279 [1973] Fam. 35.

280 Jaffey, (1978) 41 M.L.R. 38; and (1982) 2 Oxford Journal of Legal Studies, p. 368.

281 Or, if Radwan No. 2 is correct, extending this test to other issues of capacity.

matrimonial home test appear to us to be more cogent and are as follows:

(a) The test has serious practical disadvantages. It would be virtually unworkable in the prospective situation;[282] and it would create uncertainty as to status. In effect, it would be almost impossible to predicate at the time of the marriage whether it is valid or void. The parties may have no firm intention as to their future matrimonial home, or they may implement their intention after a considerable period of time, or they may for whatever reason not implement their intention at all; and, indeed, albeit rarely, as in Vervaeke v. Smith,[283] no matrimonial home or cohabitation at all may be proposed. "Very serious practical difficulties are likely to arise if the validity of a marriage has to remain in suspense while we wait and see (for an unspecified period) whether or not the parties implement their (unexpressed) ante-nuptial intention to acquire another domicile. This is especially true if interests in property depend on the validity of a marriage, as, for instance where a widow's pension ceases on her remarriage."[284]

(b) The presumption in favour of the husband's domiciliary law[285] is in principle unjustifiable, now that a wife can acquire a separate domicile. Such a presumption

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282 I.e., where the question is whether a marriage should be allowed to take place. How would marriage officials, e.g., be able to test the parties' intentions?

283 [1983] 1 A.C. 145, 166.

284 Morris, op. cit., p. 160.

285 See para. 3.3 above.

is contrary to current ideas of equality between the sexes[286] and it can lead to arbitrary results. If, for example, the parties unreasonably delay in implementing their intention or do not implement it at all, the law of the husband's domicile will govern, even if the parties have never visited that country as man and wife and even if the matrimonial home is eventually established in the country of the wife's domicile.

(c) In principle, the post-nuptial intentions of the parties to a marriage should be irrelevant to the question of their legal capacity to enter into it.[287]

(d) The intended matrimonial home test opens the door to evasion of the capacity rules of the law of the country in which the parties are domiciled at the time of the marriage and which therefore has a legitimate concern in their status and in the application of its rules as to capacity. For instance, one purpose of rules as to the minimum age of marriage is to protect a minor from the consequences of his or her own immaturity. This purpose will be defeated if the marriage of a girl under age by her domiciliary law were to be held valid, and this

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286 It has been said that the presumption is "in fact, a fairly transparent attempt to subject the wife, in respect of her capacity to marry, to the law of her husband's domicile, and thus to extend back to a time before the marriage a wife's subjection to that law.": Stone, Family Law, (1977) p. 52. But it may be said that it is perhaps more likely that the parties will settle in the country of the husband's domicile.

287 Anton, op. cit., p. 278, and see Cooper v. Cooper (1888) 13 App. Cas. 88, 108 per Lord Macnaghten; Muhammad v. Suna 1956 S.C. 366, 370 per Lord Walker and Ali v. Ali [1968] P. 564, 578 where Cumming-Bruce J. said that "it is clear that personal intention is irrelevant to the legal consequences of a validly celebrated marriage ...".

is so even though the minor settles abroad.[288] So far as English and Scots law is concerned it would appear that the domestic policy is that rules as to minimum age apply to persons domiciled in England and Scotland (as the case may be) irrespective of whether the marriage takes place abroad or whether they intend to settle in another country.[289]

(e) The test would not necessarily give effect to the reasonable expectations of the parties and would operate harshly in cases where a marriage is valid by the law of the domicile of both parties at the time of marriage but invalid by the law of their intended matrimonial home. The parties' expectations that their marriage (unobjectionable by the mores of the community to which they belong at the time) will be valid should be upheld.

(ii) Dual domicile test

3.36 Some of the arguments for and against the dual domicile test will have emerged from the discussion of the merits and demerits of the intended matrimonial home test.[290] The main advantages of the dual

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288 This is conceded by Cheshire and North op. cit., pp. 334-335 and by Jaffey (1978) 41 M.L.R. 38. Jaffey proposes that the dual domicile test should apply where the issue is non-age. As regards polygamy and prohibited degrees of relationship, he suggests that a marriage should be void only if it is void by either party's domiciliary law at the date of the marriage and by the law of the country in which they establish a matrimonial home within a reasonable period of time after the marriage.

289 Pugh v. Pugh [1951] P. 482 (Age of Marriage Act 1949); Marriage (Scotland) Act 1977, s.1(1): "No person domiciled in Scotland may marry before he attains the age of 16".

290 See paras. 3.34-3.35 above.

domicile test may be summarised as follows:

(a) The main rationale of the dual domicile rule is that a person's status is a matter of public concern to the country to which he belongs at the time of marriage; and therefore the domiciliary law of each party has an equal right to be heard. The issue of whether a valid marriage has been or may be contracted should, in principle and in logic, depend on the conditions existing at the time of marriage rather than subsequently.

(b) The test is relatively easy to apply in the prospective situation and enables the parties' marital status to be ascertained with certainty at the time of the marriage.

(c) The test would make it difficult for parties to evade the restrictions imposed by their ante-nuptial domiciliary law.[291]

On the other hand the main disadvantage of the dual domicile test, it has been said,[292] is that it leans too heavily in favour of the invalidity of a marriage. On balance, however, our provisional view is that this test is preferable to the intended matrimonial home test and that it should be adopted as the test for all issues of legal capacity.[293]

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291 This indeed was the main reason why the domicile test was adopted in the first place: see Brook v. Brook (1861) 9 H.L.C. 193; n. 248 above.

292 Hartley, (1972) 35 M.L.R. 571; in effect, the law least favourable to validity is applied.

293 In Radwan v. Radwan (No. 2) [1973] Fam. 35, 51, Cumming-Bruce J. indicated that differing policy factors may point to differing choice of law rules for differing issues of capacity. We doubt, however, whether there are any strong policy reasons for applying different choice of law rules to the various issues of capacity: see para. 3.16 above.

(iii) An alternative reference test

3.37 Another solution, which has been put forward,[294] is a rule of alternative reference for the purpose of validating a marriage: the marriage should be held valid if it is valid under either the dual domicile test or the intended matrimonial home test. Such a choice of law rule would, of course, result in more marriages being upheld as valid. But it would be open to most of the disadvantages to which the intended matrimonial home test is subject.[295] It would also mean that three different laws may have to be proved and applied.[296] Further, it would be wrong to elevate the general policy in favour of upholding the

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294 Jaffey, (1978) 41 M.L.R. 38. The Royal Commission on Marriage and Divorce (1956) Cmd. 9678, proposed, in effect, that a rule of alternative reference should apply but only in relation to marriages celebrated abroad: "where a marriage is alleged to be void on a ground other than that of lack of formalities, that issue should be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage should be declared void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland should not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out." (para. 891). This test would not create additional difficulties in the prospective situation for marriage officials here but it would (in addition to the other criticisms which may be made of an alternative reference test) be open to the objection that different choice of law rules would apply depending on whether the marriage took place in this country or abroad.

295 See para. 3.35 above.

296 Four, if the parties must also have capacity by the law of the country of celebration: see para. 3.43 below. The Royal Commission's test envisages that recourse should first be had to the dual domicile test; the law of the matrimonial home would only be relevant if the marriage was invalid under the dual domicile test. This would mean that one may have to go to the trouble of ascertaining the domiciles of the parties at the time of the marriage and investigating their domiciliary laws and then investigating another law and then end up with the result which was reached in the first place.

validity of marriages into a governing rule;[297] and it would be contrary to principle to adopt the dual domicile (or the intended matrimonial home) test and then to refuse to give effect to it if it results in the invalidity of the marriage. We do not recommend that a rule of alternative reference should be adopted in this country.

(iv) Validity by domiciliary law of either party

3.38 A further proposal which has been put forward[298] is that a marriage should be regarded as essentially valid if it is valid by the law of the domicile of either party at the time of marriage. The arguments in favour of this proposal are:

(a) It would protect the reasonable expectations of the parties and promote the policy in favour of validity of marriage.

(b) It would solve the problem raised by Sottomayer v. De Barros (No. 2)[299] without ignoring the policy consideration underlying that decision. One of the main criticisms[300] of this case is that the rule it lays down is unilateral in that it only applies in favour of the law of the forum. This objection would not apply to the proposed rule.

We do not favour this test. It is, in principle, open to the same sort of objections as the alternative reference test mentioned in paragraph 3.37 above. If it is accepted that a person's status is a matter of public concern to the country in which he or she is domiciled at the time of

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297 This policy is not that the validity of marriages should be upheld irrespective of other considerations but simply that marriages should not be invalidated without good reason. See para. 2.35(e) above.

298 Hartley, (1972) 35 M.L.R. 571, 576-578.

299 (1879) 5 P.D. 94; see para. 3.6 above and paras. 3.45-3.47 below.

300 See para. 3.17 above.

marriage, then the rules of that country which are designed to protect its public interest (such as rules laying down prohibited degrees of relationship or requiring monogamy) should be given effect. The proposed rule would enable a party to evade the requirements of his domiciliary law and would also lead to limping marriages.

Renvoi

3.39 At present, reference to the law of the domicile appears to include a reference to the whole of that law (including its choice of law rules) and not merely to its domestic rules.[301] The arguments for and against excluding renvoi in the present context are, in essence, the same as those in relation to the formal validity of a marriage;[302] and we think that the same solution should be adopted for both formal validity and essential validity. Accordingly, we provisionally recommend that the present rule should be retained.

Role of the law of the country of celebration

3.40 Should a marriage be held invalid on the sole ground that it does not comply with the rules as to essential validity of the law of the country of celebration (lex loci celebrationis)?[303] The situation envisaged here is that the parties have capacity under their respective ante-nuptial domiciliary laws but lack capacity under the law of the country of celebration.

3.41 The arguments for ignoring the law of the country of celebration in relation to matters of capacity are as follows:

(a) Since the rationale of the basic choice of law rule (law of the domicile) is that capacity to marry, like other

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301 R. v. Brentwood Superintendent Registrar of Marriages, ex p. Arias [1968] 2 Q.B. 956 (C.A.).

302 See para. 2.39 above.

303 For the present law on this point, see paras. 3.7-3.8 and 3.13(b) above.

aspects of status, should be governed by a person's personal law, it is difficult in principle to see why the law of the country of celebration should be relevant. "Since essential validity is not a matter of ensuring certainty or publicity but is concerned with upholding social policies and, in certain cases, protecting the interests of the parties, there is no policy justification for applying this [lex loci] rule which would create an additional obstacle to the validity of the marriage."[304]

(b) The application of the law of the country of celebration in this context, although justifiable at the prospective stage (where the question is whether a proposed marriage should be allowed to take place), is not appropriate in the retrospective situation (where the question is whether a marriage which has taken place is valid). Although marriage officials cannot be expected to allow a marriage to take place unless it complies with all the substantive requirements of the law of the country of celebration, it does not follow that a marriage which has in fact been celebrated, and which does not comply with the substantive requirements of that law, should be held void, particularly in another country.

3.42 There is, however, force in the view that the country of celebration has a legitimate interest in not allowing the use of its procedures for the contracting of marriages which it considers to be void. So far as marriages celebrated in any part of the United Kingdom are concerned, a rule that it is not necessary to comply with the local requirements as to essential validity would, we think, be unacceptable.

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304 Hartley, (1972) 35 M.L.R. 571, 576-577.

The requirements as to capacity have been reduced to a small number of rules which for the most part are rules of public policy.[305] It is reasonable that, if the parties (even if one or both are foreign domiciliaries) choose to use English or Scottish marriage procedures, they must comply with the substantive requirements of English or Scots law as the case may be,[306] and our courts can hardly be expected to uphold the validity of marriages which their own law does not countenance.[307] This is of some importance since the validity of a marriage can affect such matters as immigration, citizenship, income tax liability and social security benefits.

3.43 Should a different rule, i.e., ignoring the law of the country of celebration, apply to determine the validity here of marriages celebrated outside the jurisdiction?[308] Provisionally, we think not. Such a rule would mean that an English court could uphold the validity of a marriage celebrated in Scotland between two foreign domiciliaries, even if the mandatory requirements of Scots law as to age or prohibited degrees of relationship had not been satisfied.[309] One could avoid such a result by drawing a distinction between marriages celebrated in some other part of the United Kingdom, and marriages celebrated abroad; but it is suggested that such a distinction would have little to commend it on the

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305 The general public policy nature of our marriage laws was recently emphasised by the House of Lords in Vervaeke v. Smith [1983] 1 A.C. 145, esp. pp. 151-153 per Lord Hailsham of St. Marylebone, L.C.

306 Normally both the formal and substantive requirements for marriage under the law of a part of the United Kingdom must be fulfilled by persons who marry in that part. It is thought that legal process would not lie against a marriage official in the United Kingdom to compel him to perform a ceremony if one or both of the parties (wherever domiciled) lacked capacity under the local law.

307 The Marriage (Scotland) Act 1977, ss.1(2), 2(1)(a) expressly provides that a marriage celebrated in Scotland is void if the requirements as to age or consanguinity or affinity are not satisfied.

308 As suggested by Cheshire and North, op. cit., p. 343.

309 See n. 307 above.

ground of principle. Considerations of international comity indicate that we should recognise the legitimate interest of a foreign country in the application of its substantive rules to marriages celebrated within its borders, particularly if we ourselves claim such an interest when a marriage is celebrated in the United Kingdom. Further, a rule that the law of the foreign country of celebration need not be complied with would lead to a limping marriage, void in the country of celebration, valid in our own.

3.44 We would particularly welcome views on our provisional conclusion 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)[310] under an incapacity to marry the other.

Role of the law of the forum

(i) Marriages celebrated in the forum

3.45 Where a marriage is celebrated in the English or Scottish forum and the parties possess capacity under the law of the forum, i.e., lex fori, should incapacities imposed by the foreign domiciliary law of one party be disregarded? In other words, should the rule in Sottomayer v. De Barros (No. 2)[311] be retained?

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310 The arguments for including renvoi in the present context are essentially the same as those in relation to the formal validity of a marriage: see para. 2.39 above.

311 (1879) 5 P.D. 94. As has been noted at para. 3.6 above, the effect of this decision is that, if a marriage is celebrated in England between parties one of whom has an English and the other a foreign domicile, an incapacity imposed by the foreign law but not by English law must be totally disregarded. In other words, effect will not be given to the foreign domiciliary law unless English law also prohibits the marriage or unless the marriage is celebrated outside England.

3.46 This decision has met with almost unanimous disapproval, at least amongst academic commentators,[312] and the main criticisms of the rule have already been noted.[313] The rule is an illogical exception to the dual domicile rule, and it cannot be supported from the standpoint of principle. However, it is not without practical merit and it is suggested that the following considerations should be weighed in the balance:

(a) It might be thought unjust to, say, an English party (who marries in his own country, the marriage being valid by his own law) if his marriage was rendered invalid by the application of a foreign rule.[314] Although the public policy safeguard could (as applied at present by the courts in the United Kingdom) be invoked so as to disregard the grosser forms of foreign incapacity (for example, incapacity imposed on the foreign domiciliary prohibiting marriage outside his religion), it would not cover all forms of incapacity (for example, a reasonable age limit of over eighteen). Further, it is arguable that, if the Sottomayer rule were abolished, our courts would be tempted to invoke the public policy exception more readily to uphold the validity of marriages, and this might create uncertainty in the law.

(b) The Sottomayer rule has the merit of upholding the validity of a marriage in the country of the forum. True, it also produces a limping marriage, valid in the country of the forum and void in the country of the foreign domicile, but, arguably, in such cases the issue of the validity of the marriage is likely to arise at a time when the parties are domiciled or habitually resident here. If

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312 And some judicial criticism: see para. 3.17 and n. 230 above.

313 Para. 3.17 above.

314 See para. 3.6 above.

this is so, what may be thought to matter, in practice, is not international recognition of the marriage as such, but the recognition of the marriage in the country in which the parties are now domiciled.

(c) Although, in theory, the private international law of most countries requires the personal laws of each party to be satisfied, in practice "results [similar to that in the Sottomayer case] are often reached in other countries by one means or another, usually either by the aid of special conflicts rules for the annulment of marriage which set up an additional bar to invalidation, or by relying on the notion of permissive public policy".[315] This being so, we might as well (so the argument might go) adhere to a rule which is convenient to operate[316] and which protects the interests of the parties.[317]

(d) The rule is convenient for the parties, for marriage officials who are relieved of the burden of investigating

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315 Palsson, Marriage in Comparative Conflict of Laws (1981) p. 184.

316 See (d) below.

317 Article 3(1) of the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriage preserves the substance of the Sottomayer rule: see Appendix A, para. 2.

the foreign domiciliary law of one of the parties[318] and for the courts since the law of the forum will be the applicable law. The abolition of the rule might make litigation more costly.

(e) The rule has been in existence for over 100 years and there is no real evidence to show that it has caused hardship or, in practice, produced unacceptable results.

3.47 In addition to the two options already noted - i.e., (i) abolish the rule or (ii) retain it unamended - there are two other solutions:

(iii) a rule that the marriage should be regarded as essentially valid if it is valid by the domiciliary law of either party at the time of the marriage;

(iv) a rule that a marriage (wherever celebrated) should be held valid if one of the parties was domiciled in the country of celebration and both parties had capacity under the law of the country of celebration.

Option (iii) has already been considered at paragraph 3.38 above. Option (iv) would mean retaining the Sottomayer rule but removing its

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318 However, arguably, the abolition of the rule would not impose a very great burden on marriage officials. It is understood that where both the parties are domiciled abroad it is not at present the normal practice for superintendent registrars in England to seek to satisfy themselves that there is no legal impediment to the marriage under the law of a foreign domicile. But if the existence of such an impediment were brought to the superintendent registrar's notice then, if it were one which, under English rules of private international law, would invalidate the marriage, he would give effect to it. A similar practice would presumably be adopted across the board if the Sottomayer rule were abolished. In Scotland, the Marriage (Scotland) Act 1977, s.3(5), already requires (subject to qualifications not here relevant) a party to a proposed marriage in Scotland who is not domiciled in any part of the United Kingdom to submit, if practicable, a certificate from a competent authority in the state of his domicile to the effect that he is not known to be subject to any legal incapacity in terms of the law of that state which would prevent his marrying. The Act pays no regard to the Sottomayer rule (the status of which is doubtful in Scots law) and abolition of the rule would make no difference to marriage officials in Scotland.

nationalistic bias. It would, however, be open to the same sort of objections of principle as the Sottomayer rule itself.

3.48 On balance, we have reached the provisional conclusion that the rule in Sottomayer v. De Barros (No. 2) should be abolished. This would not mean that our courts would be compelled to give effect to every foreign incapacity. The courts would continue to have a discretion to deny effect to a foreign incapacity which was contrary to the public policy of the forum.

(ii) Public policy[319]

3.49 Little need be said about this. Clearly any choice of law rule in this field must be subject to a public policy safeguard. We envisage that any legislation to implement our proposals might indicate that this safeguard should only be invoked in exceptional circumstances (thus confirming the present practice of the courts) but that no further legislative guidance would be required.

Relationship between capacity to marry rules and divorce and nullity recognition rules

3.50 It has already been noted[320] that there is uncertainty as to some aspects of this relationship, for example, are the parties to be regarded as free to remarry (whether in this country or abroad) even though regarded as incapable by the law of their domicile because of non-

319 See paras. 3.10-3.11 above.

320 See paras. 3.9 and 3.13(c) above.

recognition there of the divorce or annulment? This topic has recently been reviewed by the two Law Commissions. In our recent Report on Recognition of Foreign Nullity Decrees and Related Matters we recommend[321] that:

(a) A person whose divorce or annulment is recognised in a part of the United Kingdom should be regarded thereafter as free to remarry, in that part of the United Kingdom or elsewhere, notwithstanding that the law of that person's domicile would not recognise the divorce or annulment as valid.

(b) A person divorced, or whose marriage is annulled, in a part of the United Kingdom, should be regarded in that part as being free thereafter to remarry, whether in the United Kingdom or elsewhere, notwithstanding that the law of that person's domicile would not recognise the divorce or annulment as valid.

We do not, therefore, consider the matter further in this paper.

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321 Law Com. No. 137; Scot. Law Com. No. 88 (1984), paras. 6.56-6.57. The Report also recommends that the common law rules for nullity recognition should be placed on a statutory footing and that the Recognition of Divorces and Legal Separations Act 1971 should be repealed and replaced by a new statute which would apply the same rules to the recognition of divorces, annulments and legal separations.

PART IV
TWO PARTICULAR PROBLEMS

Introduction

4.1 In this Part of the paper we consider two particular problems. The first is whether lack of parental consent should continue to be classified as a formal requirement and, therefore, to be governed by the law of the country where the marriage was celebrated. The second problem is whether the validity of a marriage should be affected by a retrospective change in the applicable law after the date of its celebration.

A. *Characterisation of lack of parental consent*

4.2 Under our proposals in Parts II and III of this paper different choice of law rules will continue to apply to the formal validity of a marriage and to its essential validity. The law to govern the formal validity of a marriage will, in general, be the law of the place of its celebration; the law to govern the issue of essential validity or legal capacity will, in general, be the law of each party's ante-nuptial domicile. This distinction makes it important to determine whether a particular requirement relates to form or essential validity.

4.3 As we have already indicated,[322] some requirements, such as the place or the time when a ceremony of marriage may be performed or the number of witnesses required, are clearly formal in character. It is also clear that issues, such as consanguinity and affinity or lack of age, relate to legal capacity rather than form. The main problem, which has arisen in practice, concerns the requirement, common to many countries, that persons under a certain age must obtain the consent of their parents or guardians to marry. Should such a requirement be characterised or

322 Para. 2.5 above.

classified as pertaining to form (and therefore within the scope of the law of the country of celebration) or to essential validity (and therefore a matter for the law of the domicile)? English and Scottish courts have taken the former view, a conclusion which has been subjected to much academic criticism. The nature of the problem and of the criticisms can best be seen by reference to the leading decisions on this subject.

4.4 In Simonin v. Mallac[323] the provisions of the French Civil Code requiring parties under a certain age to seek parental consent were classified as formal and therefore inapplicable to a marriage celebrated in England between two French domiciliaries. The decision would seem to be correct since under French law the actual consent of the parents was not an essential condition to the validity of the marriage; the French rules merely delayed the celebration of the marriage if consent was unobtainable.[324] However, the court indicated that another provision of the French Civil Code (Article 148) which imposed an absolute prohibition on marriages without parental consent might receive a different interpretation. But this suggestion was not taken up by the Court of Appeal in Ogden v. Ogden:[325] the requirement of parental consent imposed by Article 148 was treated as formal with the result that a marriage in England between a French domiciliary, who had not obtained

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323 (1860) 2 Sw. & Tr. 67, 164 E.R. 917.

324 Article 151 of the French Civil Code required the parties to seek their parents' consent by "a respectful and formal act" but Article 152 provided that the marriage could take place after 3 months' formal asking. The effect of these Articles, as has been observed by one of the draftsmen of the Code, was merely "to require a deferential act capable of leading to a reconciliation between ascendant and descendant": Bigot-Préameneu in Locré, Procès-Verbaux du Conseil d'Etat, (1804) Tome IV, pp. 251 ff.

325 [1908] P. 46.

parental consent, and an English woman was held to be formally valid.[326] "No case in the English conflict of laws has been criticised more heavily than Ogden v. Ogden"[327], but it has been followed both in England[328] and Scotland.[329]

4.5 In Bliersbach v. MacEwen[330] the Inner House of the Court of Session held that a domiciled Dutch girl of eighteen was not disqualified from marrying in Scotland, even though she had not obtained her parents' consent as required by Dutch law. In considering the nature and quality of the impediment imposed by Dutch law, the Lord President relied upon the domestic distinction between an impediment rendering a marriage void ab initio (impedimentum dirimens) and one merely prohibiting the celebration of a marriage (impedimentum impeditivum) and concluded that:

> "... if parental consent is an impedimentum dirimens the law of the girl's domicile is probably the proper law to apply, but if that consent is an impedimentum impeditivum, then the law of Scotland will determine whether such consent is necessary. It is ... firmly settled that parental consent is an impediment of this latter category".[331]

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326 The result, however, would have been the same if the court had treated the rule as one of capacity since a marriage celebrated in England between an English domiciliary and a person domiciled abroad is not invalidated by any incapacity which, though existing under the foreign law, does not exist in English law: Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94: see para. 3.6 above.

327 Morris, Conflict of Laws, 3rd ed., (1984) p. 153.

328 Lodge v. Lodge (1963) 107 S.J. 437.

329 Bliersbach v. MacEwen 1959 S.C. 43.

330 Ibid.

331 Ibid., at pp. 49-50. This distinction is supported by Nygh, Conflict of Laws in Australia, 4th ed., (1984) p.305, but criticised by Clive, Husband and Wife, 2nd ed., (1982) p. 136, on the ground that many countries do not have the concept of a marriage void ab initio and there is no necessary connection between this distinction and the form/substance distinction.

This conclusion was reached without reference to the way the issue would be characterised under Dutch law;[332] the way in which parental consent would be characterised in Scottish domestic law was the factor regarded as conclusive.

4.6 The present solution that every rule requiring parental consent must be characterised as formal has the merit of simplicity and certainty. It is a clear and convenient solution which is easy to apply in practice.[333] But it is open to the following objections:

(a) "... The result [of the characterisation] is unfortunate from a practical standpoint since, unless foreign rules establishing impediments to marriage are characterised in the light of the system of which they form part, the tendency will be to promote rather than to prevent limping marriages. This was the practical consequence of the decision in Ogden v. Ogden and is clearly undesirable."[334]

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332 The Lord President, however, referred to Dutch law at the end of his judgment merely to "confirm" the conclusion he had already reached. Lord Sorn expressly rejected the propriety of any reference to Dutch law. This approach, and the characterisation of lack of parental consent as a formality, is criticised by Anton, Private International Law, (1967) pp. 280-281.

333 There does not seem to be any strong evidence that this leads to limping marriages. Further, the problem is much less significant now that the age at which parties can marry without parental consent has been lowered in a large number of countries. In Scotland, moreover, the danger of limping marriages has been greatly reduced by the requirement of a certificate of capacity under s.3(5) of the Marriage (Scotland) Act 1977. See n. 318 above.

334 Anton, Private International Law, (1967) p. 276. It has also been said that the requirement of parental consent "cannot be characterised in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, but that in the law of one country it may by its terms and in the light of its context in that law be a matter of capacity, and in the law of another country it may by its terms and in the light of its context in that law be a matter of formalities...": Falconbridge, Essays on the Conflict of Laws, 2nd ed., (1954) p. 76.

(b) To characterise every parental consent requirement as formal simply because it would be so characterised in a domestic case is, in principle, wrong. The policy considerations governing the categories of form and substance are not necessarily the same in the two situations. The English and Scottish rule presumably means that an English (or Scottish) couple over eighteen marrying abroad would have to seek parental consent if this was required by the local law and failure to do so would (unless recourse could be had to renvoi) result in the marriage being invalid. In this, and the converse case where foreign domiciliaries marry in this country, it may be thought that the country to which the parties belong, rather than the country of celebration, has a greater interest in the application of its law.

4.7 The proper approach, it has been suggested,[335] is to examine the foreign rule in the context of the foreign legal system. Thus, if in Ogden the French rule had been examined in its French setting, the court would not have reached the conclusion that a rule rendering a person totally incapable of marriage should be classified as a mere formality.

Possible solutions

(a) Make no legislative provision for the problem

4.8 Every conflicts case raises some issue of characterisation, but hitherto no attempt has been made to lay down by statute any specific rules or any general principles of characterisation. It may be thought that this is the correct approach: the question of characterisation should be left to judicial development without any specific legislative guidance. Provisionally we favour this approach.

335 See Dicey and Morris, The Conflict of Laws, 10th ed., (1980) p. 268; Cheshire and North, Private International Law, 10th ed., (1979) p. 50; Anton, op. cit., pp. 276, 282; Falconbridge, op. cit., p. 76.

(b) Legislative solutions

4.9 If, however, the view is taken that it would be desirable to provide a legislative solution to the problem, the question arises as to what solution should be adopted. The options seem to us to be as follows:

Option 1 Retain (and give statutory effect to) the present rule that lack of parental consent is to be classified as a matter of form. The advantages and disadvantages of this rule have been considered in paragraph 4.6 above.

Option 2 Provide that lack of parental consent should be classified as a matter of capacity. The advantages and disadvantages of this rule would be similar to those mentioned in paragraph 4.6 in relation to the present rule.

Option 3 This would require our courts to determine how the requirement of parental consent is classified under the foreign law and to follow the foreign classification (subject to the usual public policy safeguard).[336] The advantage of this approach is that it is the only sure way of avoiding a limping marriage. But it is open to the objections that it would impose an additional and, arguably, unreasonable burden on the court, increase the cost of litigation, and that it would be unworkable where there is no clear classification of the rule in the foreign country or if the law of that country does not draw a distinction between form and capacity. It is also perhaps arguable that it would be contrary to principle to allow the foreign law absolutely to control characterisation in the forum.

Option 4 This would require the courts to have regard to the foreign classification without being bound by it. This would have most of the disadvantages of option 3, but without its main advantage.

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336 This approach is supported in Cheshire and North, op. cit., p. 50.

4.10 We invite comment on our provisional view that the question of the classification of lack of parental consent (like all other issues of classification) should not be regulated by legislation but should be left to judicial development. If, however, the view is taken that a legislative solution would be desirable, we should welcome comments on which, if any, of the solutions listed in paragraph 4.9 above is to be preferred.

B. Retrospective changes in the law governing validity of marriage

4.11 It remains to consider whether the validity of a marriage should be affected by a retrospective change in the applicable law after the date of its celebration. In particular:

(a) Should the applicable law (i.e., the law of the country of celebration in the case of formalities, and the law of the domicile for issues of legal capacity) be determined as at the date of the foreign marriage or should subsequent retrospective validating legislation in the relevant country be allowed to affect the validity of the marriage, at least in certain circumstances?

(b) If the latter view is adopted, should these circumstances be defined in any legislation? Should legislative proposals also be made as to whether and, if so, in what circumstances, retrospective foreign legislation invalidating a marriage ought to be recognised?

4.12 As we have already indicated,[337] in Starkowski v. Attorney-General[338] the House of Lords held that effect would be given to foreign validating legislation, at least in cases where a party had not remarried

337 See para. 2.10 above.

338 [1954] A.C. 155. This decision concerned the formal validity of a marriage, but it is thought that the same principles would apply in relation to the essential validity of a marriage.

prior to that legislation. This decision has been criticised on the ground that it is undesirable for the marital status of the parties to remain in suspense: a person could never rely on his existing status if his void marriage remained liable to retrospective validation.[339] The contrary arguments, which found favour with the House of Lords and which seem to us to be more persuasive, are as follows:

(a) Recognition of the foreign validating legislation would protect the reasonable expectations of the parties and promote the policy in favour of the validity of marriages. "If people have lived and acted and brought up families in the reasonable belief that they were married, it is highly desirable that the law should recognize some practical way of neutralizing a belated and fortuitous discovery that their marriage was formally invalid."[340]

(b) As a matter of practical realities, if there is to be such remedial legislation, it is not likely to be long delayed.

(c) In principle, effect should be given to the foreign law as it is actually applied in the foreign country itself.

(d) The "balance of justice and convenience" is in favour of recognising the validity of the foreign legislation, at least in certain cases.

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339 Cheshire and North, op. cit., p. 314.

340 [1954] A.C. 155, 171 per Lord Reid.

(e) Just as domestic statutes retrospectively validating marriages are given local and deserve international recognition, so foreign validating legislation ought to be effective in the forum, and this would encourage reciprocity.[341]

4.13 In Starkowski the Law Lords left open the question whether the foreign validating legislation would be given effect if one of the parties had entered into another marriage, or had obtained a nullity decree from a court of competent jurisdiction, before the legislation took effect.[342] Should such exceptions to the recognition of any retrospective validation be included in any reforming legislation, and should it also be made clear that foreign retrospective invalidating legislation[343] should not be given effect here? Such a course could be supported on the grounds of certainty and justice. Our provisional view, however, is that the appropriate course would be to leave this whole area, in which the crucial consideration is public policy and the securing of "just and reasonable" results in the circumstances of the particular case, to judicial development. Further, the question of retrospective legislation is not confined to the field of marriage and ought to be considered, if at all, in a wider context.

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341 "It would seem to be in accord with comity and with principle that our courts should recognize the validity of similar foreign laws dealing with an aspect of marriage, viz., formality, which has always been recognized as governed by the lex loci celebrationis.": ibid., per Lord Tucker at p. 174. The validation may relate to a single marriage or to a series of marriages.

342 The foreign validating legislation itself might well include exceptions for such cases, in which event no problem would arise.

343 Starkowski v. A.-G., supra, does not deal with this issue. There is no direct English or Scottish decision on this point, but the weight of academic opinion is against recognising the foreign invalidating legislation on public policy grounds: see para. 2.11 above.

PART V
CHOICE OF LAW RULES IN NULLITY SUITS

A. Introduction

5.1 A decree of nullity of a void marriage is the converse of a declaration (or declarator) as to the initial validity of marriage. Both are concerned with the same basic issue, namely, whether a marriage was or was not initially valid. The choice of law rules in nullity petitions of a void marriage are therefore, in effect, the same as those relating to the initial validity of a marriage. If the alleged defect is characterised as one pertaining to form the applicable law will, as a general rule, be the law of the country of celebration; if, however, the issue raised is one of legal capacity, the governing law will, in general, be the law of each party's ante-nuptial domicile.[344]

5.2 However, not all grounds for annulment can be readily classified as matters of form or legal capacity. For instance, impotence which is a ground for annulment in the three legal systems of the United Kingdom, and wilful refusal to consummate the marriage, which is a ground for annulment in England and Wales and Northern Ireland, cannot be regarded as formal defects; nor can they be regarded in those systems at any rate as involving a legal incapacity to marry: the impotent can marry and so can those who later refuse marital intercourse.[345] The same analysis applies to the ground of lack of consent, at least so far as the law of England and Northern Ireland is concerned. Further, since

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344 The choice of law rules relating to formal validity and to legal capacity have been considered in detail in Parts II and III above.

345 See Clive, Husband and Wife, 2nd ed., (1982) p. 156. However, in other systems defects such as impotence and lack of consent may give rise to a legal incapacity. For instance, a legal system might have a rule that those suffering from certain types of impotency, such as the total lack of sexual organs, should be incapable of contracting a marriage; or that a person certified as mentally ill should be incapable of marriage even in a lucid interval: ibid., p. 152.

different legal systems have different grounds for annulment[346] and the same ground may render the marriage void in one system but voidable in another,[347] it is necessary to consider what law governs the question whether a marriage can be annulled on the ground alleged and, if so, whether it renders the marriage void or voidable.[348]

B. Grounds for annulment in the domestic laws of the United Kingdom

(a) *England and Wales*

5.3 Under English domestic law[349] a marriage may be annulled on the following grounds:

(a) Invalid ceremony of marriage.

(b) Non-age, consanguinity or affinity, prior existing marriage, marriage between parties of the same sex; and that either party to a polygamous marriage was domiciled in England and Wales at the time of the ceremony.

(c) Incapacity of either party to consummate the marriage; the respondent's wilful refusal to consummate the marriage; lack of consent; mental disorder of either party at the time of marriage; that the respondent was at the time of the marriage suffering from a venereal

346 E.g., wilful refusal to consummate and pregnancy per alium are grounds for annulment in England and Northern Ireland, but not in Scotland.

347 E.g., lack of consent renders a marriage void in Scots law but only voidable in English and Northern Ireland law.

348 For the distinction between void and voidable marriages, see n. 436 below.

349 Matrimonial Causes Act 1973, ss. 11 and 12. The Act does not attempt to deal with the problem of conflict of laws, but s.14 makes it clear that ss. 11 and 12 do not preclude the English courts from determining the validity of a marriage in accordance with the rules of a foreign country where English rules of private international law so require.

disease in communicable form; and that the wife respondent was at the time of the marriage pregnant by a man other than the husband.

The gounds set out at (a) and (b) above render a marriage void while those mentioned at (c) render the marriage voidable.

(b) Scotland

5.4 The grounds on which a marriage may be annulled under Scots domestic law[350] are: invalid ceremony of marriage,[351] non-age, consanguinity or affinity, prior subsisting marriage, marriage between parties of the same sex, lack of consent, insanity, and impotence of either party. Only the last ground renders the marriage voidable.

(c) Northern Ireland

5.5 The grounds on which a marriage may be annulled as void or voidable under the domestic law of Northern Ireland[352] are the same as those in English domestic law.[353]

C. Choice of law rules: lack of consent

5.6 The choice of law rules relating to formal invalidity, and legal incapacity (i.e., the issues of non-age, consanguinity or affinity, prior subsisting marriage, and marriages between parties of the same sex) have

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350 See Clive, op cit., Ch. 7. Some of these grounds, such as formal invalidity, non-age and prohibited degrees of relationship, are placed on a statutory footing: see Marriage (Scotland) Act 1977.

351 However, a marriage solemnised under the Marriage (Scotland) Act 1977 (i.e. on or after 1 January 1978) will not be invalidated by non-compliance with formalities if both parties were present at the ceremony and the marriage was duly registered: s. 23A (inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 22).

352 Articles 13 and 14 of the Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) (N.I. 15).

353 See para. 5.3 above.

been considered in Parts II and III respectively. That leaves for consideration lack of consent and physical incapacity. In this Part of the paper the choice of law rules relating to these issues will first be considered in the context of the specific grounds for annulment available under the domestic laws of the different parts of the United Kingdom. This arrangement has been adopted because such case law as there is has arisen in relation to such grounds. Apart from cases concerning issues of formal validity or legal capacity there is no decision in which a marriage has been annulled on a ground unknown to the domestic law of the forum in the United Kingdom. Whether a court in the United Kingdom should be able to annul a marriage on some such ground will be considered later.[354]

(1) Present law

5.7 If the parties have not uttered the appropriate words of consent, the necessary formalities will not have been completed; the marriage will be void for formal invalidity. However, the situation presently under consideration is where the ceremony is formally valid and the marriage is between parties who have legal capacity under the appropriate laws. What is in issue here is reality of consent. The petitioner seeks to have the marriage annulled because his or her outward expression of consent was not accompanied by the requisite mental intention, for example, on the ground of duress or insanity; and the question is whether he or she should be entitled to rely on a particular domestic rule to do so.

(a) England and Wales

5.8 In English domestic law a marriage may be annulled on the ground that "either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise".[355] A petition on the grounds of the respondent's venereal

354 See paras. 5.44-5.49 below.

355 Matrimonial Causes Act 1973, s. 12(c).

disease or pregnancy by another at the time of marriage can only be brought if the petitioner was at the time of the marriage ignorant of the facts alleged;[356] and the issue is therefore appropriately classified as relating to lack of consent.[357]

5.9 So far as choice of law is concerned, the weight of authority is that the issue of reality of consent (as distinct from the form in which the consent is expressed)[358] is to be determined by the parties' domiciliary law.[359] In Szechter v. Szechter,[360] although the law of the domicile and

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356 Ibid., s. 13(3).

357 Dicey and Morris, The Conflict of Laws, 10th ed., (1980) vol.1, p. 375. This classification is appropriate only in so far as it relates to provisions of the type figuring in English law, i.e., where the ground of annulment is dependent on the petitioner's knowledge of the defect. It is difficult, however, to agree with the view expressed in Dicey and Morris that the "mental disorder" ground (Matrimonial Causes Act 1973, s.12(d)) should also be taken as going to the matter of consent; that subsection makes it clear that where this ground is relied upon the validity of consent is not in issue; nor is knowledge by the petitioner a specific bar to a petition based on this ground. Sect.12(d) is intended to cover the case where, although the afflicted party is capable of giving a valid consent, his mental disorder makes him incapable of carrying on a normal married life, and this ground is better classified as one akin to physical incapacity. The question of classification, however, will only be of practical relevance if different choice of law rules are adopted for consent and physical incapacity cases.

358 This is a matter of formality and therefore governed by the law of the country of celebration: Apt v. Apt [1948] P. 83 (C.A.).

359 Apt v. Apt [1948] P. 83, 88 (C.A.); Way v. Way [1950] P. 71, 78 per Hodson J.: "questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made." On appeal, sub. nom., Kenward v. Kenward [1951] P. 124, 134, Sir Raymond Evershed M.R. was "prepared to assume" that this was a correct statement of the law; Szechter v. Szechter [1971] P. 286; Vervaeke v. Smith [1981] Fam. 77, 122 (C.A.). See also Feiner v Demkowicz (1973) 42 D.L.R. (3d) 165 (Canada) and In the Marriage of Suria (1977) 29 F.L.R. 308 (Australia).

360 [1971] P. 286. The question as to which party's domiciliary law is relevant is considered at paras. 5.21-5.23 below.

the law of the forum agreed that the marriage celebrated in Poland was void for duress, Sir Jocelyn Simon P. expressly stated that it was Polish law as the law of the domicile which determined the validity of the marriage. More recently, in Vervaeke v. Smith[361] the Court of Appeal held that the rule in Sottomayer v. De Barros (No. 2)[362] applies to the consent of the parties[363] as it applies to legal capacity. Thus, if a marriage is celebrated in England and one party is domiciled here at the time of the marriage, the issue of consent is to be decided exclusively by English law. The Sottomayer rule is an exception to the general rule that legal capacity to marry is governed by the law of each party's ante-nuptial domicile;[364] its application to the issue of consent clearly indicates that the Court of Appeal proceeded on the basis that the law of the domicile is the basic applicable law for matters of reality of consent. In the light of these decisions, it is thought that earlier decisions supporting the application of the law of the country of celebration[365] and the law of the forum[366] cannot be regarded as good law.

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361 [1981] Fam. 77, 122.

362 (1879) 5 P.D. 94.

363 On appeal the House of Lords made no comment on this proposition.

364 See paras. 3.5-3.6 above.

365 Parojcic v. Parojcic [1958] 1 W.L.R. 1280, 1283.

366 In Cooper v. Crane [1891] P. 369; Valier v. Valier (1925) 133 L.T. 830; Hussein v. Hussein [1938] P. 159 and Mehta v. Mehta [1945] 2 All E.R. 690, the law of the forum coincided with either the law of the ante-nuptial domicile of the petitioner or with the law of the country of celebration. However, in H. v. H. [1954] P. 258; Kassim v. Kassim [1962] P. 224 and Buckland v. Buckland [1968] P. 296, the marriages were celebrated outside England between parties not then domiciled in England. But in none of the cases was any express consideration given to the choice of law issue. In the Australian case of Di Mento v. Visalli [1973] 2 N.S.W.L.R. 199, Larkins J. applied the law of the country of celebration to determine an issue of reality of consent, but the proceedings were undefended and it does not appear that the foreign law, which was the law of the country of celebration and the common ante-nuptial law of the domicile, had been proved to be different.

(b) Scotland

5.10 There is no conclusive Scottish authority on what law governs defects in consent.[367] In all the cases[368] in which the issue appears to have arisen Scots law was the law of the forum, the law of the place of celebration and the law of the domicile of the party whose consent was alleged to be defective; and, with one exception, no indication is given as to the basis on which Scots law was applied. In the one case[369] where the choice of law problem was mentioned, Lord Guthrie stated (obiter) that "the question whether the pursuer gave a true consent to the marriage is to be decided by the law of Scotland as the lex loci celebrationis."

(c) Northern Ireland

5.11 There does not appear to be any Northern Ireland authority directly in point. It is thought, however, that the courts in Northern Ireland would place reliance on the recent English decisions supporting the application of the law of the domicile to the issue of consent.

(2) What law ought to be applied?

5.12 The choice of law rules which have some support in the case law are: the law of the domicile, the law of the forum, the law of the country of celebration; and there is also some support[370] for referring the issue of reality of consent to the law of the country with which the marriage has the most real and substantial connection. These connecting

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367 See Clive, op. cit., p. 156.

368 Lendrum v. Chakravarti 1929 S.L.T. 96; MacDougall v. Chitnavis 1937 S.C. 390; Noble v. Noble 1947 S.L.T. (Notes) 62; Di Rollo v. Di Rollo 1959 S.C. 75; Orlandi v. Castelli 1961 S.C. 113; Mahmud v. Mahmud 1977 S.L.T. (Notes) 17; Akram v. Akram 1979 S.L.T. (Notes) 87.

369 Di Rollo v. Di Rollo 1959 S.C. 75, 78.

370 See Vervaeke v. Smith [1983] 1 A.C. 145, 166 per Lord Simon of Glaisdale; and Clive, op. cit., p. 157.

factors have all been considered in the context of the earlier discussion on legal capacity.[371] It is now proposed to consider their appropriateness in relation to the issue of consent.

(a) Real and substantial connection

5.13 This has been rejected as the test for issues of legal capacity,[372] and in our view there is no good reason for introducing it here. The test is an inherently vague one which is liable to produce an unacceptable degree of uncertainty in the law.

(b) Law of the country of celebration

5.14 We have rejected the law of the country of celebration as the basic choice of law rule for issues of legal capacity,[373] and we do not think that a different rule should be adopted for the issue of reality of consent.[374] The issue is not one of form but of substance. It would, we think, be inappropriate and undesirable to refer a substantive issue exclusively to the law of a country with which the parties may only have a fortuitous or fleeting connection.[375]

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371 Paras. 3.19-3.32 above.

372 Para. 3.20 above.

373 See para. 3.23 above.

374 The question whether the law of the country of celebration should have some role to play in relation to the issue of lack of consent is considered in para. 5.24 below.

375 The lex loci rule would mean, e.g., that an English domiciliary would not be able to rely on a ground for annulment under English domestic law if such a ground was not available under the domestic law of the country of celebration. Further problems might arise if the ground of annulment is unknown to the domestic law of the forum in the United Kingdom: see paras. 5.44-5.49 below.

(c) Law of the forum

5.15 The law of the forum (lex fori) has been rejected as the applicable law in matters of legal capacity,[376] but, arguably, it has a more serious claim as the governing law in the present context. The arguments in favour of the law of the forum are as follows:

(a) It seems to work.[377] The application of the law of the forum is in general consistent with the actual decisions (though not necessarily with the reasoning) in all the English and Scottish cases on the issue.

(b) Some aspects of the question as to whether or not a marriage was voluntary raise issues of fact and are therefore appropriately governed by the procedural rules of the forum.[378]

(c) The law of the forum is cheaper and easier to apply.

(d) The issue of reality of consent is closely connected with the public policy of the forum.

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376 Para. 3.19 above.

377 Clive, op. cit., p. 156.

378 See Webb, (1959) 22 M.L.R. 198, 202-204, who draws a distinction between the different grounds on which the reality of a party's consent may be challenged and suggests that for some of them, including mistake as to the attributes of the other spouse, the law of the ante-nuptial domicile of the other spouse is appropriate; for a number of other issues, however, such as duress, fraud, mistake as to the legal nature of the ceremony, he suggests that the law of the forum should apply because in these cases the element of fact-finding is predominant.

5.16 While, of course, the law of the forum must have an important role at the public policy level,[379] we do not think that it ought to be adopted as the basic choice of law rule in matters of validity of consent. The reasons for rejecting the law of the forum in matters of legal capacity are in general equally applicable here. Since the outcome of the proceedings would be dependent on the petitioner's[380] choice of forum, the lex fori rule would provide an encouragement to forum-shopping. Apart from the fact that the proceedings are brought there, the country of the forum may have no connection with the case. The marriage may have been celebrated in, say, Scotland between parties who at all times were domiciled there. It would be quite contrary to principle[381] that the husband should be able to have his marriage annulled in England on a ground (for example, pregnancy per alium) unknown to the law of the domicile.

5.17 The counter arguments to the specific arguments put forward at paragraph 5.15 above are as follows:

(a) Although all the English and Scottish decisions may be consistent with the application of the law of the forum, in no case where the issue is specifically considered is approval given to that choice of law rule.

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379 See paras. 3.10-3.11 above. The English rule upholding the validity of a marriage entered into for some ulterior purpose with no intent on the part of either party to live together as man and wife is based on English public policy: see Vervaeke v. Smith [1983] 1 A.C. 145. This decision suggests that this rule of English public policy in favour of upholding the validity of sham marriages is so powerful as to override the application of a foreign domiciliary law which regards such marriages as invalid.

380 See n. 236 above.

381 See Ross Smith v. Ross Smith [1963] A.C. 280, 306 per Lord Reid.

(b) The argument in paragraph 5.15(b) is not convincing. Whatever the ground on which the reality of a party's consent is challenged, the court is not exclusively concerned with fact-finding. It is also necessary to consider the legal issues of whether the facts found amount to a defect in consent and what effect this has on the validity of the marriage.

(c) Of course, it is always easier and cheaper to apply the law of the forum, but this argument is not permitted to prevail where formal invalidity or legal incapacity is in issue.

(d) One cannot maintain that the issue of consent is more closely connected with the public policy of the forum than other issues of essential validity, such as those involving legal capacity. Indeed, so far as English law is concerned, it would appear that the domestic rules relating to lack of consent are designed more to protect a party than the public interest of the forum; lack of consent renders a marriage voidable: if the party concerned does not exercise his option to have the marriage annulled, it is valid in all respects.

(d) Law of the domicile

5.18 Although defects in consent do not in the three legal systems of the United Kingdom create a legal incapacity for marriage, both lack of consent and legal incapacity are concerned with the essential or substantive validity[382] of a marriage and both should, in our view, be

382 Dicey and Morris, op. cit., p. 305 point out that the question of consent is analogous to one of legal capacity in that marriage is essentially a voluntary union and the question whether a union is voluntary should depend on the personal law (i.e., the law of the domicile) of the parties.

subject to the same choice of law rules.[383] It would be contrary to principle and inconvenient in practice to fragment the question of essential validity and apply, say, the law of the forum, to the issue of *consent*. Our provisional recommendation is that the issue of lack of consent should be governed by the law of the domicile.

5.19 If, as we suggest, the law of the domicile is to be adopted as the governing law for matters of reality of consent, three questions need consideration:

(i) Should the rule in the Sottomayer case apply to lack of consent?

(ii) Which party's domiciliary law should be referred to where the parties are domiciled in different countries at the time of the marriage?

(iii) Is there a subsidiary role for the law of the country of celebration?

(i) The Sottomayer rule

5.20 As indicated at paragraph 5.9 above, it has recently been held that the Sottomayer rule applies to consent as it applies to legal capacity. If (as we have proposed)[384] the Sottomayer rule is not to be retained in relation to legal capacity, it ought not to be retained in relation to consent.

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383 In Western European countries, matters affecting consent, although not strictly falling within the category of legal capacity, are generally treated on the same lines as other questions pertaining to the substantive validity of a marriage, i.e., by reference to the personal law (national law) of the parties: Palsson, Marriage in Comparative Conflict of Laws, (1981) p. 285.

384 Para. 3.48 above.

(ii) Which party's law?

5.21 There are two possibilities:

(i) "No marriage is (semble) valid if by the law of either party's domicile he or she does not consent to marry the other." (Dicey and Morris, Rule 34). This rule was approved by Sir Jocelyn Simon P. in Szechter v Szechter.[385] Its effect is as follows. Where the petitioner alleges his own lack of consent, the petitioner may obtain a nullity decree if he did not consent under one or both of two laws: the law of his own domicile at the time of the marriage or the law of the respondent's domicile at the time of the marriage. If the petitioner alleges that the respondent did not consent, he may likewise obtain a decree if the respondent is held not to have consented under her own domiciliary law or under the law of the petitioner's domicile.

(ii) One should apply the ante-nuptial domiciliary law, at the time of the marriage, of the party whose consent is alleged to be defective. This approach is suggested in Cheshire and North[386] and it is now accepted in Dicey and Morris[387] as the preferable solution. In the usual case where the petitioner alleges his own lack of consent it means applying the law of his domicile only; the fact that his conduct did not constitute consent under the law

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385 [1971] P. 286, 294-295.

386 At p. 401.

387 At p. 305.

> of the respondent's domicile is irrelevant. If the petitioner alleges that it is the respondent who has not consented, the issue of consent will be referred exclusively to the law of the respondent's domicile; and that law will decide whether the petitioner can rely on the respondent's lack of consent as a ground for annulling the marriage.[388]

5.22 The difference between the two solutions referred to in the previous paragraph may be illustrated as follows:

> H, domiciled in Scotland, marries W, who is domiciled in England. The marriage is valid by Scots law, but voidable under English law for lack of consent at the instance of H on the ground that at the time of the marriage he was unaware that W was pregnant by someone else. H seeks to have the marriage annulled in England.

The Szechter test would enable H to avoid the marriage: H's consent, although valid by his own domiciliary law, is defective by W's domiciliary law. On the other hand, under the Cheshire and North test H cannot have the marriage annulled because his domiciliary law does not enable him to avoid the marriage on the ground of W's pregnancy: the fact that W's domiciliary law enables him to do so is irrelevant.

5.23 Our provisional view is that the issue of a party's lack of consent should be governed by that person's ante-nuptial domiciliary law. If a party's own domiciliary law regards the marriage as defective for lack of consent and for his own protection enables him to avoid the marriage, it is reasonable that he should be entitled to rely on that law to have his marriage annulled. It is, however, difficult to see why, if a party's own

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388 Under English law, e.g., the petitioner can rely on the fact that the respondent did not consent to the marriage even if he himself was responsible for this state of affairs.

law considers that he has validly consented to the marriage, he should nevertheless be entitled to avoid the marriage on the basis of his lack of consent under the other party's domiciliary law. It may also be noted that the test we propose constitutes an application of the dual domicile test which has been adopted for issues of legal capacity. To apply different tests to these two issues would produce unnecessary complexity in the structure of the choice of law rules.

(iii) Role of the law of the country of celebration

5.24 If the law of the domicile is adopted as the basic choice of law rule for issues of reality of consent the question arises whether a subsidiary role should remain for the law of the country of celebration. The issues here are similar to those considered in relation to capacity to marry.[389] On the one hand, it can be argued that questions of essential validity, including questions relating to the reality of consent should be governed exclusively by a person's personal law. On the other hand, it can be argued that the law of the country of celebration has a legitimate interest in not allowing its procedures to be used for the contracting of at least some marriages tainted by a lack of true consent, for example, marriages entered into under duress, or sham marriages entered into for immigration purposes, or marriages entered into for financial reasons with those mentally incapable of consenting. It may also be argued that there is no convincing reason for adopting different rules in this context for issues of legal capacity and issues relating to reality of consent: the issues in both cases are, in essence, the same. Further, to apply different rules to these two issues would produce an undesirable complexity in the structure of the choice of law rules and give rise to difficult problems of classification. We invite views as to whether a court in the United Kingdom should be able to annul a marriage, whether celebrated in the

389 See paras. 3.40-3.44 above. We have provisionally recommended that for a marriage to be essentially valid, the parties must have capacity not only under their domiciliary laws but also under the law of the country of celebration.

United Kingdom or abroad, on a ground relating to the reality of consent which, though available in relation to that marriage under the law of the country of celebration, is not available under the law of the domicile[390] of the party whose consent is alleged to have been defective.

D. Choice of law rules: impotence and wilful refusal to consummate

(1) Present law

5.25 Under the domestic laws of England and Wales and of Northern Ireland a marriage may be annulled on a number of grounds relating to a spouse's physical defects. Two such grounds - i.e., those concerning venereal disease and pregnancy per alium - have been taken to raise the issue of lack of consent (and have therefore been considered in that context)[391] because they are only available if the petitioner was at the time of the marriage unaware of the facts alleged. The other 'physical' grounds of annulment are: impotence and wilful refusal to consummate.[392] In Scots domestic law the only 'physical' ground of annulment is impotence. Wilful refusal to consummate is not a ground for nullity in Scots law.

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390 The references to the law of the country of celebration and the law of the domicile are to be construed as including the choice of law rules of that law.

391 See para. 5.8 above.

392 To these grounds could be added the ground that at the time of the marriage either party, though capable of giving a valid consent, was suffering from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to make him unfitted for marriage: Matrimonial Causes Act 1973, s.12(d). This ground, however, raises issues essentially similar to those applying to capacity to marry and we consider that for present purposes it should be treated in the same way as an incapacity to marry. Accordingly, we do not discuss it further in this Part of the paper.

(a) England and Wales

5.26 There is considerable uncertainty as to what law governs impotence and wilful refusal. The authorities[393] are in a state of some confusion and provide support for a variety of choice of law rules: the law of the forum,[394] the law of the country of celebration[395] and the law of the husband's domicile.[396]

(b) Scotland

5.27 The Scottish courts have always applied Scots law in actions for declarator of nullity of marriage on the ground of impotence; and they have not granted declarators of nullity on the ground of wilful refusal to consummate. A possible explanation of the cases is that Scots law was applied as the law of the domicile. However, now that the Scottish courts also assume nullity jurisdiction on the basis of habitual residence under the Domicile and Matrimonial Proceedings Act 1973, it is thought that Scots law would still be applied, but as the law of the forum.[397] This would mean, for example, that a Scottish court would not annul a marriage on the ground of wilful refusal even if the spouses were domiciled in England because that ground is unknown to Scots law.

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393 For a detailed analysis of the authorities, see Dicey and Morris, op. cit., pp. 374-378; Cheshire and North, op. cit., pp. 401-403; North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland, (1977) pp. 125-129.

394 Easterbrook v. Easterbrook [1944] P. 10; Hutter v. Hutter [1944] P. 95; Magnier v. Magnier (1968) 112 S.J. 233.

395 Robert v. Robert [1947] P. 164.

396 Ponticelli v. Ponticelli [1958] P. 204; Robert v. Robert [1947] P. 164.

397 See the Scottish Law Commission's Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status (1972) Scot. Law Com. No. 25, paras. 24-30; Clive, op. cit., pp. 154-156.

(c) Northern Ireland

5.28 The only Northern Ireland authority - Addison v. Addison -[398] supports the application of the law of the country of celebration. In this case impotence and wilful refusal were pleaded as alternative grounds for annulling a marriage celebrated in Northern Ireland between parties domiciled in England. Lord MacDermott said that he -[399]

> "very much doubt[ed] if the question of capacity to marry which is to be determined by the law of the domicile has to do with more than juristic capacity. Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with the nature and quality of those obligations as to be, naturally and aptly, a matter for the lex loci contractus."

(2) What law ought to be applied?

The options considered

5.29 As has already been indicated, the case law suggests the following possibilities as the applicable law: the law of the country of celebration, the law of the forum, and the law of the domicile. As in the case of lack of consent,[400] we think that the law of the country of celebration should not be adopted as the basic choice of law rule for matters of impotence and wilful refusal. Such personal defects have nothing to do with formalities and are not analogous to them. The real choice, in our view, is between the law of the forum and the law of the domicile.

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398 [1955] N.I. 1. This decision was overruled by the House of Lords in Ross Smith v. Ross Smith [1963] A.C. 280 on the question of jurisdiction, but was not expressly dissented from on the question of choice of law.

399 Ibid., p. 30. However, Lord MacDermott L.C.J. pointed out that there was no difference between the law of the forum (Northern Ireland law) and the law of the domicile (English law) on impotence.

400 See para. 5.14 above. The question whether the law of the country of celebration should have some relevance is discussed at para. 5.43 below.

5.30 Impotence is properly classifiable as an ante-nuptial defect in the legal systems of the United Kingdom[401] and therefore in principle ought to be governed by the personal law. Impotence (like the issues of legal capacity and consent) is concerned with the essential or substantive validity of a marriage and should therefore attract the general choice of law rule based on domicile. On the other hand, wilful refusal to consummate is necessarily a post-nuptial defect, more akin to a ground of divorce and therefore (arguably) the appropriate analogy here is with the divorce choice of law rule, i.e., the law of the forum. This seems to suggest that different choice of law rules should apply to impotence and wilful refusal. Such a prospect cannot, however, be viewed with any degree of equanimity. Wilful refusal and impotence are frequently pleaded in the alternative, and it would be undesirable and inconvenient if different choice of law rules were to apply, depending on whether non-consummation was due to inability to consummate or unwillingness to do so. So if the divorce analogy is accepted for wilful refusal and the law of the forum is to be the applicable law, then the same law ought to govern impotence. On the other hand, if the suggested choice of law rule for impotence (law of the domicile) is taken as the starting point, then it also ought to apply to wilful refusal.

5.31 The case in favour of the law of the forum, as the applicable law for both impotence and wilful refusal, may be stated as follows:

(a) In reality, impotence and wilful refusal are ways out of a marriage which are akin to divorce and should therefore

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401 The English legislation does not in terms state that the incapacity should have existed at the time of the marriage: see Matrimonial Causes Act 1973, s. 12(a). But the statutory codification of the law was not intended to effect any change to the requirement that the incapacity must exist at the date of the marriage: see the Law Commission's Report on Nullity of Marriage (1970) Law Com. No. 33, p. 47, para. 2. See, however, Bromley, Family Law, 6th ed. (1981) p. 85.

be subject to the same choice of law rule as applies in divorce, i.e., the law of the forum.[402]

(b) It is inappropriate to classify impotence and wilful refusal as legal incapacities: "the impotent can marry and so can those who later refuse marital intercourse, just as can the psychologically inadequate and those who later commit adultery".[403] On this basis, it may be thought that the divorce choice of law rule should also apply to impotence and wilful refusal.

(c) It would be unreasonable to expect a Scottish court, for example, to annul a marriage on a ground, such as wilful refusal to consummate, which is unknown to the domestic law of Scotland.

(d) The law of the forum is simpler and easier (and less costly) to apply. The application of the law of the forum avoids the quite considerable difficulties which arise in applying the law of the domicile to impotence and wilful refusal.[404]

5.32 On the other hand, the following arguments may be advanced to support the view that impotence and wilful refusal to consummate should be governed by the law of the domicile:

(a) However anomalous wilful refusal may be as a ground for annulment, it is nevertheless a ground for nullity and not divorce. Consistency may suggest the application of the same rule in all cases of nullity.[405]

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402 Clive, op. cit., p. 155.

403 Ibid., p. 156.

404 See paras. 5.34-5.49 below.

405 See Bromley, op. cit., p. 103.

(b) If the law of the forum is to apply, the marriage is liable to be annulled in England or Northern Ireland, though the ground (wilful refusal) may be unknown to the parties' domiciliary law (for example, Scots law). Unless the issue is regarded as analogous to divorce, this would be quite contrary to principle[406] and would open up the prospect of forum-shopping. "[I]t would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue".[407]

(c) If, as has been suggested,[408] the law of the domicile should govern the issue of lack of consent, then that law should also govern impotence. In some countries impotence may only be a ground for annulment if the petitioner was unaware at the time of the marriage that the respondent was impotent. This could be classified as lack of consent to be governed by the law of the domicile, whereas if impotence is a ground for annulment, irrespective of the petitioner's knowledge, the law of the forum would apply instead. It may be thought strange that the choice of law rules and therefore, possibly, the outcome of the case should depend on the petitioner's state of knowledge.

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406 See Ross Smith v. Ross Smith [1963] A.C. 280, 306 per Lord Reid: "Suppose a case where the law of the parties' domicile gives no relief on this ground [i.e., wilful refusal]. It seems to me quite contrary to principle that the wife should be able to come here and seek relief on that ground."

407 Ponticelli v. Ponticelli [1958] P. 204, 215 per Sachs J.; and see para. 3.19 above.

408 See para. 5.18 above.

(d) The adoption of the domicile rule would produce a welcome simplification in the structure of the choice of law rules. There would be two categories: formal validity, and essential validity (including legal capacity, consent and physical capacity). The former would be governed by the law of the country of celebration, the latter by the law of the domicile.[409] It must be said, however, that the simplification might only be at the structural level. There might be difficulty, at a more detailed level, in deciding which party's domiciliary law should apply to impotence and wilful refusal.[410]

5.33 We have not ourselves reached any firm conclusion as to which of these alternative solutions - the law of the forum or the law of the domicile - is the most appropriate. We make no proposal on this point, but invite views.

The domicile test

5.34 If the view is taken that the application of the law of the domicile should be adopted as the basic choice of law rule for impotence and wilful refusal to consummate, the following further questions will require consideration:

(a) Which party's law should be regarded as relevant where the parties are domiciled in different countries at the date of the marriage?

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409 See Szechter v. Szechter [1971] P. 286, 295 where Sir Jocelyn Simon P. referred to "the old distinction between, on the one hand, 'forms and ceremonies,' the validity of which is referable to the lex loci contractus, and, on the other hand, 'essential validity,' by which is meant... all requirements for a valid marriage other than those relating to forms and ceremonies, for the validity of which reference is made to the lex domicilii of the parties".

410 See paras. 5.35-5.39 below.

(b) What should be the relevant date for determining the domiciliary law?

(c) What solution should be adopted if a petition is presented on the ground of impotence or wilful refusal but the petitioner is domiciled in a country which only grants divorce in such a case?

(d) Is there a subsidiary role for the law of the country of celebration?

These issues will be discussed in turn.

(a) Which party's law?

5.35 The cases supporting the application of the law of the domicile indicate that reference must be made to the law of the husband's domicile. This view, however, was put forward at a time when the unity of domicile rule prevailed. Now that a married woman can acquire an independent domicile, there can, in our view, be no justification for giving primacy to the law of the husband's domicile.

5.36 In our view, the real choice lies between:

(i) the law of the domicile of the spouse alleged to be incapable[411] ("the first approach");

(ii) the law of the petitioner's domicile[412] ("the second approach");

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411 This view is suggested in Cheshire and North, op. cit., p. 403.

412 This view is advocated by Jaffey, (1978) 41 M.L.R. 38 and by Bishop, (1978) 41 M.L.R. 512.

(iii) the law of the domicile of either spouse, i.e., the petitioner would be able to avoid the marriage on the ground of non-consummation if he is entitled to do so under either his own domiciliary law or the respondent's domiciliary law[413] ("the third approach").

5.37 The first approach proceeds on the basis that, since it is the impotent or unwilling spouse who has revealed the defect, his or her own law should be applied. This would, however, produce injustice where a spouse has a right under the law of his or her own ante-nuptial domicile to petition for nullity on the ground of the other party's incapacity. To take an example:

> H domiciled in England marries W domiciled in Scotland. H petitions the English court for nullity on the ground of W's wilful refusal.

On the first approach, H cannot have the marriage annulled; although his own domiciliary law provides for annulment on the ground of wilful refusal, the law of the other (non-consummating) party's domicile does not. "It is one thing to take a spouse from another country and quite another thereby to forfeit some important rights to redress of grievance - to wed not only the spouse but also his (or her) nullity law on the subject of non-consummation."[414]

5.38 The second approach has the advantage that a person would not be held unwillingly bound to a marriage which, according to the notions of his own community, is a defective marriage. Thus, in the example given at paragraph 5.37 above, H would be able to avoid the

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413 This suggestion is made in Palsson, Marriage in Comparative Conflict of Laws, (1981) pp. 314-315.

414 Bishop, (1978) 41 M.L.R. 512, 517.

marriage on the ground of non-consummation by W since his own law enables him to do so.[415] But since the rationale of the second approach is that a party should only be entitled to such protection as the law of his own community would confer on him,[416] he would not be able to avoid his marriage on the ground of the respondent's non-consummation if his own domiciliary law does not entitle him to do so, even though the law of her domicile does. For example:

> H domiciled in Scotland marries W domiciled in England. H petitions the English court for nullity on the ground of W's wilful refusal to consummate the marriage.

On the second approach H would not be able to have the marriage annulled: although W's domiciliary law (English law) allows H to avoid the marriage on the ground of W's wilful refusal, his own domiciliary law (Scots law) does not. To this extent this approach is more restrictive than the first approach under which H would be able to have the marriage annulled: although his own law does not entitle him to have the marriage annulled on the ground of W's wilful refusal, her law does.

5.39 The third approach (indicated at paragraph 5.36 above) seeks to avoid the restrictive elements of the other two approaches. The effect of the third approach would be as follows: the petitioner (H) would be able (as under the second, but not first, approach) to avoid the marriage on the ground of the respondent's non-consummation if his own domiciliary law enables him to do so, even though her law does not; and he would also be able to avoid the marriage (as he can under the first, but not second, approach) on the ground of the respondent's non-consummation if he is entitled to do so by her domiciliary law, though not

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415 To this extent, it is similar to the approach adopted in relation to lack of consent: see paras. 5.21-5.23 above.

416 See Jaffey, (1978) 41 M.L.R. 38, 49; Bishop, (1978) 41 M.L.R. 512, 521-522.

by his own. Thus, in both examples at paragraphs 5.37 and 5.38 above, H would be able to avoid the marriage. In some cases, however, it may be thought that this approach would go too far in the direction of annulment. For example:

> H domiciled in Scotland marries W domiciled in England. H seeks a declarator of nullity in a Scottish court on the ground of W's wilful refusal to consummate the marriage.

On the third approach, he would be entitled to a declarator of nullity[417] even though he has no ground for seeking such a remedy under his own law. His grievance is the same wherever his wife was domiciled at the time of the marriage. No issue is raised as to his wife's capacity to marry or as to any protection conferred on her by her personal law. Her ante-nuptial domicile is, in this situation, irrelevant. Yet the husband's remedy depends on it. He has, as it were, "wed not only the spouse but also ... her nullity law on the subject of non-consummation".[418]

5.40 We do not make any proposal as to which of the three solutions identified at paragraph 5.36 above would be the most appropriate, but we would welcome comments on all three, or any other alternative.

(b) Relevant date for determining domiciliary law

5.41 If the domicile test is adopted, we suggest that the relevant date for determining the domiciliary law of the relevant spouse should be as at the time of the marriage (and not the date of the proceedings) even

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417 I.e., if a court in the United Kingdom is permitted to annul a marriage on a ground unknown to the domestic law of the forum. This issue is considered at paras. 5.44-5.49 below.

418 See n.414 above.

for the post-nuptial defect of wilful refusal. Consistency requires the application of the same rule in all nullity cases and the other grounds require the application of the relevant law at the time of the marriage; further, as we have already indicated,[419] wilful refusal and impotence are often pleaded in the alternative.

(c) Impotence and wilful refusal as grounds for divorce

5.42 Some legal systems regard certain defects, such as impotence and wilful refusal, as grounds for divorce.[420] What should a court in the United Kingdom do if a petition is presented on the ground of, say, impotence but the petitioner is domiciled in a country which only grants divorce in such a case? It is tempting to say that in such a case the petition should be dismissed and the petitioner left to pursue his remedy (divorce) in the country of his domicile. It has, however, been argued that this would not be a rational course to adopt: "it seems an absurd situation that both relevant laws end a marriage, one calling it nullity and the other calling it divorce, and yet because they call it by different names the petitioner, who may be indifferent between labels, cannot

419 Para. 5.30 above.

420 E.g., in France for impotence in certain cases and in Canada for wilful refusal. In a number of U.S. states, impotence, fraud, duress and incest are regarded as grounds for divorce rather than annulment: see Clark, The Law of Domestic Relations in the United States, (1968) p. 357.

obtain relief."[421] There are two solutions:

(a) The court should in all such cases grant a decree of nullity applying the law of the forum.

(b) The issue here is as to how the decree of divorce in the foreign country is to be classified for the purposes of the conflicts rules of the forum. The classification should be made according to the law of the forum, and the court should have regard to the effects of the foreign decree.[422] On this analysis, an English court should grant a nullity decree: the ground is one for annulment in England, and there is no practical difference between a decree of nullity of a voidable marriage and a decree of divorce; both decrees operate prospectively and the consequential rights, for example, as to financial provision, are identical. On the other hand, presumably, a Scottish court should not grant a declarator of nullity because in Scots law a declarator of nullity on the ground of impotence does not operate prospectively and the court cannot grant financial relief on granting a declarator. But what is the Scottish court to do where the case is one of wilful refusal (assuming that the court would be able to grant relief on this ground in a conflicts case)? It may be thought that the only possible solution in such a case is for the court to dismiss the petition. The foreign decree cannot be characterised as one of annulment when wilful refusal is not a ground for annulment in Scots law.

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421 Bishop, (1978) 41 M.L.R. 512, 524.

422 Ibid.

We doubt, however, whether this matter is sufficiently important in practice to justify legislative intervention; and indeed it may be thought to be impracticable to attempt any legislative solution. The problem, as and when it arises, should, in our view, be left to the courts to resolve.

(d) Role of the law of the country of celebration

5.43 If the law of the domicile is adopted as the basic choice of law rule for the issues of impotence and wilful refusal to consummate,[423] the question arises whether such issues should also be referred to the law of the country of celebration. In relation to issues of legal capacity, we have provisionally proposed[424] that a marriage, whether celebrated in the United Kingdom or abroad, should not be valid if either of the parties is, according to the law of the country of celebration, under a legal incapacity to marry the other. In other words, for a marriage to be essentially valid, the parties must have legal capacity not only under their domiciliary laws but also under the law of the country of celebration. The adoption of such a rule in relation to issues of impotence and wilful refusal would mean that a marriage could be annulled on a ground which, though available under the law of the country of celebration, is not available under the law of either party's domicile. It may be thought that such a result would be undesirable. If the ground in question (for example, wilful refusal to consummate) is not available by the law of the community to which the parties belong, it is difficult to see why one of them should nevertheless be entitled to avoid the marriage on the ground that wilful refusal is a ground of nullity under the law of a country with which the parties may only have a fortuitous or casual connection. It may be argued that there are good reasons for adopting different rules in this context for issues of legal capacity and for issues of impotence and wilful refusal. The latter do not arise in the prospective situation and it may be argued that the law of the country of celebration has no

423 See paras. 5.29-5.33 above.

424 Para. 3.44 above.

legitimate interest in what happens after a formally valid marriage is properly entered into by parties with the required legal capacity. On the other hand, the view may be taken that the adoption of different rules for issues of legal capacity and for issues of impotence and wilful refusal to consummate would produce undesirable complexity in the structure of the choice of law rules and would give rise to difficult problems of classification. We do not make any provisional recommendation on this matter, but invite views as to whether, in relation to issues of impotence and wilful refusal to consummate, the same rule should be applied as in the case of legal capacity, namely that a court in the United Kingdom should be able to annul a marriage on a ground which, though available in relation to that marriage under the law of the country of celebration, is not available under the law of either party's domicile.[425]

E. Miscellaneous problems

Grounds unknown to the domestic law of the forum

5.44 We have proposed that the law of the domicile should be adopted as the governing law for issues of reality of consent;[426] in relation to impotence and wilful refusal to consummate, we made no provisional proposals as to the applicable law but suggested that the choice lies between the law of the forum and the law of the domicile.[427] Our discussion has in general proceeded on the basis that, when choice of law issues arise, the ground on which the marriage is sought to be annulled is one which in essence is known to the domestic law of the forum. Different countries, however, have different grounds for the annulment of

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425 The references to the law of the country of celebration and the law of the domicile are to be construed as including the choice of law rules of that law.

426 Para. 5.18 above.

427 Para. 5.33 above.

marriage. As has already been indicated,[428] there are grounds for annulment in English and Northern Ireland law which do not exist in Scots law: for example, wilful refusal to consummate and the ground that the wife respondent, unknown to the petitioner, was at the time of the marriage pregnant by another man. Other systems have grounds which are unknown to the domestic laws of England, Scotland and Northern Ireland. Examples of such grounds are sterility,[429] the fact that at the time of marriage another woman was pregnant by the husband,[430] or a mistake as to attributes,[431] such as the respondent's virginity, health or financial standing. The question for consideration is whether a court in the United Kingdom should be able to annul a marriage on such grounds. Apart from issues relating to formal validity and legal capacity, there does not appear to be any reported case in which a court in the United Kingdom has annulled a marriage on a ground which does not have a counterpart in the domestic law of the forum.

5.45 If the law of the forum is chosen as the applicable law for issues of essential validity (other than legal capacity), the answer is clear. A court in the United Kingdom will only be able to annul a marriage on a ground which exists in the domestic law of the forum. This may be seen by some as one of the merits of choosing the law of the forum: it would, or so the argument might go, be impracticable and undesirable (as in the case of divorce) to require a court in the United Kingdom to apply unfamiliar concepts of law in dissolving marriages.

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428 See paras. 5.3-5.5 above.

429 Italy: Civil Code, Article 123, para. 2.

430 This was formerly a ground for annulment in New Zealand law.

431 See, e.g., the German law referred to in Mitford v. Mitford [1923] P. 130.

5.46 If, however, the law of the domicile is chosen as the applicable law, the possibility arises of a court in the United Kingdom annulling a voidable marriage on a ground unknown to the domestic law of the forum. It has been argued[432] that an English court should fully accept the principle that questions as to the essential validity of the marriage are to be referred to the law of the domicile, and should, subject to overriding considerations of public policy, be prepared to annul a marriage on a ground which falls outside those prescribed in English domestic law. The argument in support of this view is that English[433] and Scottish[434] courts have annulled marriages on the ground of formal invalidity or the parties' legal incapacity, even though the foreign applicable law differed in content from English law; and so far as English law is concerned there is statutory recognition in section 14(1) of the Matrimonial Causes Act 1973 that foreign law may be applied to issues affecting the validity of a marriage.[435] In the nullity cases just referred to the particular defects as to formalities and capacity rendered a marriage void but it is arguable that it ought not in principle to make any difference if the foreign defect renders a marriage voidable. Further, it could be argued that there is no very strong reason in principle for not giving effect to the foreign domiciliary law, merely because there is a difference between the foreign law and the law of the forum. Is there any fundamental difference in principle between a mistaken belief as to the wife's virginity and a mistaken belief that at the time of the marriage she is not pregnant by

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432 Cheshire and North, op. cit., p. 405.

433 E.g., Kenward v Kenward [1951] P. 214 (failure to comply with the formalities prescribed by the Russian Civil Code); Sottomayor v. De Barros (1877) 3 P.D.1 (marriage celebrated in England between two first cousins supposedly domiciled in Portugal held to be void because the parties lacked capacity by their domiciliary law even though they had capacity by English domestic law).

434 E.g., Johnstone v. Godet (1813) Fergusson's Consistorial Law, App. of Reports, p. 8 (formal validity); Lendrum v. Chakravarti 1929 S.L.T. 96 (capacity).

435 See n. 349 above. There is a similar provision in Northern Ireland law: see Article 17 of the Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) (N.I. 15).

another man, or between the latter ground and the ground that another woman was pregnant by the husband? The view may be taken that if the application of a particular foreign ground is contrary to the public policy of the forum, it can be disregarded; if it is not, it ought not to be.

5.47 However, despite these arguments, it might be thought that it would be unacceptable to public opinion if, say, an English court annulled an English domiciliary's marriage, which may have been celebrated in England, on the ground that the foreign petitioner at the time of the marriage mistakenly believed her to possess certain attributes. Such a case is likely to produce greater disquiet than a case where the English court annuls a marriage on the ground that the parties, though having capacity under English domestic law, lacked capacity by the foreign domiciliary law. Further, so far as English and Northern Ireland law is concerned, there is no practical difference between a divorce and the annulment of a voidable marriage; in both cases the decree brings to an end a marriage which was validly constituted and both decrees operate only prospectively. It is therefore arguable that, as in the case of divorce, the court should not annul a voidable marriage on a ground which does not exist in the domestic law of the forum.

5.48 If the view is taken that a court in the United Kingdom should not annul a marriage on a ground unknown to the domestic law of the forum, the question arises as to how this should be achieved. There are two possibilities:

(a) The law of the forum should be adopted as the governing law for all matters of reality of consent and physical capacity.

(b) The law of the domicile should be adopted as the applicable law, subject to the proviso that, in relation to lack of consent and physical defects, the court should only grant a decree on the specific grounds prescribed by the domestic law of the forum. Under both this solution

and the law of the forum solution the court would not be able to grant a decree if the ground alleged did not exist in the domestic law of the forum. The difference between the two solutions is that under the law of the forum (but not the modified domicile) solution, the court would be able to grant a decree on a ground known to the forum's domestic law even if such a ground did not exist under the law of the domicile. To take an example. Both H and W were domiciled in Scotland at the time of their marriage. H seeks to have the marriage annulled in England on the ground that unknown to him W was pregnant by another man at the time of the marriage. Under the law of the forum test the English court could grant a decree, even though pregnancy per alium is not a ground for annulment under the law of the domicile (Scots law). If however, the modified domicile solution is adopted, the court would not grant a decree: pregnancy per alium, though a ground for annulment under English domestic law, is not a ground for annulment under Scots law.

5.49 We do not make any provisional recommendation on this matter, but invite views as to whether a court in the United Kingdom should be able to annul a marriage on a ground which has no counterpart in the domestic law of the forum.

The law to determine whether a marriage is void or voidable[436]

5.50 Different legal systems assign different consequences to defects in the validity of a marriage. Thus, for example, lack of consent renders a marriage voidable in England and Wales and in Northern Ireland, but void in Scotland. Non-age renders a marriage void in the domestic laws of the three United Kingdom law districts, but only voidable in France. Consanguinity and affinity render a marriage void in the United Kingdom, but only voidable in certain Canadian provinces. If according to the appropriate law the defect in question renders a marriage invalid, a further question for consideration is whether the marriage is void or voidable. Which law is to determine this issue?

5.51 There are two views:

(a) The classification of the marriage as void or voidable is to be determined by the law that governs validity, i.e., the law applicable to the particular defect in question ("the De Reneville view"). This view is supported by the

436 In the domestic laws of the United Kingdom the distinction between a void and a voidable marriage is as follows. A void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; no decree is necessary to render it void and a decree, if obtained, merely declares that there is not and never has been a marriage. Either spouse or any person having a sufficient interest may petition for a decree, whether during the lifetime of the spouses or after their death. A voidable marriage, on the other hand, is a valid marriage unless and until it is annulled by decree. It can be annulled only at the instance of one of the spouses during the lifetime of both. In English and Northern Ireland law, a decree annulling a voidable marriage, unlike a decree annulling a void marriage, affects the parties' status only prospectively. But in Scots law a declarator in respect of a voidable marriage operates retrospectively.

weight of judicial authority[437] in England[438] and academic opinion[439] on both sides of the Border.

(b) The question whether a marriage is void or voidable is a matter for the law of the forum. This view is advocated by Dr. Morris[440] and derives support from Corbett v. Corbett.[441]

5.52 The question as to whether a marriage is void or voidable does not, of course, only arise where the defect alleged relates to lack of consent or physical incapacity. It can equally arise where the marriage is challenged on the ground of formal invalidity or because the parties lacked legal capacity. The initial question for the court is to characterise (according to the law of the forum) the juridical nature of the defect alleged by the petitioner in the nullity proceedings. If the defect pertains to form, the applicable law will (in general) be the law of the country of celebration; if the defect is characterised as one relating to essential validity, the appropriate law will govern, i.e., the ante-nuptial domiciliary law of each party if the defect is one of legal capacity; or the law of the domicile or the law of the forum (whichever is eventually

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437 De Reneville v. De Reneville [1948] P. 100, 114 per Lord Greene M.R.; Casey v. Casey [1949] P. 420, 429-430; Merker v. Merker [1963] P. 283, 297; Szechter v. Szechter [1971] P. 286, 294.

438 There do not appear to be any Scottish or Northern Ireland decisions on this question.

439 See, e.g., Cheshire and North, op. cit., pp. 392-394; Anton, op. cit., p. 293; Clive, op. cit., pp. 157-158.

440 (1970) 19 I.C.L.Q. 424.

441 [1957] 1 W.L.R. 486.

chosen) where the defect relates to lack of consent or physical incapacity. The law to decide the validity of a marriage will not vary depending on whether the marriage is classified as void or voidable. The question of voidness or voidability arises after the marriage is held to be invalid by the law which determines validity. An example might help.

> W petitions for a decree of nullity in England on the ground of duress. Both H and W were domiciled in Scotland at the time of the ceremony of marriage. Lack of consent renders a marriage voidable in English law, but void in Scots law.

Let us assume that the law applicable to lack of consent is, as has been suggested,[442] the law of the ante-nuptial domicile of the party whose consent is alleged to be defective, i.e., the petitioner. The court will look to Scots law to ascertain whether lack of consent for duress renders the marriage invalid. If so, on the De Reneville approach, that law will also determine whether the marriage is void or voidable; but on the law of the forum approach the latter issue will be governed by English law.

5.53 Our provisional view is that the law governing the validity of a marriage should determine the question whether it is void or voidable. Our reasons are as follows:

> (a) The issue before the court in nullity proceedings is whether the marriage is valid or invalid. "Whether a marriage is void or voidable is merely a facet of the question whether it is valid or invalid. The law that determines its validity or invalidity must also determine what is meant by invalidity, that is, whether it means voidness or voidability."[443]

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442 See para. 5.23 above.

443 Cheshire and North, op. cit., p. 392.

(b) To adopt any solution other than that put forward in De Reneville "could result in the virtual negation of the choice of law rule in any case where a legal incapacity for marriage makes the marriage void ab initio by the law of the domicile, is not contrary to any country's public policy, but has no effect by the internal law of any other legal system."[444]

The law determining the effects of a nullity decree of the forum

5.54 One final related issue remains to be considered. What law is to determine the effects of a nullity decree, for example whether it is to operate prospectively or retrospectively?[445] The decree annulling the marriage is a decree of the forum and, in our view, it must be for the law of the forum as the law governing procedure to determine the effect of its own decree.[446] Thus, in the example at paragraph 5.52 above, it will be for Scots law (as the law determining the validity of the marriage) to decide that the alleged defect renders the marriage void, but for English law to determine the effects of its own decree, i.e., that the decree will operate retrospectively. To take another example.

An uncle and niece, who are domiciled in country X where marriages between persons in their relationship are voidable (and not void, as in English or Scots law), marry in that country. H seeks to have his marriage annulled in (a) England, or (b) Scotland.

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444 Clive, op. cit., p. 158.

445 In English law, but not Scots law, a decree of nullity of a voidable marriage operates prospectively.

446 See Cheshire and North, op. cit., pp. 392-393; Clive op. cit., p. 158.

Since the alleged defect is consanguinity, it will be for the law of the domicile (the law of X) to classify the defect as rendering the marriage void or voidable (in this case, the marriage would be voidable); but for the law of the forum to decide, in the light of that classification, whether the decree should have retrospective or prospective effect. In English law a decree of nullity in respect of a voidable marriage operates prospectively, whereas in Scots law a declarator of nullity in respect of a voidable marriage operates retrospectively. Thus the English decree will have prospective effect, whereas the Scottish decree will have retrospective effect.

5.55 Our provisional recommendations on the issues raised in paragraphs 5.50-5.54 above are:

(a) the law governing the validity of a marriage should determine whether it is void or voidable;

(b) the law of the forum should determine the effect to be given to a nullity decree of the forum.

At a later stage a decision will have to be taken as to whether these principles, if acceptable, need to be given statutory effect. Views on this question would be welcome.

PART VI

SUMMARY OF PROVISIONAL RECOMMENDATIONS

6.1 We conclude with a summary of the provisional recommendations which we have made and the main questions which we have raised in this consultative document. Comments and criticisms are invited.

A. Formal validity of marriage

The lex loci rule

(1) The formal validity of a marriage should continue to be governed by the law of the country of celebration, i.e., the lex loci celebrationis ("the lex loci rule").

(Paragraph 2.36).

Identification of country of celebration

(2) The problem of identifying the country of celebration in exceptional cases, for example, where a marriage is contracted merely by an exchange of promises and the parties are in different countries at the time, should not be regulated by legislation but left to judicial development.

(Paragraph 2.38).

Renvoi

(3) The reference to the law of the country of celebration should be construed as a reference to the whole law of that country (including its rules of private international law) and not merely its domestic rules.

(Paragraph 2.39).

(4) A marriage should not be held to be formally valid on the ground that it complies with the domestic rules of the law of the foreign country of celebration if the choice of

law rules of that country require the parties to observe the formalities prescribed by some other legal system.

(Paragraph 2.42).

Rule of alternative reference

(5) A rule of alternative reference, whereby the formal validity of a marriage would be tested by reference to either the law of the country of celebration or the parties' domiciliary law, should not be adopted in this country. A marriage celebrated in the United Kingdom should be formally valid if, and only if, the parties have complied with the formal requirements prescribed by the law of the country of celebration. The same rule should apply to marriages celebrated abroad, except in so far as the law of the forum in the United Kingdom excuses compliance with the formal requirements of the law of the foreign country of celebration.

(Paragraph 2.47).

Statutory exceptions to the lex loci rule

(6) The statutory exceptions to the lex loci rule provided by the Foreign Marriage Act 1892 (as amended) should be retained, subject to the amendments mentioned in (7), (8) and (10) below.

(Paragraph 2.48).

(7) The Foreign Marriage Act 1892 should be amended to make it clear that the requirement as to parental consent in section 4(1) of that Act should not apply to a person domiciled in Scotland, and that a person domiciled in Northern Ireland should comply with the Northern Ireland (rather than the English) provisions as to consent.

(Paragraph 2.50).

(8) In section 8 of the 1892 Act the solemnisation of a marriage according to a form of ceremony recognised by the Church of Scotland should be placed on an equal footing with the solemnisation of a marriage according to the rites of the Church of England. We invite views on whether this result should be achieved by:

(a) deleting the reference to the Church of England rites in section 8(2) and (3) of the 1892 Act; the subsections would then simply state that a marriage may be solemnised in such form and ceremony as the parties see fit to adopt, provided that at some stage in the ceremony they declare, in the presence of each other, the marriage officer and witnesses, that they accept each other as husband and wife; or

(b) expressly stating in section 8(2) that a marriage may be solemnised according to a form of ceremony recognised by the Church of Scotland, and also excepting such a form from the requirements of section 8(3).

(Paragraph 2.51).

(9) Article 3(1)(d) of the Foreign Marriage Order 1970 should be amended to refer expressly to the law of the domicile of each party.

(Paragraph 2.52).

(10) The facilities for marriage provided under section 22 of the Foreign Marriage Act 1892 should also be made available to -

(a) United Kingdom civil servants and sponsored civilians accompanying Her Majesty's Forces

abroad. The civilian personnel to whom section 22 would apply would be specified by Order in Council.

(b) Children of members of the Forces and of the specified civilian personnel depending upon him or her for support. We invite views, however, on whether the facilities for marriage under section 22 of the 1892 Act should be made available to any other person who is related to the member of the Forces or the specified civilian personnel by blood or marriage and who is dependent upon him or her for support. We would also welcome comment on whether the requirement of dependence for support should not apply to a child or should only apply to a child over a certain age.

(Paragraph 2.53).

Common law exception to the lex loci rule

(11) Views are invited as to whether the common law marriage exception should be retained for cases where compliance with the law of the foreign country of celebration is virtually impossible or not reasonably to be expected.

(Paragraphs 2.54-2.56).

(12) If the view is taken that the common law marriage exception should be retained, we invite comment as to whether the present law needs to be changed and, if so, how such a change should be achieved. The three main possibilities on which we invite views are:

(i) Preserve the common law exception without any amendment.

(Paragraphs 2.58-2.59).

(ii) Provide a statutory restatement of the common law exception, subject to any reform which might be thought desirable.[447]

(Paragraphs 2.60-2.66).

(iii) Replace the common law exception with a statutory provision to the effect that a marriage which does not comply with the formal requirements of the law of the foreign country of celebration should nevertheless be held to be formally valid if it would be contrary to the public policy of the forum not to recognise its validity.

(Paragraph 2.67).

B. Legal capacity

The main choice of law rule: law of the domicile

(13) The personal law of the parties should continue to govern their capacity to marry.

(Paragraph 3.23).

(14) The connecting factor for identifying the personal law of the parties should be the law of the domicile.

(Paragraph 3.32).

(15) All issues of legal capacity to marry should be governed by the law of each party's ante-nuptial domicile (the dual domicile test).

(Paragraph 3.36).

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447 If this approach is adopted, we provisionally recommend that the formal validity of a marriage, in cases where the local law is inapplicable, should be referred to the law of the forum; and that any legislation should make it clear that what is required by that law of the forum, where that is the law of any part of the United Kingdom, is merely the exchange of voluntary consents to take one another as husband and wife. (Paragraph 2.66).

Renvoi

(16) The reference to the law of the country of the domicile should be construed as a reference to the whole law of that country (including its rules of private international law) and not merely to its domestic rules.

(Paragraph 3.39).

Capacity under the law of the country of celebration

(17) 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 an incapacity to marry the other.

(Paragraph 3.44).

The Sottomayer rule

(18) The rule in Sottomayer v. De Barros (No. 2)[448] should be abolished.

(Paragraph 3.48).

Public policy

(19) The choice of law rules governing the validity of marriage should continue to be subject to a public policy safeguard, i.e., the courts should continue to have a narrow discretion to refuse to apply a rule of the foreign law governing validity if such application would be contrary to the public policy of the forum.

(Paragraph 3.49).

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448 (1879) 5 P.D. 94. This rule is to the effect that the validity of a marriage celebrated in the forum in the United Kingdom between persons one of whom is domiciled in the forum and the other in a foreign country is not affected by an incapacity which, though existing under the law of the foreign domicile, does not exist under the law of the forum.

C. Characterisation of lack of parental consent

(20) The characterisation of a rule requiring persons under a certain age to obtain the consent of their parents or guardians should be left to judicial development without any specific legislative guidance (Paragraph 4.8). If, however, the view is taken that it would be desirable to provide a legislative solution to this problem, we invite comments as to which of the following solutions should be adopted:

(a) Retain (and give statutory effect to) the present rule that parental consent is to be classified as a matter of form.

(b) Provide that lack of parental consent should be classified as a matter of capacity.

(c) Require the courts to determine how the requirement of parental consent is classified under the foreign law and to follow the foreign classification subject to the usual public policy safeguard.

(d) Require the courts to have regard to the foreign classification without being bound by it.

(Paragraph 4.9).

D. Retrospective changes in the law governing the validity of marriage

(21) The question whether the validity of a marriage should be affected by a change in the applicable law after the date of its celebration should not be regulated by legislation but left to judicial development.

(Paragraph 4.13).

E. Choice of law in nullity suits

Lack of consent

(22) The issue of a party's lack of consent should be governed by that person's ante-nuptial domiciliary law.

(Paragraphs 5.18 and 5.23).

(23) The rule in Sottomayer v. De Barros (No. 2)[449] should not be retained in relation to the issue of lack of consent.

(Paragraph 5.20).

(24) We invite views as to whether a court in the United Kingdom should be able to annul a marriage, whether celebrated in the United Kingdom or abroad, on a ground relating to reality of consent which, though available in relation to that marriage under the law of the country of celebration, is not available under the law of the domicile of the party whose consent is alleged to be defective.

(Paragraph 5.24).

Impotence and wilful refusal to consummate

(25) We suggest that, whatever choice of law rule is adopted for impotence and wilful refusal to consummate, the same rule should apply to both.

(Paragraph 5.30).

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449 See n. 448 above.

(26) Views are invited as to whether the applicable law for impotence and wilful refusal to consummate should be the law of the forum or the law of the parties' domicile.

(Paragraphs 5.31-5.33).

(27) If the view is taken that the applicable law for impotence and wilful refusal to consummate should be the law of the domicile, we invite comment as to which party's law should be regarded as relevant where the parties are domiciled in different countries at the date of the marriage. In particular we invite views on three possible solutions:

(a) the law of the domicile of the spouse alleged to be incapable;

(b) the law of the petitioner's domicile;

(c) the law of the domicile of either spouse.

(Paragraphs 5.35-5.40).

(28) We suggest that the relevant date for determining the domiciliary law of the relevant spouse should be as at the time of the marriage (and not the date of the nullity proceedings).

(Paragraph 5.41).

(29) If the law of the domicile is adopted as the applicable law for impotence and wilful refusal to consummate, we suggest that legislative intervention is unnecessary to deal with the problem that can arise where a petition for nullity is presented on the ground of impotence or wilful refusal but the petitioner is domiciled in a country which only grants divorce in such cases.

(Paragraph 5.42).

(30) If the view is taken that the application of the law of the parties' domicile should be the basic choice of law rule for issues of impotence and wilful refusal to consummate, we invite comment on whether, in relation to such issues, the same rule should be applied as in the case of legal capacity, namely that a court in the United Kingdom should be able to annul a marriage on a ground, which though available in relation to that marriage under the law of the country of celebration, is not available under the law of either party's domicile.

(Paragraph 5.43).

Grounds unknown to the domestic law of the forum

(31) Views are invited as to whether a court in the United Kingdom should be able to annul a marriage on a ground which has no counterpart in the domestic law of the forum. If the view is taken that a court in the United Kingdom should not be able to annul a marriage on a ground unknown to the domestic law of the forum, we invite comment as to how this should be achieved; and in particular on whether:

(a) the law of the forum should be adopted as the governing law for all matters of reality of consent and physical capacity;

(b) the law of the domicile should be adopted as the applicable law, subject to the proviso that, in relation to lack of consent and physical defects, the court should only grant a decree on the specific grounds prescribed by the domestic law of the forum.

(Paragraphs 5.44 - 5.49).

The law to determine whether a marriage is void or voidable

(32) The question whether a marriage is void or voidable should be determined by reference to the law governing the validity of the marriage.

(Paragraph 5.53).

The law determining the effects of a nullity decree of the forum

(33) The effects of a nullity decree of the forum should be determined by the law of the forum.

(Paragraph 5.54).

(34) Views are invited as to whether the recommendations at (32) and (33) above need to be given statutory effect.

(Paragraph 5.55).

APPENDIX A

The Hague Convention on Celebration and Recognition of the Validity of Marriages (1978)[1]

1. This Convention falls into two main parts. Chapter I deals with the rules for the celebration of marriages in a Contracting State and Chapter II with the recognition of the validity of marriages entered into in other States. Chapter I is said, in Article 1, to apply to the requirements in a Contracting State for the celebration of marriage. It lays down what appear to be choice of law rules for the celebration of a marriage, though they are far from being a complete set of rules. Their form is strongly influenced by the principle underlying the chapter and indeed the Convention as a whole, namely that of "favouring the institution of marriage". The question that Chapter I seeks to answer is whether the authorities in a Contracting State are obliged to celebrate a marriage between two parties with connections with more than one State. In the process, Chapter I lays down some choice of law rules, though not a complete "code". First of all, the distinction is drawn between formal and essential validity. Formal requirements are to be governed by the law of the place of celebration[2] but, if that country has its own choice of law rules for form, they can be applied, i.e., renvoi is included.

2. The main provision in Chapter I dealing with essential validity is Article 3 which states:

> "A marriage shall be celebrated -
>
> 1. where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or

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1 This Convention has been signed by only five States and ratified by none. The Government does not propose that the United Kingdom should sign or ratify the Convention: see paras. 1.2 - 1.3 above.

2 Art. 2.

2. where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration."

What this does not do is lay down a general choice of law rule for the essential validity of marriage. Indeed it assumes that the State of celebration has such a rule, but without defining it. What the Article appears to do is to make an inroad into the principle adopted in a number of countries that a marriage must comply both with the local law and the law applicable by reason of the forum's choice of law rules. The effect of Article 3(2) is that a marriage shall be celebrated in, for example, England between two 15-year-olds both of whom are domiciled in a country where the age of marriage is 14, notwithstanding the fact that the minimum age of marriage in England is 16. This is because the choice of law rules of the State of celebration, England, refer the question of capacity to the law of the domicile. Article 3(1) provides an inroad into the forum's general choice of law rule by, in effect, stating that incapacity under a foreign domiciliary or national law may be ignored if one of the parties marrying in England is resident there. This perpetuates a variant of the English rule[3] that a foreign incapacity may be ignored if one of the spouses is domiciled in England and the marriage is celebrated there.

3. The Convention goes on to provide that the application of a foreign law rendered applicable by, for example, Article 3 may be refused if to apply it would be manifestly incompatible with the public policy of the State of celebration,[4] i.e., the forum, and that a State may reserve the right to derogate from Article 3(1) and decline to apply its own internal marriage law to the capacity of a spouse who is neither a national nor habitually resident there.[5]

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3 Sottomayer v. De Barros (No. 2) (1879) 5 P.D. 94; see para. 3.6 above.

4 Art. 5.

5 Art. 6.

4. Chapter II is concerned with the recognition of the validity of marriages entered into in other States.[6] This chapter is universal in character, rather than reciprocal, in that it governs the recognition of the validity of marriages entered into in any foreign State, not just those States which have become parties to the Convention.[7] The "heart of Chapter II" is to be found in the first paragraph[8] of Article 9:

> "A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter."

Primacy is conferred on the law of the country of celebration. Furthermore, there is no distinction drawn between formal and essential validity: both are governed by the law of the place of celebration. The law of the place of celebration is also to govern retrospective validation, and reference to the law of the place includes its choice of law rules, i.e., renvoi is permitted. Proof of validity is assisted by the provision that, where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established.[9]

5. Article 9 requires a marriage, valid as to form and substance under the law of the country of celebration, to be recognised for all purposes, whether these be a judicial declaration as to its validity (or

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6 Art. 7.

7 Art. 8 excludes a number of fairly unusual types of marriage from the scope of the Convention, namely marriages celebrated by military authorities, marriages on ships or aircraft, proxy marriages, posthumous and informal marriages. A State could of course choose to apply the rules in the Convention to them if it so wished.

8 The second paragraph deals with marriages celebrated by diplomatic or consular officers.

9 Art. 10.

presumably the denial of a petition for nullity), or an administrative decision by a marriage registrar as to whether one spouse was free to marry again, or decisions as to taxation, social security and the like. Indeed the Convention expressly provides that the validity of a marriage is to be governed by the rules of Chapter II even though the issue of validity arises as an incidental question in the context of another issue.[10]

6. There are in Article 11 a number of exceptions to the general rule that marriages valid according to the law of the country of celebration are to be recognised as valid. The exceptions are cast in terms of substantive marriage law and are in addition to the general exception that recognition can be refused if to recognise would be manifestly incompatible with the public policy of the forum.[11] The five grounds for non-recognition listed in Article 11 are that, at the time of the marriage, under the law of the forum including its rules of private international law, one of the spouses was regarded as already married, or was under age (and had not been dispensed from the age requirement), lacked mental capacity, did not consent or the spouses were brother and sister or related in the direct line by blood or adoption (e.g., father and daughter). Non-recognition on these grounds is not mandatory, but many States would not wish to recognise a foreign marriage which contravened its laws in these respects.

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10 Art. 12. The only exception to this provision is if the main non-marriage issue is governed, according to the choice of law rules of the forum, by the law of a non-Contracting State; in that event the rules of Chapter II need not be applied. This exception is a pretty rough and ready one. If one assumes that the main question is one of succession and the subsidiary issue is the validity of the marriage of a potential beneficiary, then whether the Convention applies to the latter issue depends on whether the forum's conflict rules, including possibly renvoi, apply to the succession laws of a State which has ratified the Convention.

11 Art. 14.

Criticism of the 1978 Convention

7. Chapter I, dealing with the requirements in a Contracting State for the celebration of a marriage, was designed to deal with the problem of migrant workers in certain countries who found it difficult to marry there either because they did not comply with the substantive requirements of the law of the place of celebration or because they did not comply with the substantive requirements of their own, or their intended spouse's, personal law.[12] This problem, however, is probably due to the stringency of the marriage laws in the countries concerned rather than to any inherent defect in the traditional approach to choice of law rules on marriage. In attempting to meet it, the Convention obliges the authorities of the country of celebration to celebrate limping marriages[13] and marriages which would be contrary to that country's own internal law.[14] The exceptions to the main rules in Chapter I based on public policy do little to maintain confidence in those rules. Indeed the very reason that some countries may at present require compliance with their substantive marriage law, even in the case of parties domiciled in or nationals of a foreign country, is because of public policy. Furthermore, Article 3(1), in preserving the essence of the rule in Sottomayer v. De Barros (No. 2), maintains a much criticised rule.[15]

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12 Hague Conference on Private International Law, Actes et Documents of the XIIIth Session, Vol. 3, p. 152.

13 I.e., marriages which would be regarded as invalid in other countries including, possibly, the country of a spouse's personal law. Chapter II of the Convention, on the recognition of marriages, attempts to meet this problem but there seems little likelihood that it will be widely adopted.

14 This result could be avoided by a forced interpretation of Art. 3(2) which would involve reading "internal law" as including "internal laws" and allowing the state of celebration to include in its choice of law rules a rule that the substantive requirements of the state of celebration must be met as well as those of the spouse's personal law. This, however, would be contrary to the spirit and purpose of the Convention.

15 See para. 3.17 above. We have provisionally recommended that the Sottomayer rule should be abolished: para. 3.48 above.

8. Chapter I of the Convention was controversial. A number of countries represented at the Hague Conference expressed the view, when commenting on an earlier draft of the Chapter, that it should not form part of the Convention at all.[16] Eventually it was included but was made optional.[17] Chapter I has not been warmly welcomed by commentators. It is said that it "would pose obvious difficulties to ... common law countries."[18] It is doubtful whether many of these countries would be willing to give up their practice of requiring marriages in their own country to comply with both their law and the spouses' personal law.

9. The basic rule of Chapter II that formal and essential validity are both to be referred to the law of the place of celebration is, in a sense, a compromise between those States which regard the domicile as the personal law and those which apply the national law. Neither is applied and reference to the personal law is abandoned in favour of the law of the place of celebration, an American rule now disapproved of in the United States of America.

10. A major criticism of the Convention is that it leaves a large number of issues still dependent on the unharmonised, unreformed choice of law rules of the individual States, bearing in mind in particular that the rules in the Convention shall not prevent the application of rules of law more favourable to the recognition of the validity of foreign marriages.[19] In Chapter I, the choice of law rules of the forum, the State

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16 Hague Conference on Private International Law, Actes et Documents of the XIIIth Session, Vol. 3, pp. 150-153. The United Kingdom was one of these countries.

17 See ibid., p. 292 and Art. 16 of the Convention.

18 Reese, (1977) 25 Am. Jo. Comp. Law 393.

19 Art. 13.

of celebration, in relation to essential validity are expressly preserved for the purposes of Article 3(2). In Chapter II, the exceptions listed in Article 11 to the lex loci rule depend for their application on the law of the State faced with recognition of a foreign marriage, including that State's conflict rules. If, for example, a couple who are British subjects, habitually resident in England but domiciled in State X, marry in State X in circumstances such that they satisfy the age of marriage requirements of State X, but not of English law, the question whether the English courts may refuse to recognise the validity of the marriage in State X will depend on English choice of law rules. Capacity to marry is governed by the law of the domicile; both spouses were domiciled in State X and recognition cannot be refused.

11. Perhaps most significant of all is that Chapter II only provides for the recognition in the forum of the validity of marriages which are valid under the law of the place of celebration. It provides no rules for recognition of the validity of marriages which are invalid under that law. Such recognition still depends on the choice of law rules of the forum.

Conclusion

12. The choice of law rules in the Convention are incomplete. They cannot, therefore, be regarded as meeting the need for reform of the choice of law rules relating to marriage. If the Convention rules, incomplete as they are, were to be regarded in themselves as desirable, then they could be included within a comprehensive set of new rules. In our view, they do not form such a basis for law reform. Even if the optional Chapter I were to be rejected, as paying insufficient regard to the personal law of the parties and the interests of the State of celebration, Chapter II, the obligatory heart of the Convention, is also unsatisfactory, not least in its effect of requiring recognition in this country of the validity of the foreign marriage of a United Kingdom domiciliary despite the fact that he or she might lack capacity under the law of the relevant part of the United Kingdom.

APPENDIX B

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