Institute of Comparative Law
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CHOICE OF LAW IN THE FORMATION, ANNULMENT AND DISSOLUTION OF MARRIAGE: ENGLISH AND ISRAELI LAWS COMPARED

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of MASTER OF LAWS

by

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Thesis Abstract:

This thesis, which is divided into four principle parts, deals with the selection of the proper law in matters of marriage, annulment and divorce.

This dissertation examines English and Israeli laws in a comparative way.

The first part gives a short survey of the Israeli legal system in matters of personal status, discussing Israel's internal and international conflicts.

In the second and third parts, choice of law rules for the formal and essential validity of marriage and nullity are examined.

The fourth part deals with choice of law in divorce, examining the relationship between jurisdiction and choice of law.

Dealing with the validity of marriage, nullity and divorce, in every part, the present law is examined and a suggested approach is given.

In the conclusion, the main points of difference between Israeli and English choice of law rules are emphasized.

Résumé de thèse:

Cette thèse, comprenant quatre parties principales traite des conflits de lois en matière de mariage, d'annulation et de divorce.

Cette thèse fait une étude comparative des droits anglais et israéliens.

Dans la première partie, nous donnons un bref aperçu de l'appareil judiciaire en Israël, en matière de statut personnel, discutant les conflits nationaux et internationaux d'Israël.

Dans les deux parties suivantes nous étudions les conflits de lois concernant la validité du mariage, tant au point de vue de la forme que du fond et son annulation.

La quatrième partie, porte sur la loi applicable en matière de divorce examinant la relation entre juridiction et conflits de lois.

Tout en étudiant la validité du mariage, son annulation et le divorce, nous examinons la loi actuelle et suggérons une méthode d'approche.

Dans la conclusion, nous soulignons les différences principales entre les dispositions prévoyant un choix de lois en Israël et en Angleterre.

PREFACE

The purpose of this dissertation is to compare and contrast the conflict rules of England and Israel in matters of marriage annulment and divorce, and also to present proposals for improvements to existing rules.

The different parts of the dissertation vary in their originality. Dealing with the validity of marriage and nullity we have mainly relied on the writings of others, a somewhat different approach has, however been suggested. The principal originality of this thesis is in the discussion of choice of law in divorce. Both English and Israeli writers have dealt mainly with questions of jurisdiction. It should be noted that in the Israeli legal writings, the choice of law rules in The Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, have received only general comments; to the best of our knowledge the specific choice of law rules have not been evaluated. English and Israeli choice of law rules in divorce have not been compared.

We wish to thank Prof. M.G. Bridge, our thesis supervisor, for his guidance and comments and especially for helping us to overcome the difficulties in expressing ourselves in English. We must also express our gratitude to the staff of McGill library for their aid and courtesy. Likewise we are much indebted to the Universities of New York and Columbia for enabling us to use their fine collections of Israeli legal material. Last but not least we wish to thank Mrs. M. Pollock and Mrs. D. Poirier, for preparing the typescript.

ABBREVIATIONS ***

A.C.	Law Reports, Appeal Cases
All-E.R.	All England Law Reports
Buff. L. Rev.	Buffalo Law Review
c.	Chapter (of Act of Parliament)
Can. Bar. Rev.	Canadian Bar Review
Ch.	Law Reports, Chancery
Colum. L. Rev.	Columbia Law Review
Dalhousie L.J.	Dalhousie Law Journal
Fam.	Law Reports, Family Division
Fam. L.Q.	Family Law Quarterly
Fed. L. Rev.	Federal Law Review
H.L.C.	House of Lords Cases
Hagg. Con.	Haggard's Consistory Reports
Harv. L. Rev.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
Journal Comp. Leg.	Journal of Comparative Legislation and International Law
L.J. Ch.	Law Journal Chancery
L.T.	Law Times
M.L.R.	Modern Law Review
P.	Law Reports, Probate
P.D.	Law Reports, Probate Division
Q.B.	Law Reports, Queen's Bench
Rec. des Cours	Recueil des Cours
s. *	Section
Sec. **	Section
S.I.	Statutory Instruments
T.L.R.	Times Law Reports
U. Chi. L. Rev.	University of Chicago Law Review
U.T.L.J.	University of Toronto Law Journal
Vand. L. Rev.	Vanderblit Law Review
Wash. L. Rev.	Washington Law Review
W.L.R.	Weekly Law Reports

* used in footnotes

** used in text

*** abbreviations concerning Israeli legal material are listed on next page.

NOTE

All titles of books and articles published in Hebrew are given in translation. The three Hebrew language law journals appearing in Israel are: "HaPraklit" - published by the Israel Bar; "Iyune Mishpat" - Tel Aviv University Law Review; "Mishpatim" - Hebrew University of Jerusalem Law Review. Hebrew book titles given in translation are accompanied with the indication "(in Hebrew)", in the bibliography list. The laws of the state of Israel are cited in their authorised English translation, in the series of the "Laws of the State of Israel", published by the Ministry of Justice.

ABBREVIATIONS

concerning the Israeli legal material

A.G.	Attorney General
Art.	Article
C.A.	Civil Appeal
Cr.A.	Criminal Appeal
H.C.J.	High Court of Justice
Is.L.R.	Israel Law Review
L.S.I.	Laws of the State of Israel
Misc. App.	Miscellaneous Application
P.D.	Piskei Din (Judgments) - Law Reports of the Supreme Court (in Hebrew)
P.M.	Pesakim Mehoziim (District Decisions) - Law Reports of the District Courts (in Hebrew)
S.J.S.C.	Selected Judgments of the Supreme Court of Israel (in English)

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INTRODUCTION

This dissertation is intended to deal with choice of law problems in matters of marriage, nullity and divorce in English and Israeli laws. We have chosen to compare these two laws because of their special relationship. A large part of Israel's conflict rules are based on English rules of private international law. Yet the Israeli legal system, in which religious laws continue to be applied, is very different from the English legal system. This difference and new Israeli legislation have promoted the formation of different choice of law rules in many cases.

Delimitation of the Subject Matter:

We shall deal with the validity of marriage and its annulment and dissolution as pure questions of status. On the other hand, the question of their effects (on proterty or the person) will be excluded.

Our attention will chiefly be focused on choice of law problems. In dealing with divorce, the jurisdictional aspect will also be taken into account because of the close connection between jurisdiction and choice of law in divorce. On the other hand, the questions of the recognition of foreign decrees of divorce and nullity will be left out of consideration.

With respect to the law of Israel, further limitation is necessary. We shall deal mainly with the law applicable to foreigners and Israeli Jews in the secular courts; Israelis belonging to other faiths, such as Christians, Moslems and others, will not be considered.

As Israel's legal system is very complex and unfamiliar, we shall begin with a short survey of it in matters of personal status. This we deem necessary for a better understanding of Israel's private international law rules as well. We shall then continue to deal with the choice of law in the formation annulment and dissolution of marriage, comparing English and Israeli rules respectively.

I

ISRAEL - A LEGAL SYSTEM OF INTERNAL AND INTERNATIONAL CONFLICTS

1. Israel's Internal Conflicts: The Conflict Between Religious and Secular Laws

While at present the internal legislation of most countries is homogeneous, in Israel, apart from state legislation, religious laws continue to be applied in matters of personal status.

In this area the British Mandatory legislator, as well as the Israeli legislator preserved in general the outline of the system which was in force in the Ottoman period. Thus jurisdiction in matters of personal status is vested in the various religious courts of the religious communities recognized by the state.[1] The religious courts apply their religious law and Israel has no uniform territorial secular family law.[2] Conflicts of interpersonal laws are therefore an unavoidable result of Israel's legal system.

Israel's internal conflict rules consist of dividing the jurisdiction between the various religious tribunals and the secular courts, and determining the law applicable. As we shall deal mainly with the law applicable to the Jews, the majority in Israel, we shall give a short survey of one important aspect of Israeli internal conflicts: the conflicts between Jewish religious and secular jurisdiction and laws, especially with regard to matters of marriage and its dissolution.

Since the foundation of the State of Israel, there has been secular legislation in matters of personal status, always accompanied by political conflicts and struggles. Questions of guardianship, adoption, capacity, succession, and property relations between spouses have been regulated by secular legislation.[3] But the legislator has refrained from dealing with matters of marriage directly because they are matters of strict religious command, and the religious parties have shown no flexi-

bility and no agreement to any deviation from the religious law. This approach can also be seen in the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, which does not apply when both parties are Jews (or non-Jewish of the same recognized religious community), Israeli subjects or foreigners.[4]

(a) Jurisdiction in Matters of Personal Status

The jurisdiction of the rabbinical courts is determined by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.[5] Their jurisdiction is confined to matters of personal status of Jews. This jurisdiction is, in some cases, exclusive; in others, concurrent with the civil courts.

Sec. 1 of the law determines the following:

> "Matters of marriage and divorce of Jews in Israel,[6] being nationals or residents[7] of the State shall be under the exclusive jurisdiction of the rabbinical courts:"

The rabbinical courts have further jurisdiction in matters of marriage and divorce of Jews when one or both parties are foreigners, (i.e., when they are not nationals or residents of Israel) provided both parties consent to the rabbinical court's jurisdiction.[8]

In other matters of personal status, the rabbinical courts have jurisdiction over Israelis or foreigners provided both parties consent to their jurisdiction.[9]

In all cases where consent - which is needed to establish the rabbinical court's jurisdiction - is not given, the civil courts have jurisdiction.[10] They do not, however, have jurisdiction to give a decree of nullity or divorce when both spouses are Jewish.[11]

A question of marriage and divorce can, however, arise before a secular court in several ways:

1. As an incidental question,[11a] in matters which are within the jurisdiction of the secular courts, such as criminal or tort cases where the validity of a marriage or divorce may arise, or in matters of personal status which are within the concurrent jurisdiction of the religious and the secular courts, such as maintenance or succession.[12]

2. Before the High Court of Justice.[13] Religious Courts are subject to the supervision of the High Court of Justice by virtue of Sec. 7 (b) (4) of the Court's Law. This supervision is confined to questions of jurisdiction only.[14]

A question of marriage and divorce may also entail their recognition for some administrative purpose.[15] Here again the High Court has intervened widely in those matters by virtue of Sec. 7 (a).[16]

3. In addition, when one or both parties are Jewish foreigners, the question may arise directly before the district court.
4. When only one party is Jewish, the matter will arise before a civil court, unless a religious court has been appointed by the President of the Supreme Court.[17]

We see, therefore that the same matter may arise before a rabbinical court or a secular court incidentally or directly. The conflict, however, is not limited to questions of jurisdiction. The laws applied by secular and religious courts are not exactly the same and the results therefore are not necessarily the same. The difference between the laws applied sharpens the conflicts of jurisdiction.

(b) Law Applied by the Rabbinical Courts

The Palestine Order in Council is silent as to the laws to be applied by the various religious courts. Thus the religious courts have always applied their religious law. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law has not changed this situation and, with a few exceptions,[18] this practice of the rabbinical courts is unchallenged.

The supremacy of the religious law in matters of personal status has been slightly narrowed by the legislator who, besides enacting secular laws in the field of personal status,[19] has determined that certain secular provisions apply over and above the religious laws in the religious court itself.[20]

An important question is whether the religious courts must and in fact do consider secular rules of private international law when dealing with a case which involves a foreign element. There is abundant authority that they do not consider rules of private international law.

Thus, in Cohen-Bousslik v. A. G.,[21] Justice Silberg stated with regard to rules of private international law:

> "The religious court regards itself as completely free from these 'cramping' rules; it extends the application of the religious law - a priori and unrestrictedly - to acts performed in the past by foreign nationals outside the boundaries of the State, and it is permitted to do so ..."[22]

While it is not quite clear whether the legislator had intended that the religious courts refrain from applying rules of private international law,[23] their non-application is accepted though sometimes criticised.[24]

Refraining from applying rules of private international law coincides with the very nature of religious law. It is a personal law applicable to all its members without qualification of boundaries or nationalities.[25]

G. Tedeschi describes the religious laws thus:

> "They regard themselves not as one of the existing legal systems but as the law - the eternal, necessary, essential law - which has always been binding upon adherents of their religion ... This 'retroactive overbearing power' of religious law is linked very closely to the reluctance of religious - though not of secular - jurisdictions to apply foreign law, at least as regards certain matters which they regard as the close preserve of their religious law...(Matters of marriage and divorce are undoubtedly such matters. I.S.) In conclusion we may say that, in contrast to secular law, ... it excels in being naturally more exclusive."[26]

(c) Law Applied by the Secular Courts

The secular courts dealing with matters of the personal status of Israelis in which there is no secular territorial legislation, (e.g. matters of marriage) apply the parties' religious law.[27] But the religious law as applied by the secular court is not the same as when it is applied by the religious court.[28]

In Cohen v. Bousslik, Justice Silberg set out three principal limitations to the application of religious law: the modes of procedure; the law of evidence;[29] and the rules of private international law.[30]

We see therefore that religious law applied by civil courts can be compared to a foreign law for even though it need not be proven as a fact as demanded of a foreign law, only its substantive provisions are

applied. Moreover Prof. Englard is inclined to the view that, in practice, religious law has been excluded by rules of natural justice of the secular judges.[31] And even taking a milder view, one has to recognize that the secular judge's understanding and interpretation of religious law is different and religious laws are often used to reach results a religious court would have avoided.[32]

The courts of Israel, religious and secular, speak therefore in different voices about the same matters, even in instances where both apply the religious law.

Of importance to our study are the cases where secular courts exclude religious law, and apply the rules of private international law by which they are bound.[33]

The problems are especially acute in matters of marriage and divorce. Thus a civil marriage contracted by Israelis at the time when they were foreign nationals would be recognized by the civil courts,[34] not so by the religious courts, unless recognized as a doubtful marriage.[35] A civil divorce of such persons will also be recognized by the civil courts though not by the religious courts. Where the religious court recognizes the validity of a marriage but not the divorce, the parties will not be able to remarry in Israel.[36]

2. Israel's Rules of Private International Law in Matters of Personal Status and Their Relation to English Law[37]

Israel's rules of private international law are derived from several sources: mandatory; English; and Israeli. The Palestine Order in Council gives the rules of private international law and refers us to the English rules for supplementation. The Israeli Legislator has also regulated rules of private international law on specific topics.

With regard to Israeli citizens (in those days Palestinians) of a recognized religious community, Art. 47 of the Palestine Order in Council[38] directs the civil courts to apply their personal law. There is no definition specifying what law is the personal law. The personal law of an Israeli has, however, been interpreted by the Mandatory Courts to mean the religious law of the subject and this has received unanimous accord by the Israeli courts.[39]

Art. 64 of the Palestine Order in Council determines the personal law of foreigners:

Matters of Personal Status:

> "64 (i) Matters of personal status affecting foreigners other than Moslems shall be decided by the District Courts, which shall apply the personal law of the parties concerned ...,
>
> (ii) The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile in which case the latter shall be applied."

Article 64 gives the general rule that the personal law of a foreigner should be applied and that his personal law is his law of nationality. But where questions arise which are not covered by the ordinance, such as his personal law at a particular time, we refer to the English common law as we do in every other instance where we lack an answer in our legal system, by virtue of Article 46.

Article 46 determines the law prevailing and the law that could be enacted and continues:

> "46 ..., and subject thereto, (in above mentioned, I.S.) and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England ..."

There is abundant authority for the application of English private international law rules where there is a lacuna in Israeli law as Justice Agranat said in Skornik v. Skornik. It is a:

> "... well-established principle in our jurisprudence that where there exists a lacuna in the local law, the omission is to be filled by relying upon Article 46, that is to say, by applying the English Common Law. And the English Common Law means that law including the principles of private international law which are part of it."[40]

There is no legislation to determine the personal law of a stateless (without nationality) person or a person of double or more nationalities. It appears that the personal law of a stateless person is his law of domicile.[41] With regard to a person of more than two nationalities, none of which is Israeli, there has not yet been a court decision. Several writers suggest the test of effective nationality.[42]

The Isreali legislator has not enacted any general rules of private international law. He has however laid down rules of private inter-

national law in several matters of personal status. Thus in matters of capacity, guardianship, adoption, maintenance, spouses property relations, and the dissolution of marriage, he has given preference to the criterion of domicile,[43] more accurately to the Israeli concept of domicile,[44] and has not accepted the criterion of nationality chosen by the British Mandate legislator.

In determining that the law of nationality is the personal law of a foreigner, the English legislator deviated from the principle of domicile. While in England the law of a man's domicile is his personal law, (since English law sees a man's domicile as the country to which he is most closely connected, and whose law should apply in most matters of his personal status), the English legislator attached no specific importance to the law of the domicile in Israel.

The clear preference for the criterion of nationality was probably due to the legislator's belief that it was more suitable for Palestine and its inhabitants. Different opinions have been put forward to expalin this. One is that most of the foreigners in Palestine at that time were Jews from European countries whose private international law rules were based on the law of nationality - the lex patriae.[45] More commonly accepted is the notion that the reason is to be found in Ottoman Law (which prevailed in Palestine before the English legislation) where there were capitulations giving exclusive jurisdiction over foreigners to their respective consular courts, which of course applied the law of the consul's country; the English legislator transferred the jurisdiction to the district courts but maintained the application of the foreigner's national law.[46]

Much has been written about the criterion of domicile, accepted by the Anglo-American world, and nationality, reigning in the European continent, and each has advantages and disadvantages.[47] The Israeli legislator defining domicile as the place where the center of a person's life is,[48] has shed the technicalities and artificialities of the English concept of domicile and has given the courts a tool to determine a person's domicile as the place to which he is most closely connected.

While the Israeli concept of domicile has many advantages, it is clear, even from such a short survey of the Israeli rules of private inter-

national law, that the Israeli legislator has brought confusion to the realm of personal status. The result is that some matters of personal status will be decided according to a person's nationality, others according to his domicile, with a splitting of status as the most probable result.[49] Thus it appears that whatever the better criterion, one of them should have been adopted for all matters of personal status.[50]

To end this survey of the Israeli rules of private international law, we should like to emphasize that the Israeli rules suffer from two major defects:

1. The Palestine Order in Council determines that the law of a foreigner is the law of his nationality, yet this general rule is supplemented by Article 46 with English rules of private international law. As a result, there is inconsistency in court decisions over which criterion, domicile or nationality, applies.[51]
2. The criterion of domicile, through Israeli legislation, and nationality, by virtue of Mandatory legislation, both apply to matters of personal status and this may result in inconsistency in a given person's status.

3. Doubtful Marriage[52]

We shall end this survey of the Israeli internal and international conflict rules with a discussion of the recognition of doubtful marriages. This institution has helped Israeli secular judges to apply religious law and reach decisions consistent with their philosophy of justice. This institution, while showing the sharp conflict between religious and secular courts, can also prove useful in the realm of private international law.

One of the ways of marrying a woman, which has been frowned upon and not practiced for hundreds of years, is an institution of Jewish law called marriage by intercourse. In Jewish law there is a presumption to the effect that "a man does not indulge in sexual intercourse for the purpose of sin."[53]

These two factors produce the following result: where a man and a woman cohabitate, there is a presumption that they intended to marry

under Jewish law.[54] This presumption is rebuttable, and some writers submit that where there is a civil ceremony, it would be since the parties did not intend to marry in accordance with Jewish law.[55]

In most cases, this marriage is regarded as a doubtful marriage, and as adultery in a woman is a very grave sin in the Jewish religion, the religious courts will demand a Jewish divorce (a "Gett") to dispense with doubt.[56]

Secular courts have thus recognized the validity of a marriage, prohibited under Jewish law but valid ex post facto according to it, celebrated in private. (No civil marriage exists in Israel.)[57] For the last fifteen years both the secular and rabbinical courts are going out of their way and sometimes beyond their jurisdiction - the former to recognize marriages which are prohibited under Jewish law, and the latter to give a decision that will not state decisively that a divorce is needed - because such a statement will be interpreted by the secular courts as implying that the marriage is valid.[58]

Through the institution of the doubtful marriage it is also possible to recognize civil marriages contracted by Jews outside of Israel.[59] This is positively unnecessary when both parties were foreign nationals at the time of the marriage, yet might be helpful where their marriage was not valid according to their national law, and it is doubtful that a Jewish religious ceremony was contracted.[60]

The conflicts between the secular and religious courts derive from the fact that their attitude and the consequences which each is ready to recognize from a doubtful or prohibited marriage are different. Thus in a religious court a prohibited marriage should be dissolved. No privileges arise from it - e.g. a woman is not entitled to maintenance.[61] A civil marriage is viewed as a cause for divorce. If the woman disagrees, the husband is entitled to permission to marry another woman. These results and others do not follow a secular court's decision that there is a doubtful marriage in religious law and therefore a marriage in the eyes of the secular court. All rights and duties follow from such a marriage.[62]

I

FOOTNOTES

1. Palestine Order in Council, 1922-1947, Arts. 47-55 Drayton; Laws of Palestine III, 2569; Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5712-1953, 7 L.S.I. 139.

2. See also this dissertation at p. 5.

3. See Capacity and Guardian ship Law, 5722-1962, 16 L.S.I. 106; Adoption of Children Law, 5720-1960, 14 L.S.I. 93; Spouses Property Relations Law, 5733-1973, 27 L.S.I. 313; Succession Law, 5725-1965, 19 L.S.I. 58.

4. Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, 23 L.S.I. 274.

5. Supra note 1.

6. There are two possible ways to interpret this part of the section: (1) The words "in Israel" should be connected to the word Jews only. Thus the rabbinical courts have exclusive jurisdiction even when the marriage or divorce have not been performed in Israel. (2) The words "in Israel" apply to the marriage and divorce. Thus the rabbinical courts have jurisdiction only if the marriage and/or divorce were performed in Israel. In H.C.J. 3/73, Cahanoff v. The Rabbinical District Court, 29 P.D. (1) 449, Berenson J. decided in favour of the second view which gives the rabbinical courts narrower exclusive jurisdiction. For a fuller discussion of the interpretation of s.1 and its implication, see Msoz, Marriage and Divorce of Jews Contracted Outside Israel, (1976), 5 Iyune Mishpat 186. See also H.C.J. 38/75, Talisman v. The Rabbinical District Court, 30 P.D. (1) 433.

7. Resident in s.1 means permanent resident. See Cohen J. in H.C.J. 129/63, Matalon v. The Rabbinical Court, 17 P.D. 1640, at p. 1651. This interpretation was accepted and followed. See Part IV of this dissertation note 24 and cases cited there.

8. H.C.J. 10/71, Gordon v. The Rabbinical Court, 25 P.D. (1) 485. When one party is an Israeli and the other a foreigner, the consent of the Israeli spouse is also needed. On consent to jurisdiction, see H.C.J. 141/71, Haspel v. The Rabbinical District Court, Tel Aviv, 25 P.D. (2) 471. See also Shava, Does Section 9 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, Empower the Rabbinical Court to Deal with Matters of Marriage and Divorce When Consent is Acquired?, (1971/72), 27 Hapraklit 479. Shava answers this question in the affirmative. See also Matters of Dissolution of Marriage (Jurisdiction in Special Cases)

Law, 5729-1969, s.1(b). The Law does not apply when both parties are Jewish. It would seem therefore that Jewish foreigners can only dissolve their marriage by consenting to the jurisdiction of the rabbinical court. See also Palestine Order in Council, 1922-1947, Art. 65.

9. s.9 of the Law.

10. s.18 of the Courts Law, 5717-1957, 11 L.S.I. 157. See s.3, 4, of the Rabbinical Court Jurisdiction (Marriage and Divorce) Law, supra note 1, for special jurisdictional provisions with regard to a wife's claim for maintenance.

11. The Matters of Dissolution of Marriage (Jurisdiction in Special cases) Law, 5729-1969, supra note 4, does not apply when both parties are Jewish. See also this dissertation at p. 80.

11a. Courts Law, 5717-1957, supra note 10, s.35.

12. See, for example, C.A. 191/51, Skornik v. Skornik, 2. S.J.S.C. 327; Cr.A. 54/54, Hirshoren v. A.G., 8 P.D. 1300.

13. See Courts Law, 5717-1957, supra note 10, ss. 7a, 7b.

14. See, however, H.C.J. 214/64, Bassan v. The Rabbinical Court of Appeal, 18 P.D. (4) 309.

15. See, for example, H.C.J. 143/62, Funk-Schlesinger v. Minister of the Interior, 17 P.D. 225.

16. See our discussion of a doubtful marriage and the cases cited there.

17. By virtue of Art. 55 of The Palestine Order in Council, supra note 1; Matter of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 4.

18. See note 24 and accompanying text with regard to the non-application of the rules of private international law in the religious courts. See also note 20.

19. See note 3 and accompanying text.

20. For example, see the Woman's Equal Rights Law, 5711-1951, 5 L.S.I. 171; H.C.J. 187/74, Barria v. The Kadi of the Sharia Moslem Court, Acre, 2 S.J.S.C. 429. The concept of excessive jurisdiction to empower the intervention of the High Court of Justice was given a broad interpretation and it was held that a decision contravening a secular law which the religious court was bound to apply was tantamount to a decision out of jurisdiction. See also Friedman, Independent Development of Israeli Law, (1975), 10 Is.L.Rev., 515. Shiloh, Marriage and Divorce in Israel, (1971), 5 Is.L.Rev. 479.

21. C.A. 238/53, 2 S.J.S.C. 239.

22. Ibid., at p. 255. See also Skornik v. Skornik, supra note 12; H.C.J. 301/63, Streit v. The Chief Rabbi of Israel, 18 P.D. (1), 598 at pp. 608, 621, 629. But see Shaki, Effect of Civil Marriages Between Jews Contracted Outside Israel - in Rabbinical Courts in Israel, (1964), 20 Hapraklit 385 at pp. 391 ff. The author analyses rabbinical judgments and comes to the conclusion that the rabbinical courts tend to recognize rights acquired under a foreign law according to its own rules of conflict. This does not apply, however, in matters of purely religious significance.

23. The Palestine Order In Council, supra note 1. Arts. 46, 47 and 64 are directed towards the secular courts. See also Tedeschi, Transition from Secular to Religious Matrimonial Status and the Retroactive Applications of the Latter, Tedeschi, Studies in Israel Private Law, (1966) at p. 212.

24. See Justice Vitkon in Skornik v. Skornik, supra note 12, at pp. 378-379; and H.C.J. 73/66, Zemulun v. Minister of the Interior, 18 P.D. (4) 645, at p. 660.

25. Englard, Religious Law in the Israel Legal System, (1975), at pp. 137 ff.

26. Tedeschi, supra note 23, at pp. 213, 214.

27. The personal law of an Israeli is his religious law. See note 39 and accompanying text.

28. Justice Silberg in Cohen-Bousslik v. A.G., supra note 21, at p. 254: "Jewish law as applied by a civil court is different from Jewish law as applied by a religious court."

29. The civil courts' non-application of religious law in procedural matters has been criticised. For criticism of this approach, and a survey of its extent, see Shava, The Personal Law in Israel, (1976), at pp. 134 - 140. See also Levontin, On Marriages and Divorces out of the Jurisdiction, (1957), at p. 70. For a discussion of this matter, see also Englard, supra note 25, at pp. 177 ff.

30. Supra note 21, p. 254, 255. See also C.A. 26/51, Kotik v. Wolfson, 5 P.D. 1341, at p. 1344.

31. Englard, supra note 25, at pp. 139 ff.

32. See our discussion of a doubtful marriage.

33. Silberg, Personal Status in Israel, (1957), at p. 255.

34. See Skornik v. Skornik, supra note 12.

35. See our discussion of doubtful marriages.

36. See note 6, especially Maoz, supra note 6, at pp. 206 ff.

37. In general on the relations between Israeli and English private international law, see Levontin and Goldwater, Conflict of Laws in Israel and Article 46 of the Palestine Order in Council, (1974).

38. Supra note 1. It is submitted that Art. 47 is also a rule of private international law. See Shava, supra note 29, at p. 143, but see Justice Vitkon in Skornik v. Skornik, supra note 12, at p. 378 ff.

39. Kotik v. Wolfson, supra note 30, at p. 1345. It appears that Palestinian and later Israeli citizens who are not of any recognized religious community have no personal law. On this matter, see Shava, supra note 29, at pp. 150 - 164.

40. Skornik v. Skornik, supra note 12, at p. 356. On the problems of the application of Art. 46 in general, (with which we shall not deal), see Tedeschi, The Problem of Lacunae in the Law and Article 46 of Palestine Order in Council, 1922, Studies in Israel Law, (1960), at p. 166. For a greater reliance on English private international law, see Vitkon, supra note 38, and see this dissertation, at p. 26.

41. This was determined in C.A. 65/67, Latushinski v. Kirshen, 21 P.D. (2) 20. In the past however, it was decided that the law of a stateless Jew is his religious law. See Skornik v. Skornik, supra note 12. See also Silberg, supra note 33, at pp. 333-334. For a detailed survey of the personal law of a stateless person, see Shava, supra note 29, Part I, Chapter 4. With regard to a Jew without nationality, see also Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 5713-1953, supra note 1. Nationality is not always needed for power of jurisdiction over a Jew.

42. If one of the nationalities is Israeli, then Israeli law would apply. See Silberg, supra note 33, at pp. 248-249; Shava, supra note 29, at p. 110.

43. See the laws mentioned in note 3, Family Law Amendment (Maintenance) Law, 5719-1959, 13, L.S.I. 73 and Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 4. In general, see Shaki, The Criterion "Domicile" and its Preference Over the Criterion of Nationality in Israel Private International Law, (1966), 16 Scripta Hierosolymitana, 163.

44. s.80 of the Capacity and Guardianship Law, 5722-1962, supra note 3, defines domicile. See text accompanying note 48.

45. Silberg, supra note 33, at p. 335.

46. Shava, supra note 29, at p. 75. Vitta, Conflict of Laws in Matters of Personal Status in Palestine, (1947), at p. 246. Further, Vitta sees the applicability of the law of domicile, when it is imported by the national law, as a concession to the Anglo-American conception under which domicile and not nationality is decisive in determining the law applicable.

47. We shall not deal with the advantages and disadvantages of nationality and domicile. On this matter, see De Winter, Nationality or Domicile, (1969), 128 Rec. des Cours, 347; Anton, Private International Law, (1967), at pp. 159-161; Rabel, The Conflict of Laws (2nd ed., 1958), Vol. I, at pp. 117 ff.; Shava, supra note 29, at pp. 60-63.

48. Capacity and Guardianship Law, 5722-1962, supra note 3, s.80. See also the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 4, s.6.

49. We shall deal with this problem in Part III of this dissertation. As will be discussed there, we imply a splitting of the status itself and not that the status will be regulated by different rules in matters concerning different effects of the status, such as succession or legitimacy. Thus when the parties will request a declaration that their marriage is valid as opposed to when they ask for a decree of nullity, different choice of law rules and results may be the outcome of the different suits.

50. See also Shaki, supra note 43, at p. 178.

51. See this dissertation, Part II, note 137 and accompanying text.

52. For a full discussion of this subject, see Shifman, Doubtful Marriage in Israel Law, (1975).

53. Skornik v. Skornik, supra note 12, at p. 333. On marriage by intercourse, see Schereschewsky, Family Law, (2nd ed., 1967), at p. 35.

54. Thus a doubtful marriage is usually a result of a private ceremony, a civil marriage outside of Israel, or a long cohabitation. See Shifman, supra note 52, at pp. 133-155. Prohibited marriage in which all due ceremony was followed is not doubtful, yet the fact that it was private may shed doubt, if all was followed as necessary.

55. Schereschewsky, supra note 53, at pp. 85 ff.

56. Ibid.

57. See Cohen-Bousslik, supra note 21. The man who officiated the marriage was, however, put to a criminal trial. Cr.A. 208/53, Ganor v. A.G., 8 P.D. 833.

58. On the development of the conflict see H.C.J. 80/63, Gorfinkel, Chaklai v. Minister of the Interior, 17 P.D. 2048; H.C.J. 51/69 Rodnitzki v. The Rabbinical Court of Appeal, 24 P.D. (1) 704; H.C.J. 29/71, Kedar,Cohen v. The Rabbinical District Court, Tel Aviv, 26 P.D. (2) 608; H.C.J. 275/71; 330/71, Cohen v. The Rabbinical District Court, Tel-Aviv-Jaffo, 26 P.D. (1) 227. The secular courts have refused, however, to assist Israeli Jewish couples who can be married by a Rabbi. H.C.J. 130-132/66, Segev, Reichert v. The Rabbinical Court and The Chief Rabbinate of Safed, 21 P.D. (2) 505.

59. On the lex loci celebrationis, see this dissertation, Part II, at pp. 25-27.

60. Skornik v. Skotnik, supra note 12. According to Agranat J.'s exception at p. 372. See also this dissertation Part II, at pp. 28-29.

61. See Scherechewsky, supra note 53, at p. 317. The same applies to a civil marriage (the parties can, however, be remarried). See Shaki, supra note 22.

62. Streit v. The Chief Rabbi of Israel, supra note 22; but see Shaki, Civil Marriage Contracted Between Jews Outside Israel - A Cause for Granting 'A Permit to Marry' to the Husband, (1966), 22 Hapraklit, 347.

II

THE VALIDITY OF MARRIAGE AND THE CHOICE OF LAW[1]

1. Choice of Law Rules Determining the Validity of Marriage

In England, there are two aspects to the validity of marriage: formal validity, which deals mainly with the requirements of ceremony, licence, and registration; and essential validity, dealing with all other questions not classified as formalities, mainly capacity.[2]

Originally, the entire contract of marriage was governed by the law of the place of celebration under the principle locus regit actum. This distinction between formal and essential validity did not appear in the English decisions until the middle of the 19th century.

In 1861, in Brook v. Brook ,[3] it was established that the question of essential validity was to be referred to the law of the parties' domicile, and to the lex loci celebrationis, there remained only the question of formal validity. Lord Campbell explained why the lex loci cannot govern all questions of validity.

> "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 domicil, if the contract is forbidden by the law of the place of domicil as contrary to religion, morality, or any of its fundamental institutions."[4]

Peter Maddaugh explains the distinction between the formalities and essentials of marriage, taking the latter out of the rules of lex loci celebrationis, as a result of the transfer of jurisdiction in matrimonial matters from the ecclesiastical to the common law courts. Prior to that time, all questions of validity involving extra-state elements were referred exclusively to the lex loci celebrationis.

> "The common law courts, it seems, were far more parochial than their ecclesiastical brethren and immediately chose to safeguard the English view at least with respect to English domiciliaries by applying the lex domicilii to matters of essential validity."[5]

From Israel's Supreme Court decisions it is not clear if Israeli rules of private international law direct all questions of matrimonial validity to the party's personal law or only substantial matters, leaving formal validity to the lex loci celebrationis.

It is submitted that since both Articles 47 and 64 of the Palestine Order in Council[6] direct us to the personal law of the parties, there is no place to refer matters of formal validity to the lex loci celebrationis, and the personal law should decide both the formal and the essential validity of marriage. In the words of Justice Agranat:

> "It is well recognised that our law directs us to turn to the personal law of the parties in order to decide whether a civil marriage ... is valid - from all points of view."[7]

The result is that the English distinction does not exist in Israeli law and the lex loci celebrationis has no place as an independent rule of conflict. It can, however, be applied if the personal law of the foreigner,[8] i.e. his national law, directs the application of the lex loci celebrationis, because the reference to the national law includes that law's rules of private international law.[9]

There have been dicta, however, in the Israeli Supreme Court which support the application of the English private international rules distinguishing between the essential and the formal validity of marriage, and applying to the latter the lex loci celebrationis.[10]

The fact that in English law different rules apply to formal and essential validity necessarily involves the classification of each particular requirement to the former or the latter categories. The ineludable question is by which law this classification is made.[11]

The classification between formal and essential requirements was dealt with by the English courts with regard to parental consent. In Ogden v. Ogden,[12] parental consent was classified as a formality, since parental consent is so regarded by English domestic law. This was decided regardless of the fact that in French law parental consent in the circumstances of the case was an essential matter.

This case was heavily criticised.[13] Nevertheless, it appears the English law determines the classification of parental consent,[14] at least where the marriage was celebrated in England.[15]

In Apt v. Apt,[16] the method of giving consent was classified as a matter of form. This was decided according to English concepts. In that case English law was also the law of the wife's domicile.[17]

It is not clear whether Israeli rules of private international law distinguish between formal and essential validity of marriage.[18] If all questions of validity are regulated by the personal law, the question of classification does not arise. On the other hand, if the English conflict rules are followed, the classification of the requirements of marriage as being a matter of formal or essential validity is necessary.

Following the English law, the classification would most probably be determined according to the lex fori.[19] As Israel has no territorial domestic family law, the ineludable question is: what is the Israeli lex fori in this matter?

Having no distinction of its own, Israel may follow the English domestic law's distinction between matters of formal and essential validity.[20] Another view is possible. Israeli law is a combination of several religious laws. In religious laws, a religious ceremony is an essential matter.[21] Israeli lex fori can, therefore, regard all matters regarding the ceremony as matters of essential validity.[22]

A third possibility is to apply the English distinction of foreign laws but retain the religious law's approach when dealing with an Israeli personal law. There is no decision in this matter. There is support for the application of the English distinction.[23]

We shall continue to examine the English rules with regard to matters of form and essentials according to the English classification. Even though we submit that the distinction does not apply in Israel,[24] this mode of analysis has been chosen, first as there is support also for the application of the distinction in Israeli law; and secondly, for convenience in sorting the material as Israeli and English rules are to be compared.

2. Formal Validity of Marriage.

A. The English Rule

1) Formal Validity Depends on the Lex Loci Celebrationis

There is abundant authority in English law that the formal validity of a marriage depends on the lex loci celebrationis.[25]

This rule was formed as early as 1752 in Scrimshire v. Scrimshire,[26] which is generally accepted to be the first decision in which this question was directly in issue.

In that case, two British subjects married in France. The marriage was solemnized in a private house by an unauthorized priest and without the consent of the parents. The marriage was not valid according to French law. Sir Edward Simpson stated:

> "As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place ... to be tried by different laws than those of the place where the parties contracted ... This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practiced in all civilised countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such."[27]

The rule has since been more forcibly laid down in Berthiaume v. Dastous[28] in 1929, where a religious marriage of a Canadian girl in France was held invalid as she had not complied with the civil requirements of French law.

> "If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage. These propositions are too well fixed to need much quotation."[29]

This imperative compulsory nature of the English rule of lex loci celebrationis has been criticised as being too stringent, especially with regards to religious ceremonies concluded by the parties outside England, which are valid according to their personal law.[30]

English law has given a wide extension to the principle that validity of marriage is ruled by the lex loci celebrationis in several ways:

(a) By means of classification of what is a formality.[31] Thus the consent and notice of parents and guardians which is necessary by many systems of law to the validity of a marriage have been considered as part of the forms of marriage.[32]

Dicey and Morris explain this classification on two grounds:

(i) English domestic law has always treated the absence of parental consent as a matter of form;

(ii) the validity of marriages celebrated in Scotland without parental consent required by English law was established by decisions given at a time when English courts had not yet distinguished between capacity and form in relation to marriages and applied to both the lex loci celebrationis.[33]

(b) The validity of a marriage is not affected by the fact that the object of the parties by marrying in another country than their own, was to evade the requirements of their domicile as regards parental consent, publicity, etc.[34]

There is no doubt that the application of the lex loci celebrationis to the formalities of marriage is a rule firmly established.[35] There is no exception to the rule that a marriage, formally valid by the lex loci celebrationis, is formally valid in England. There exist, however, exceptions to the rule that a marriage formally invalid by the lex loci celebrationis is formally invalid in England. A marriage can be valid even if it is invalid by the lex loci, if it is celebrated in accordance with the English common law, or in accordance with English statutory provisions in certain circumstances. We shall continue to examine the exceptions to the English rule of lex loci celebrationis dealing mainly with two important exceptions, impossibility of the use of local form, and celebration of marriage of a person in a country under belligerent occupation.

2) Exceptions to the Rule of Lex Loci Celebrationis

(a) Use of local form impossible[36]

This rule applies to marriage in countries where it is strictly impossible for the parties to use a local form. This impossibility may arise either because such local forms of marriage as exist are completely alien to the social and cultural environment to which the parties belong; or because the form provided by the local law is morally impossible; or legally impossible.[37]

Relatively few cases have been decided under this head, and they are not recent cases.

In 1821 in Ruding v. Smith,[38] the validity of a marriage of two British subjects at the Cape of Good Hope by the Chaplain of British Forces then occupying that settlement was questioned. The law of Holland still prevailed there and the marriage was not in conformity with Dutch law which was the lex loci celebrationis. Under that law both parties required the consent of their guardians. The husband's father was in England and the wife's father was dead and no guardian had been appointed. It was held that this presented "insuperable difficulties of obtaining any marriage conformable to the Dutch Law."[39]

For this principle to apply, however, mere difficulty is not enough. In Kent v. Burgess,[40] the parties married in Antwerp disregarding the local law which required that foreigners could not marry each other until they had resided in that place for at least six months. In that case it was admitted that when insuperable difficulties in complying with the lex loci existed that law could be disregarded, but the court held that no such difficulty existed in this case and accordingly the marriage was held void.

This exceptional rule or, more accurately, part of the reasons for it, has been said to be inacceptable today.

> " It is apparent that the first basis of exceptions (to lex loci - I.S.) found in the early case law is not acceptable to a polity in the last quarter of the twentieth century. It no longer is possible to regard some legal systems as too primitive for their regulation to be imposed upon nationals, or domiciliaries, of the forum state who sojourn in such places."[41]

(b) Marriages in countries under belligerent occupation[42]

In this exception it should be noted that it is not quite clear whether the cases on which it is based form an exception or go more fundamentally to shake the maxime of lex loci celebrationis as a conflict rule to be applied to the formalities of marriage. We shall examine two cases.

In Taczanowska v. Taczanowski,[43] the relevant facts were as follows: two Polish nationals, both Roman Catholics, the husband a member of the Polish 2nd Corps then serving in Italy and the wife a civilian refugee, were married in 1946 by a Catholic priest in Rome. The marriage was not celebrated in full compliance with the Italian domestic law - the lex loci celebrationis.[44]

The English court recognised the validity of the marriage on the basis that the formal validity of a marriage is not automatically determined by the lex loci celebrationis, and that the application of the lex loci celebrationis depends on the presumption that the parties intended to submit the question of formal validity to that law. In this case the presumption was rebutted as the person contracting marriage was a member of an occupying force.

> "The principles in Scrimshire's case, that parties by entering into marriage contract in a foreign country subject themselves to have the validity of it determined by the laws of that country, does not apply in the case of a contract performed in an occupied country by a member of the occupying forces."[45]

Taczanowska v. Taczanowski was followed that year by Kochanski v. Kochanska.[46] It should be noted, however, that both cases concern situations which are typical of post-war Europe. By upholding their validity the courts have saved a great many marriages.[47]

These cases have been criticized however. Mendes Da Costa[48] submits that, insofar as they based the application of the lex loci celebrationis on a presumption, both cases were wrong.

> "... the application of the lex loci rests upon a rule of law, independant of the intention of the parties (to which there exist certain exceptions) and not merely upon a presumption that the parties have submitted to this law."[49]

Later cases followed the rule set in Taczanowska[50] but narrowed the broad principle set, that lex loci applies only as a rebuttable presumption that the parties had submitted to the local law.[51]

(c) Statutory exceptions[52]

Two exceptions to the rule that marriage should be celebrated according to the lex loci celebrationis are governed by the Foreign Marriages Acts, 1892 and 1947.[53]

1. "Consular Marriages" - marriages solemnised between parties of whom at least one is a British subject before marriage officers, such as ambassadors, consuls, Governors and High Commissioners. The Acts also state several requirements as to the form of the marriage. A marriage celebrated under this provision is valid even though invalid by the lex loci celebrationis.[54] But the Foreign Marriage Order 1970 has reduced such a possibility, for under its rules, a marriage officer will not solemnize the marriage if the following commulative conditions are not met:

(a) that at least one of the parties is a British subject;
(b) that the authorities of that country will not object to the solemnization of the marriage;
(c) that insufficient facilities exist for the marriage of the parties under the law of that country;
(d) that the parties will be regarded as married by the law of the country to which they belong.[55]

2. Marriages of members of H. M. Forces serving abroad.[56] They may marry without complying with the local form. A point of interest in this exception is that there is no requirement that either party be a British subject.

B. The Israeli Rule

1) Is Formal Validity Regulated by the Lex Loci Celebrationis or by the Parties' National Law?

Having seen that in England the lex loci celebrationis applies to the formalities of marriage, i.e. mainly the form of solemnising the

marriage, we shall examine the Israeli law with regard to the same matter.

As already stated, it is not quite clear whether in Israel there is a distinction between matters of form and essentials of marriage. However, if one takes the view that English law should be applied and such a distinction indeed exists, it follows that the lex loci celebrationis would apply to formalities as it does in England.

The leading case in this matter is still Skornik v. Skornik.[57] The difficulty arises, however, as different views were expressed by different judges, and in that case the law of nationality, the lex loci celebrationis, and even the law of domicile were the same.

In Skornik v. Skornik the parties were Jews married in Poland in 1948 according to the civil law without a religious ceremony. They were at the time of the marriage Polish citizens who were domiciled in Poland and they remained domiciled in that country after their marriage. They emigrated to Israel in 1950 and thereupon became stateless. The validity of their marriage came up as an issue incidentally, when the husband sued the wife in tort and she counterclaimed for maintenance.

The main issue to the validity of the marriage was which law should apply: their personal law at the time of their marriage, Polish law, or their personal law at the time of the claim. Since they were stateless Jews in Israel, Israeli law meant Jewish law.[58]

Justice Agranat taking the view with which, with due respect, we agree, that the personal law in Israeli law decides all questions of the validity of marriage,[59] applied the English law only to decide the temporal question: personal law at what time. As the Palestine Order in Council[60] (Articles 64 and 47) does not answer this question, we have a lacuna and are therefore directed to the English rules of private international law to decide that specific question only.[61] He thus decided that in accordance with English law the law applicable is the parties' national law at the time of the marriage.[62]

Justice Vitkon, however, stated that lex loci celebrationis applies in Israel:

"... the question of the validity of the marriage - at least from the point of view of form - must be tested according to the law which applied in the place and at the time of the celebration of the marriage (locus regit actum)."[63]

The basis for Vitkon J.'s decision is that the rules of private international law apply in any case involving a foreign element. Article 47 is of a municipal character and therefore subjected to the rules of private international law. Israeli rules of private international law are the English rules of private international law which apply by virtue of Article 46. Moreover, the English rules of private international law also override Article 64. Thus, in matters of form, the lex loci celebrationis applies.[64]

We do not agree that Articles 47 and 64 are of a municipal nature and are subject to the rules of English private international law. They are, in our opinion, rules of private international law, and therefore the reference to the English rules can only be made in cases of lacuna. The reference cannot be made in cases where those articles decide rules differently from the English rules of private international law, and do not make a distinction between matters of form and matters of essential validity, with the concomitant application of the lex loci celebrationis to the former. There are, however, dicta in later decisions where the view that the validity of the manner of solemnization of marriage depends on the lex loci celebrationis. The basis of those later dicta is Skornik v. Skornik.[65]

Thus, it appears, although criticised,[66] that the application of the lex loci celebrationis has support in the Israeli decisions, yet we contend that this is wrong and does not correspond to the private international law rules set in the Palestine Order in Council.

It appears to us that some support for the application of the lex loci celebrationis can also be found in the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.

"Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law."[67]

It is clear that in one way the application of religious law was extended, i.e. a Jewish foreign national when marrying in Israel will have to use the religious form.[68] But does this section also mean that

Israelis marrying outside of Israel do not have to marry according to the religious law? It appears that support for this view is possible.[69]

Following our previous contentions that the lex loci celebrationis is not an independent conflict rule in Israel, it is submitted that Israelis should not be able to contract a marriage abroad which is invalid according to their religious law. Should it arise before a civil court, the case should be examined according to their personal law, i.e. the religious law. In that law all matters are judged by the religious law (including the ceremony).[70]

As we have seen it is not clear if the rule that the lex loci celebrationis decides matters of formal validity is an independent conflict rule in Israeli private international law.

One view is that all questions of the validity of marriage are determined by the parties' personal law. And the lex loci celebrationis can only be applied if the personal law refers to it.[71]

The second view is that following the English rules, the lex loci celebrationis decides the formal validity of marriage. It has been submitted that the first view is correct.

In practice, whichever view is taken, the result may be the same in a great number of cases.

(a) The formal validity of a marriage contracted out of Israel by two foreign nationals (or persons who were foreign nationals at the time their marriage was contracted) can be examined in two ways.[72] According to the first view, the matrimonial validity will be decided by the parties' national law at the time of the marriage. According to the second view, it will be determined by the lex loci celebrationis. In both ways the result may be identical. In many cases the national law and the lex loci celebrationis are the same, if they are not it is quite probable that the national law will refer the court to the law of the lex loci celebrationis. A difference of result between the two views is, however, possible in rare cases.

(b) Two Israelis (the same would apply to the Israeli party if one party is an Israeli the other a foreigner) marry outside Israel in a civil ceremony. According to the second view that the lex loci celebrationis decides the formal validity, the marriage will be valid if valid by the local form.

The marriage may also be valid according to the first view. According to the parties' personal religious law, the marriage may be regarded as a doubtful marriage. Secular courts have recognised doubtful marriages in Jewish law to be valid marriages in cases where the parties' marriage was prohibited but valid ex post facto by Jewish law.[73] The decisions pertain to marriages performed in Israel in a private ceremony. There is no reason that the same recognition will not be granted when parties who are prohibited to marry in Israel go abroad to marry in a civil ceremony and avoid the complication of a private ceremony.

If the parties are not prohibited to marry by Jewish law, their marriage outside Israel according to the local form will be valid according to the second view. It will not be valid according to the first view, that the lex loci celebrationis does not decide the formal validity.

In any case it should be mentioned that any marriage contracted abroad will have to be registered as a marriage if a certificate of marriage is brought to the registration officer.[74]

2) Israeli Exception to the Law of Nationality or the Lex Loci Celebrationis[75]

(a) A marriage between Jews according to their Jewish law is always valid

This exception applies to Jews and could be summarized thus: If by the law of nationality of a Jew, foreign citizen (or has been foreign citizen at the time of the act) there is no validity to the act (e.g. of marriage), but it is valid according to Jewish law, the civil courts of Israel will see the act as valid applying the Jewish law, as his other national law, which follows him in every place at all times.

This exception is based on an opinion by Agranat J. in Skornik v. Skornik.[76] He contended that even though the law of nationality should, as a general rule, mean the law of the country of which the person was a national, in cases of Jews married abroad in accordance with their religious law only, the expression "national law" should be extended so as to include Jewish law, since their religious law has never ceased to be a national law for Jews. This, he contends, is in accordance with the

general disposition to validate an act, and with private international law rules that apply to a person of double nationality that law (of the two) which recognizes the validity of the marriage.[77]

This exception has been heavily criticised[78] as Article 64 could not have had the Jewish law in mind. It has however been followed.[79] The merit of this view appears to us to be that it validates marriages celebrated abroad by Jews, in most cases today living in Israel, where such a marriage would be valid. Israel is no doubt today the country with the greatest interest in their status.[80] Moreover the validity of such a marriage will not be questioned before a religious court and thus, at least in this case, different decisions between secular and rabbinical courts will be avoided.

This exception is of course contrary to English rules. A religious marriage is void if it does not receive recognition under the local law as was decided in Berthiaume v. Dastous.[81] But this decision, even though under different reasoning, shows common ground with the English exception to the lex loci celebrationis in cases of marriage in countries under belligerent occupation.[82] In both, there is a recognition of the validity of a ceremony contrary to the local law because the parties have not submitted themselves to the local law. It appears, however, that this exception has more merit than the English one as here the parties have undoubtedly a connection with the law applied, the religious law. This much cannot be said with regards to the wide application of the common law marriage.

C. Lex Loci Celebrationis - Compared and Evaluated

> "There are strong policy reasons for upholding a marriage when it complies with the lex loci. The local form may often be the only one available and the policies of upholding the reasonable expectations of the parties, safeguarding the reliability of local records, validation and international uniformity of decision all favour the recognition of the marriage."[83]

These strong reasons for recognizing the validity of a marriage which complies with the lex loci may have to give way if the personal law regards the very celebration of the marriage in the foreign form as against

its fundamental institutions.[84] The marriage would then not be recognized by the courts of their home country. It would however be recognized by other courts unless the very ceremony is regarded as a matter of essentials.

While recognising a marriage is in accord with the policy of validating acts the question is: should a marriage not be valid if invalid by the lex loci, yet valid by the personal law. In England as a general rule the lex loci applies.[85] In Israel the personal law has a supremacy. Thus a foreigner's non-conformity with the lex loci celebrationis will only invalidate a marriage, if it is also invalid by his personal law. But the opposite proposition is also true. The marriage will be invalid if invalid by the personal law, notwithstanding that it is valid according to the lex loci celebrationis.[86]

Maddaugh suggests that the rule of the lex loci celebrationis should not be applied strictly. Traces of his suggestion can be found in Israeli decisions in the combination of religious and secular law. He agrees that the state in which the ceremony takes place is the one to set the conditions it requires for the marriage's sufficiency, but disagrees that a technical defect in the ceremony should invalidate the marriage, especially where that technicality is not a requirement in the country of the couple's matrimonial home.[87] He suggests the following:

> "... since we are primarily concerned with a 'determination of the sufficiency of the manifestation of the mutual consent', if such a manifestation is clearly apparent, then we might uphold a marriage as formally valid even if the parties have not complied with the requirements of either of the above mentioned jurisdictions."[88]
> (lex loci and country of permanent home - I.S.)

He sees hope for the acceptance of this rule eventually by the English decisions which disregarded the lex loci rule as to matters of form when they felt the circumstances did not warrant its application - the "Polish" cases, Taczanowska and Kochanski,[89] likewise in the willingness of the English courts to accept as relevant the events subsequent to the marriage ceremony as evidenced in Starkowski v. A. G.[90]

Exceptionally, we have seen that Israeli courts validate a marriage, invalid when celebrated abroad, when it is valid according to Israeli domestic law. This usually applies to Jews who have chosen Israel as their

new nationality and domicile. Israel is therefore their intended matrimonial home, the country with the greatest interest in their union.

Moreover, Jewish law - in cases where technical and even fundamental requirements to Jewish law as religious ceremony have not been fulfilled - recognizes a doubtful marriage. The couple should therefore divorce or remarry.[91]

Secular courts recognize this demand for Gett as a possible way of recognising the validity of a marriage, when it is in the state's interest to recognize such a marriage. Thus it is possible to recognize as valid private celebrations of a marriage in Israel as well as a civil ceremony between Jews in a foreign country which does not comply with the lex patriae, where the parties' intention to marry is clear.

3. Essential Validity of Marriage

A. England

1) Essential Validity Is Governed by the Law of the Domicile

The essential matters[92] of marriage relate to the creation of the status of husband and wife which has nothing to do with the ceremony itself. These are matters of capacity, such as age and sanity, prohibition of marriage for consanguinity and affinity,[93] and the existence of a prior marriage.[94]

There is no doubt that the essential validity of a marriage is determined in English law by the law of the parties' domicile. However there appears to be some uncertainty to which domicile this rule refers us; to the matrimonial domicile, or intended matrimonial domicile, (the place where the parties chose to lead their life together); or to the domicile of each party before the marriage.

Dicey states that essential validity is governed by the law of each party's antenuptial domicile. This is the dual domicile doctrine.

> "Rule 34. Capacity to marry is governed by the law of each party's antenuptial domicile ... a marriage is valid as regards capacity when each of the parties has, according to the law of his or her antenuptial domicile, the capacity to marry the other ... no marriage is valid as regards capacity when either of the parties has not, according to the law of his or her antenuptial domicile, the capacity to marry the other."[95]

The dual domicile doctrine has received support from many writers including Wolff, Graveson, Anton, Falconbridge,[96] and Halsbury's Laws of England which states clearly:

> "Capacity to marry is governed by the law of each party's antenuptial domicile."[97]

The dual domicile doctrine has been most severely criticised by Cheshire. In the 9th ed. North admits the authorities (decisions) mainly support Dicey's view.[98]

Cheshire and North propose the following:

> "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."[99]

Dicey contends that his rule is based on a sound principle:

> "... because a person's status is, as a general rule, determined by the law of his domicile, questions of status cannot be affected by the intention of the parties, and a person's capacity to marry is a matter of public concern to the country of his domicile."[100]

Furthermore, he criticises Cheshire's view for giving preference to the husband's domicile,[101] and that according to the intended matrimonial domicile doctrine at the time of the ceremony, the issue of status is left undecided.[102]

Cheshire sees the merits of his rule in that it allows the law of the country, which has in his opinion the real interest in the parties' status, to decide the validity of the marriage.

> "It seems reasonably clear that whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reason is a question that affects the community in which the parties live together as man and wife."[103]

Whatever the merits or disadvantages of each doctrine,[104] it rests for us to see which is the doctrine accepted by the English courts. There appears to be greater support for the dual domicile doctrine, especially in recent cases. The rule was laid down in Brook v. Brook[105] and Sottomayor v. De Barros (No. 1).[106] It has received further support later and

even though some of the supporting cases can, on a factual basis, be reconciled with the matrimonial domicile doctrine, the reasoning for the decision, however, was in accordance with the dual domicile doctrine.[107]

In Padolecchia v. Padolecchia[108] clear support was given to the dual domicile doctrine. In that case a domiciliary of Italy divorced his first wife in Mexico. The divorce was not recognized in Italy. He then moved to Denmark and during a one day visit to England married a woman domiciled in Denmark. It was held that the marriage was void as he had no capacity to marry by his Italian domiciliary law.

> "Each party must be capable of marrying by the law of his or her respective antenuptial domicile."[109]

The English jurisprudence supports mainly the dual domicile doctrine.[110] But in 1973 Radwan v. Radwan (No. 2) was decided according to the law of the matrimonial domicile.[111] In this case Dicey and Cheshire's confronting views were directly in issue.[112] The court decided the validity according to the matrimonial domicile. The relevant facts were as follows: A woman domiciled in England at the time of her marriage and a man domiciled in Egypt were married in France by an Egyptian consul. According to Egyptian law the marriage was potentially polygamous. Several weeks after the marriage the couple went to Egypt which they had already chosen, before the ceremony, as their intended matrimonial home. There they had their residence, for several years, and eight children were born. After nineteen years, the validity of the marriage was brought up before an English court. It is obvious that according to Cheshire's view the marriage is valid, while according to Dicey's view it is invalid.

As mentioned, the case was decided according to Egyptian law, the law of the matrimonial domicile, and the marriage was held valid.

> "... Miss Magson had the capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage."[113]

This decision is however limited to polygamous marriages and does not include other incapacities,[114] but this limitation did not spare the decision from being heavily criticized.

> "... it is submitted that the case was wrongly decided and that the law is correctly stated in our Rule. The learned judge's anxiety to uphold the marriage after the parties have lived together for

nineteen years and had had eight children is understandable. But as Dicey said in another context, hard cases make bad law."[115]

2) Exceptions to the Rule that the Essential Validity of Marriage Is Governed by the Law of Domicile

There are various exceptions to the rule that the essential validity of a marriage is determined by the law of domicile. These exceptions indicate a tendency to apply English law and English concepts in matters involving English domiciliaries, especially with regard to acts performed in England, and this not only in cases where a foreign law would be overruled as it is opposed to English public policy. While other exceptions will be mentioned shortly, we are interested mainly in the non-application of foreign law which is of a penal character, which would enable an English court to overrule Israeli incapacities of such a nature.

(a) "A marriage celebrated in England is not valid if either one of the parties is, according to English domestic law, under an incapacity to marry the other."[116]

There is no direct judicial support for this rule. Dicey treated it as reasonable.[117] It appears to us however that the disadvantage of such a rule lies in the fact that it makes it hard to recognize the validity of any marriage if it has to be essentially valid by both the law of the parties' domicile and the lex loci celebrationis. While this is understandable when the marriage is celebrated in England, for England has a right not to allow or recognize the celebration of marriages which are contrary to its domestic law, such an exception in a more unlimited manner, (i.e. that any marriage's essential validity has to comply with the lex loci and the law of the domicile), is unduly harsh. Moreover, it can be asked: Why should an English court give preference to the lex loci celebrationis which regards the marriage as essentially invalid,[118] and disregards the law of the parties' domicile which regards it as valid?[119] There is no direct English authority on this point. In Breen v. Breen,[120] however, Karminski J. was prepared to deny the essential validity of a marriage of an English domiciliary, if it were essentially invalid by Irish law, the lex loci celebrationis.

(b) "The Validity of a marriage celebrated in England between persons of whom one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England."[121]

This exception is the result of Sottomayor v. De Barros (No. 2).[122] In this second decision the case was reopened, this time on the basis that the husband was an English domiciliary.

> "To which country is an English tribunal to pay the complement of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed; would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by?"[123]

It seems to us that this passage standing alone could be interpreted as a rule that when the parties have two different domiciles and only one recognizes the marriage, the lex loci celebrationis should decide matters of capacity.[124] But the President limited this rule by saying that this should be so at least when the lex fori and the lex loci celebrationis coincide. Finding no authority on the matter he concluded:

> "... we ought not to found judgement in this case, on any other rule than the law of England as prevailing amongst English Subjects."[125]

Sottomayor v. De Barros (No. 2) though heavily criticized as giving a bias to English law has not been overruled.[126]

(c) A marriage is not valid on account of any incapacity imposed by the law of domicile which is penal or of a prohibitive discriminatory nature

This exception, in a way, is not an exception at all for it is consistent with general rules of private international law that the application of a foreign law can be excluded if it is of a penal character or if it is against the forum's public policy to apply it.[127] The cases discussed in this section involved marriages celebrated in England. But it appears that there is no reason to think the rule would be different with regard to marriages celebrated elsewhere.[128]

Thus English law does not recognize incapacities of a penal nature and has decided that the remarriage of a guilty wife in a divorce suit, who could not marry under her domiciliary law until her husband remarried, was valid.[129]

Of special interest when comparing English and Israeli law is that English law does not recognize discriminatory prohibitions between colours, religions, or castes. Thus in Chetti v. Chetti[130] the court recognized as valid a marriage between a woman domiciled in England and a man domiciled in India which was celebrated in England even though according to the man's personal law, the Hindu law, he did not have the capacity to marry a woman who was not of his caste. The President decided that the husband's incapacity was not absolute and he could get rid of it by changing his caste.[131]

It appears that the reason for this decision was also the protection of a British subject marrying in England from injustice that could be caused to him by a foreigner who "uses" his incapacity to invalidate the marriage.[132]

It seems that with this exception, and anyway by virtue of public policy, the English courts can disregard discriminatory prohibitions, something the Israeli judges need yet cannot legally use for penal prohibitions - e.g. forbidding an adulterous woman to marry her partner in adultery after the divorce, or prohibition of intermarriage between Jews and others - as they are part of Israeli law itself. They can of course use such a test with regard to foreign prohibitions; yet most cases in Israel involve the Israeli religious prohibitions which would not be recognized in England, yet have to be recognized in Israel.[133]

B. Israel - Essential Validity Is Governed by the Law of Nationality

In Israeli law, it is not quite clear which law governs the essential validity of marriage. Here again the confusion arises as a result of the relation to English private international law rules by virtue of Article 46 of the Palestine Order in Council.[134] Thus, while it is clear that the personal law governs all questions of essential validity, the question is whether that law is the national law or the law of domicile.

It is submitted that the national law decides questions of essential validity as Article 64[135] states clearly that it is the personal law of a foreigner. While in the question of the application of the lex loci celebrationis similar problems arose,[136] it is submitted that even if the

distinction between matters of form and matters of essentials is brought into the Israeli law by virtue of Article 46, we still have to apply to the essential matters, the law of nationality, which was chosen instead of the law of domicile by the Mandatory Legislator.

There have however been cases where Israeli judges referred directly to the law of domicile.[137] It is submitted that this was wrong.[138]

As Article 64 gives the general rule for the national law, it still remains to decide which national law, e.g. in the case of parties who have different national laws. By virtue of Article 46, we are referred to English law to decide this question, as in every case where there is a lacuna in Israeli law, substituting the law of domicile by the law of nationality.[139]

We have seen that in English law it appears that the dual domicile doctrine prevails; yet this is not completely certain especially since the decision in Radwan v. Radwan (No. 2).[140]

In the past, Israeli district courts, basing themselves on the English rule, have adopted the dual domicile doctrine.[141] If we take the view that Israeli courts have in the past adopted the dual domicile doctrine then this would probably not be affected by the Radwan case, not only because of its limitation to polygamous marriages and the fact that it was heavily criticized, but mainly because once the dual domicile is adopted there is no more need to turn to English law.[142]

Unfortunately, here again a clear rule cannot be postulated. There is no Supreme Court decision on this matter. In Funk-Schlesinger v. Minister of the Interior,[143] Silberg J. supported the dual domicile doctrine.[144] Zusman J., on the other hand, based himself on American rules, and suggested that when the parties have different personal laws, the lex loci celebrationis should determine the essential validity of the marriage.[145]

In the Funk-Schlesinger case the relevant facts were these: An Israeli Jew married a Belgian of the Christian faith in Cyprus. They received a certificate of marriage in Cyprus and the Belgian consul registered the marriage in the lady's passport. The Israeli authorities refused to register her as a married woman on the ground that the marriage was invalid. It was decided that the registration clerk had no right to

question the foreign certificate of marriage, whether the marriage was valid or not under Israeli law. Both Silberg J. and Zusman J. discussed the question of the validity of the marriage in Israeli law (as distinguished from Jewish law under which there is no doubt that every mixed marriage of a Jew is void ab initio).

Silberg J. came to the conclusion that the marriage was void on the basis of the English dual domicile doctrine, since by the husband's personal law, i.e. Jewish law, the marriage was void. Yet he did not enter into the problem of the conflicting views in English law between the dual domicile doctrine and the intended matrimonial domicile doctrine, as in this case the marriage would also be void by the law of Israel, the intended matrimonial home. Nonetheless, he appeared to support the dual domicile doctrine.[146]

Zusman J., as mentioned, supported the lex loci celebrationis, yet clearly by way of an obiter dictum, for according to his decision the marriage should be registered whether valid or not. In Taper v. Taper[147] the validity of a mixed marriage in Israel between two Israelis according to the English common law was the issue and Vitkon J., while holding that the marriage was invalid, since Israel does not recognize the institution of common law marriage, stated that on the basis of Funk-Schlesinger, the lex loci celebrationis applied to marriages of persons of different national laws.[148]

It is submitted that there is no such rule in Israeli law, as Zusman's suggestion was only an obiter dictum.[149]

Moreover it is submitted that there is no legal basis for adopting that rule. According to Article 64 it is the personal law that applies. Thus it is the dual national law doctrine which prevails in Israel. According to the view that the English rules of private international law reign supreme, it is the dual domicile doctrine which prevails, but not the lex loci celebrationis.

The reference to American law is understandable. It is a result of the secular judge feeling that injustice is afflicted on parties of mixed marriages of Jews and non-Jews as a result of the fact that Jewish religious law does not recognize any such union. In this respect the attempt to validate such marriages is welcome, but unfortunately this, in our opinion, has no sound legal basis.[150]

As legal analysis shows that the religious concepts should apply, there appears to be no way to refrain from applying them. They cannot be overruled as being against the secular public policy, for they are the law of Israel and cannot be avoided by turning to American law.

To summarize the Israeli rules with regard to matters of essential validity, we shall bring examples of possible situations dealing with mixed marriages,[151] undoubtedly one of the serious problems arising from Jewish law's prohibitions which cause internal and international conflict problems.

(a) A mixed marriage celebrated abroad by two foreign nationals is essentially valid in Israel provided it is valid by their national law. The same applies to foreign domiciliaries (in case we take the view that the personal law in Israel is the law of domicile). In most cases the law of domicile and nationality are the same and many of the mixed cases involve marriages of this type, when the couple later came to settle in Israel.[152]

(b) A mixed marriage celebrated abroad by two Israelis or a couple of whom one is an Israeli Jew is invalid in Israel. Whether the Israeli dual national doctrine, or the English dual domicile doctrine applies. As the Israeli citizen and domiciliary Jew's law, the religious law, renders the marriage invlaid.[153] The marriage could be held valid if the suggestion that the lex loci should apply be accepted.[154]

(c) A mixed marriage in Israel between two foreigners before the consul of their country is valid if it is essentially valid by their national law.[155]

(d) A mixed marriage in Israel between a foreigner and a Jew is definitely invalid if the Israeli is the Jewish party, for his personal law would render the marriage void. It is (semble) invalid if the foreigner is the Jew, but on a completely different ground, for a consul can perform a marriage only if both parties are subjects of his country.[156]

(e) A mixed marriage celebrated in Israel by two Israelis when one is a Jew is void as a result of Jewish law being applied to the Jewish party.[157] This is not a question of private international law, but of internal conflict. It appears however that the same dual doctrine[158] will apply. (The marriage could, of course, be pronounced valid by a Moslem or Christian

court if the case were referred to them by virtue of Article 55 of the Palestine Order in Council[159] or the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law 5729-1969.[160]

C. A Suggested Approach

We have seen that both English and Israeli law appear to follow mainly the dual domicile and the dual nationality doctrines respectively. This is not beyond doubt, and the situation is not completely clear, especially in Israeli law.

We suggest that the selection of the proper law should be made by choosing the law of the state most interested in the status of the parties, considering the purposes of the laws involved. The same choice of law rule does not necessarily apply in all cases, and different rules may be formed with respect to different alleged grounds of voidness of the marriage.[161]

A large part of the cases deal with relative incapacities, i.e. prohibited relationships. The purpose of these rules is to prevent unions which are offensive to the morality or religious concepts of the country concerned. It is submitted that the validity of the marriage should therefore conform to the concepts of the place where they live as husband and wife. The law of the matrimonial home has the greatest interest in their status and should determine whether their marriage is valid.

This is not to say that the law of the state of antenuptial domicile has no interest whatsoever in the parties' status. Yet, as the interests of all the states involved cannot always be served, the law of the most interested state should be applied, and it is submitted that in many cases of alleged voidness and in most cases where the issue is prohibited relationships, such as matters of consanguinity and affinity, the state with the strongest interest is the state of the matrimonial home.[162]

Applying the law of the matrimonial home will also respect the interests of the individual. The validity of his marriage will be determined according to the law of the place where he chooses to live as a

married person. He will be free of any prohibitary rules prevailing in a place he chooses to leave and to which he is no longer connected.[163]

A court of the state of antenuptial domicile may, quite probably, invalidate a marriage of its domiciliary, if it is invalid by its domestic law, even if it is valid by the law of the matrimonial home. A neutral forum should, however, give preference to the law of the matrimonial home because that state has a stronger interest to regulate the parties' status.

The main problem with the matrimonial home, and the intended matrimonial home doctrines is that at the time of the marriage it is not clear whether the marriage is valid or not. It should be mentioned, however, that in most cases at the time the validity of the marriage is questioned before the court, a matrimonial home has already been established.

In the rare case where this is not so, there is no established nor intended matrimonial home, Maddaugh suggests that the courts be assisted by the presumption that it would have been the husband's domicile,[164] or that the parties would have chosen a jurisdiction that would have permitted their union.[165] The first suggestion seems to us inappropriate today because it can no longer be presumed that the woman would follow her husband to his home. The latter suggested presumption, i.e. that the parties would have chosen a jurisdiction permitting their union, has the merit of validating the marriage; yet it appears to us that the validating rule is too wide.[166] Moreover, status should not be affected by intention alone,[167] and it can hardly be said that a certain state can have a strong interest in the parties' status, when they are still far away from it.

It seems therefore that as long as the parties have not established a matrimonial home, the states most interested in the parties' status are the states of their antenuptial domicile. Thus the application of the dual domicile doctrine appears "... justifiable in all cases in which the actual interest of States to control the marriage of their domiciliaries has not been displaced through a clear localization of the marriage elsewhere."[168]

An ineludable problem with the application of the law of established matrimonial home is that recognizing the role of the matrimonial home leads to recognition of similar interests for subsequent matrimonial homes. With due respect, we agree with Glenn that because of the demand for certainty, the first established matrimonial home should be chosen.[169] Once the status has been decided, the law of a subsequent matrimonial home should be considered when a divorce is sought, but it should not effect the validity of a marriage.

It should be noted that our suggestion can more easily be applied by the Israeli Courts, if the flexible concept of the Israeli domicile is applied to the concept of matrimonial home. In England, the connecting factor is also domicile, but the great technicalities which overburden this concept would make it difficult to determine that a matrimonial home has been established, if the place of the matrimonial home should also be the place of both parties' domicile as interpreted by the English courts.[170]

From this short discussion of the doctrine of matrimonial home, it is clear that difficult problems arise with its application. These problems are not encountered if the dual domicile doctrine is applied. In practice, however, the problems will rarely arise. Moreover, the application of the doctrine of matrimonial home appears more justifiable than the application of the dual domicile doctrine, as it serves the interests of the state most closely connected to the matter, and the interests of the parties themselves.

We suggested that in every case the law of the most interested state should apply. With regard to prohibited relationships, we submitted that it is the law of the established matrimonial home. The same should apply to questions of polygamy, bigamy, the marriage of parties of the same sex, and any other ground of voidness which is formed with the purpose of protecting society from a union it regards as offensive.

Incapacity resulting from non-age involves different policies. Here both the state of matrimonial home and the underaged party's antenuptial domicile have strong interests in his status.[171] The first, an interest in preventing marriages which are likely to be unstable;

the latter, to protect an immature person from the hazards of a premature marriage.[172] The court will therefore have to consider the above mentioned competing laws in the specific case. A fast rule in the abstract should not be formed. Moreover in some cases it would be difficult to justify invalidating a marriage on the ground of non-age, e.g. if the couple have been living as husband and wife for many years.

Our suggestion that the law of the state with the strongest interest should be applied, and that this in most cases would be the state of matrimonial domicile is, of course, not accepted in English and Israeli laws. It should be mentioned however that when the validity of the marriage arises in a suit for nullity in Israel, the Israeli legislation has given preference to the law of the parties' common, or last common domicile. This can coincide with the last established matrimonial home.[173]

II

FOOTNOTES

1. In this part of the dissertation, we will deal with the validity of marriage, as opposed to its voidness. Grounds of voidability will be discussed in the next part, which deals with nullity. The distinction between void and voidable marriages has been made according to ss. 11 and 12 of the Matrimonial Causes Act 1973, 1973, c.18.

   The titles chosen "Validity" and "Nullity" are more appropriate for the discussion of Israeli law. This so, because in Israeli different choice of law rules determine the validity of a marriage in a case where a decree of nullity (and divorce) is sought, as opposed to the choice of law determining the validity of marriage in any other case. See this dissertation at p. 68 With regard to English law the titles could also have been Part II "Voidness of Marriage" and Part III "Voidability of Marriage". (It should be noted that many English writers discuss grounds for voidability under the title of "Nullity". See e.g. Cheshire and North infra note 25 and Dicey and Morris infra note 11. Dicey and Morris, however, accord matters of the parties' consent a separate chapter.)

2. See this dissertation at p. 31.

3. (1861) 9 H.L.C. 193. See also Sottomayor v. De Barros (No. 1) (1877) 3 P.D. 1, especially p. 5.

4. Supra note 3, at p. 212.

5. Maddaugh, The Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position, (1973), 23 U.T.L.J. 117, at p. 119, note 13.

6. Palestine Order in Council, 1922-1947, Drayton, The Laws of Palestine III, 2569.

7. C.A. 191/51, Skornik v. Skornik, 2 S.J.S.C. 327, at p. 358.

8. The personal law of an Israeli Jew, his religious law, does not make a distinction between formal and substantial validity, and does not refer to any other law. A marriage is only valid if valid by the religious law.

9. C.A. 256/65, Miller v. Miller, 19 P.D. (3) 171. In Israel it appears that the single renvoi theory is accepted. See Shava, The Personal Law in Israel, (1976), at pp. 88 ff.

10. See, for example, Justice Vitkon in Skornik v. Skornik, supra note 7, at pp. 377 ff. The difference of opinion in the Supreme

Court derives from different approaches to the relation between Arts. 47, 64 and 46 of the Palestine Order in Council, supra note 6. See also this dissertation at pp.25-27.Unfortunately the confusion by the need to apply English rules through the channel or Art. 46 has brought the result that sometimes Israeli judges speak of domicile, even though it is clear Art. 64 directs us to the foreigner's law of nationality. See, for example, C.A. 29/66, Yania v. A.G., 20 P.D. (2) 147.

11. We shall not deal with the general question of characterisation. In general, see Dicey and Morris, The Conflict of Laws,(9th ed., 1973), at pp. 19-33. In general, the English courts have not adopted any consistent theory of characterisation. Dicey and Morris propose that the rule should be flexible. This cannot be done if the court characterises a foreign rule in accordance with its own concepts and without regard to its context in the foreign law, or if the court simply follows the foreign characterisation without regard to its own conflict rule;at pp. 32-33.

12. [1908] P. 46. See also Simonin v. Mallac,(1860) 2 L.T. 327.

13. See for example Dicey and Morris, supra note 11, at p. 239. The English courts might have treated English requirements as to parental consent as a formality and foreign requirements as relating to capacity if such were their effect under the foreign law.

14. See also Cr.A. 54/54, Hirshoren v. A.G., 8 P.D. 1300 at p. 1305. Silberg J. inclines to the view that English law determines the classification between matter of formal and essential validity, according to the English lex fori.

15. See Graveson, The Conflict of Laws, (7th ed., 1974), at p. 255. He proposes however that the classification should be made according to the personal law of the parties. There is no judicial authority for the view. Schmitthoff, The English Conflict of Laws, (3rd ed., 1954), at p. 317 is also in favour of classification according to the parties' personal law. But see Wolff, Private International Law, (2nd ed., 1950), at p. 345: The law of the lex loci celebrationis should decide what is a matter of form.

16. [1948] P. 83.

17. A difficult question of classification will also arise if according to a foreign law the question of the ceremony, namely whether a civil or religious ceremony is required, is a matter of essential validity. There is no English authority that the foreign personal law should be ignored because the ceremony is a matter of formal validity to which English law should apply. It should be noted however that Maltese decrees annulling marriages celebrated in England based on the lack of religious ceremony by their domiciliaries, were refused recognition in England on the ground that this would be contrary to natural justice. See Gray v. Formosa [1963] P. 259,

and Lepre v. Lepre [1965] P. 52. In both cases the marriages were celebrated in England and the wife's law of antenuptial domicile was English.

18. See this dissertation at pp. 25-27.

19. Silberg J., supra note 14.

20. By virtue of Art. 46 of the Palestine Order in Council, in cases of a lacuna, the court is referred to English law. See this dissertation, Part I, note 40 and accompanying text.

21. See Hirshoren v. A.G., supra note 14, with respect to Jewish law. For the same attitude in the Catholic Church, see Wolff, supra note 15, at p. 343.

22. Compare Skornik v. Skornik, supra note 7, at pp. 361, 362. Against the application of the English classification in Israel, see Levontin, On Marriages and Divorces Out of the Jurisdiction, (1957), at pp. 96 ff.

23. Skornik v. Skornik, supra note 7, Vitkon J. treated the ceremony as a matter of form. See also, Agranat J., at p. 362.

24. See this dissertation at p. 26.

25. In the words of Cheshire: "There is no rule more firmly established in private international law than that which applies the maxim locus regit actum to the formalities of marriage." Cheshire and North, Private International Law, (9th ed., 1974), at p. 316.

26. (1752) 2 Hagg. Con. 395.

27. Ibid., at p. 412.

28. [1930] A.C. 79.

29. Ibid., at p. 83.

30. Wolff, supra note 15, at pp. 342—343, states that the rule shows a lack of consideration to couples belonging to the Roman Catholic or the Orthodox churches who regard a religious marriage as an essential matter. A civil celebration may be regarded as an act of irreverence to the Holy Sacrement. He contends that it is difficult to understand why England in whose internal law a certain number of religious marriage forms are recognized, does not adopt an equally liberal attitude in its rules of private international law and insists on the compulsory nature of locus regit actum even in cases where the religious marriage is valid according to the personal law of the parties.

31. See also this dissertation at p. 18.

32. Ogden v. Ogden, supra note 12; Simonin v. Mallac, supra note 12.

33. Dicey and Morris, supra note 11, at p. 238. They criticize this classification. See this dissertation at p. 18 and note 13.

34. Dicey and Morris, supra note 11, at p. 238.

35. Dicey and Morris see the firmness of the rule also by the fact that it applies also with regards to post marriage validating rules by the lex loci celebrationis. In other words, a marriage will be regarded as valid in England if the lex loci later validated the marriage. Dicey and Morris, supra note 11, at p. 236. Starkowski v. Att. Gen. [1954] A.C. 155.

36. When cases fall under this exception, the validity of the marriage is examined by the English common law under which to solemnize a marriage the parties have to take each other as man and wife per verba de praesenti. It is not clear whether an episcopally ordained priest should officiate as a requirement sine qua non in marriages outside of England. We shall not enter this question of requirements of English common law. On this matter see Dicey and Morris, supra note 11, at pp. 242 ff. and Merker v. Merker [1963] P. 283.

37. E.g.: A British subject of the Hindu religion cannot marry an Israeli in Israel as no civil marriage exists. If they marry in accordance with the English common law, the marriage may be held valid in England (not in Israel). If both are British subjects, they can marry before the English consul and the marriage will be valid in Israel. See note 68; see also dissertation at p. 39 as a mixed marriage is a matter of essentials.

38. (1821) 2 Hagg. Con. 371. It should be mentioned however that in this case, which is placed by many writers under the category of impossibility of local form, was not decided on this point alone. The point that the parties did not submit to the local law (a basis for next exception, we shall deal with), was stressed.

39. Ruding v. Smith, supra note 38, at p. 394.

40. (1840) 10 L.J. Ch. 100.

41. Fine, Formal Sufficiency of Foreign Marriages, (1976), 7 Fed. L. Rev. 49 at p. 54.

42. Here again the marriage is examined by conformity to common law requirements. Those are applicable even when the parties, as was the case in the decisions we shall bring under this head, have no connection to the English common law. The reason for this is that the canon law conception of marriage knows no distinction between race or nationality. Dicey and Morris, supra note 11, at p. 245.

43. [1957] P. 301. Before Taczanowska the law was uncertain whether a member of an army in belligerent occupation was bound to observe the formal requirements of the lex loci (see Ruding v. Smith, supra note 38, and our remarks). Compliance would appear necessary however if the army were stationed in the territory of a friendly power. See Dalrymple v. Dalrymple (1811) 2 Hagg.Con. 54 where the marriage contracted in Scotland without religious celebration was valid, and the distinction as to the state of one of the parties being an English officer on service in that country was not sustained.

44. It is interesting to note that from this case, one can assume local form includes its private international law. In that case it was accepted that Italian conflict rules would recognize the validity of the marriage if it were valid by the national law, and English courts would probably follow the Italian recognition. (In that case, however, by Polish law the marriage was invalid).

45. Taczanowska v. Taczanowski, supra note 43. Hodson L.J. at p. 325. Parker L.J. stated regarding a member of the occupying forces: "No doubt it is often physically possible for him to marry according to the laws of that country, but if he does not in fact subject himself to that law, what ground is there for presuming that he has done so?", at p. 330.

46. [1957] 3 W.L.R. 619. Here the parties were not occupation forces but Polish nationals in a displaced persons' camp in Germany.

47. Dicey and Morris, supra note 11, at p. 244 note 78 state that according to contemporary press reports Kochanski was a test case involving the validity of 3000- 4000 similar marriages. For the policy of validating marriages, see Hartley, The Policy Basis of the English Conflict of Laws of Marriage, (1972), 35 M.L.R. 571, at pp. 572, 574.

48. Mendes Da Costa, The Formalities of Marriage in the Conflict of Laws, (1958), 7 I.C.L.Q. 217.

49. Ibid., at p. 226. He further criticizes the Taczanowski decision as lacking merit for the English decision will not be recognized by Polish or Italian laws and it is doubtful if it will be recognized by other countries. For criticism on the slender link to England, see also Dicey and Morris, supra note 11, at p. 246. Criticism of Taczanowska case, see also Cheshire, supra note 25, at pp. 330- 331.

50. Merker v. Merker, supra note 36; Preston v. Preston [1963] P. 411. But see Taczanowska v. Taczanowski distinguished in Lazarewicz v. Lazarewicz [1962] P. 171.

51. See Merker v. Merker, supra note 36; Simon P., on the application of the rule of Taczanowska at p. 295 and Preston v. Preston, supra note 50, at pp. 427- 428.

52. Foreign Marriages Act, 1892, 55 & 56 Vict. c. 23.
Foreign Marriages Act, 1947, 10 & 11 Geo. 6 c. 33.

53. Foreign Marriages Act, 1947, ss. 5, 6.

54. Hay v. Northcote 1900 2 Ch. 262.

55. Foreign Marriage Order 1970 S.I. 1970/1539. The advantage of the Act is not the refrainment from the use of local law but to receive a certificate by the consul, that a valid marriage has taken place. Thus they will not have to prove years later that their marriage was indeed valid according to the lex loci celebrationis.

56. See Foreign Marriages Act, 1892, 55 & 56 Vict., c. 23, s.22 and Foreign Marriages Act, 1947, 10 & 11 Geo. 6, c. 33, s.2.

57. Supra note 7.

58. But see C.A. 65/67, Latushinski v. Kirshnen, 21 P.D. (2) 20, and this dissertation Part I, note 41 and accompanying text.

59. See Skornik, supra note 7, at pp. 357, 358, 362, 363.

60. Supra note 6.

61. Skornik v. Skornik, supra note 7 at pp. 356 - 358.

62. Ibid., at p. 361. See for English law, Baindail v. Baindail [1946] P. 122.

63. Skornik v. Skornik, supra note 7, at p. 377 (emphasis added).

64. Ibid., at pp. 377-379. It would seem that in matters of essential validity the personal law, as in England, would apply but that the personal law would nevertheless be the national law, otherwise Art. 64 has no meaning at all. The third judge in Skornik, Justice Olshan, also subjected the rule in Art. 47 to Art. 46.

65. Zusman J. in H.C.J. 143/62, Funk-Schlesinger v. Minister of the Interior, 17 P.D. 225 at pp. 252 - 253.

66. See Shava, supra note 9, at pp. 143-147 and p. 100. See also Levontin, supra note 22.

67. 7 L.S.I. 139, s.2.

68. Thus two foreign subjects who are Jewish cannot marry in a consular marriage in Israel. For consular marriages see Palestine Order in Council, supra note 6, Art. 67 and Personal Status (Consular Powers) Regulations, Drayton, The Laws of Palestine, III, 2605, s.4(b). See also Rakover, On Consular Marriages in Israel, (1965), 25 Hapraklit 566.

69. Support for this view can be found in s.1 of the Law. The marriage of Israelis outside Israel is not in the exclusive jurisdiction of the Rabbinical Court (for rabbinical court always applies religious law). See Cahanoff v. The Rabbinical District Court, 29 P.D. (1) 449 and note 6. For support of this view see also C.A. 174/65, Badesh v. Sadeh, 20 P.D. (2) 617 at p. 631. Zusman J. states that s.2 means that if at least one of the parties is not Jewish, or if the parties intend to celebrate their marriage abroad, the religious law does not apply. We have not however found a direct decision dealing with this matter. Most problems arise as in Skornik with Israelis who had contracted a civil marriage at the time they were foreign nationals. In that case the marriage would be held valid by all views if valid according to the national law or to the lex loci celebrationis (depending on the approach to the application of English law which is taken).

70. We take the view that s.2 only extends the application of religious law to Jewish foreigners, and does not state that, regardless of their personal law, Israelis can marry abroad in a civil ceremony. We admit however that s.2 of the Rabbinical Court Jurisdiction (Marriage and Divorce) Law, can be reconciled with the view that the rule of lex loci celebrationis applies in Israel.

71. Thus the Israeli court accepts the renvoi from the national law to the lex loci celebrationis and applies the latter. See supra note 9 and accompanying text.

72. See Skornik v. Skornik, supra note 7.

73. See our discussion of a doubtful marriage at pp.9-10 and the cases cited in Part I, note 58.

74. Funk-Schlesinger, supra note 65. This case involved a mixed marriage, which is void under Jewish law. See this dissertation, at pp. 37-38.

75. See note 76.

76. Supra note 7, at p. 372. As Agranat J. supported the view that all questions of the validity of marriage are determined by the parties' national law, this is an exception to the application of the national law. It can also be an exception to the lex loci celebrationis if the national law would refer the question of formal validity to the lex loci celebrationis (as a renvoi). If one accepts the view that lex loci celebrationis determines formal validity, in Israeli private international law, the statement that a marriage between Jews according to their religious law is always valid, will form an exception to the application of lex loci celebrationis.

77. Skornik v. Skornik, supra note 7, at pp. 375, 376.

78. Silberg, Personal Status in Israel, (1957), at p. 242 ff.

79. Latushinski v. Kirshen, supra note 58.

80. Compare Levontin, supra note 22, at pp. 31 ff., and Appendix No. 7, at pp. 81 ff. He suggests that all matters of personal status be decided according to the parties' personal law, in their new acquired home, and not according to the law of the place where the status was acquired.

81. Supra note 28.

82. See this dissertation at pp. 23-24.

83. Hartley, supra note 47, at p. 574.

84. See note 21 and accompanying text.

85. For criticism, see Wolff, supra note 30.

86. As we have shown, the view that the lex loci celebrationis, and not the personal law, determines formal validity has also support in Israel. If this view is taken, there is no difference between the Israeli and English rules determining the formal validity of a marriage.

87. Maddaugh, supra note 5, at pp. 139 ff.

88. Ibid., at p. 146.

89. Supra notes 43, 46.

90. Supra note 35.

91. See our discussion of a doubtful marriage.

92. See note 1. We are dealing here with essential matters, mainly incapacity, non conformity with which renders a marriage void. See also s.11 of the Matrimonial Causes Act 1973, 1973, c.18.

93. See Wolff, supra note 15, at p. 332 distinguishing between absolute incapacities and relative incapacities. See also Cheshire, supra note 25, at p. 336.

94. Dicey and Morris, supra note 11, at p. 265.

95. Dicey and Morris, supra note 11, at p. 258. Thus English law adopts a cumulative doctrine: i.e. if one party's law of domicile regards the marriage as valid, the other's as not, the marriage is not valid in England. See also for fuller discussion of the possibilities Shava, supra note 9, at pp. 80-81.

96. Wolff, supra note 15, at p. 336; Graveson, supra note 15, at p. 267; Falconbridge, Essays on the Conflict of Laws, (2nd ed., 1954), at p. 704; Anton, Private International Law, (1967), at pp. 277-278.

97. Halsbury's, Laws of England, (4th ed., 1974) Vol. 8, at p. 342. For support of the dual domicile doctrine see also The Marriage (Enabling) Act, 1960, 8 & 9 Eliz. 2. c.29 s.1 (3) and the Matrimonial Causes Act 1973, 1973, c.18, s.11(d).

98. Cheshire and North, supra note 25, at p. 343.

99. Ibid., at p. 336. For support of this view see Schmithoff, supra note 15, at pp. 312-314; Maddaugh, supra note 5, at p. 146.

100. Dicey and Morris, supra note 11, at p. 260.

101. Ibid., at p. 260: "Considerations of religion and morality...are a pre-matrimonial matter and it would therefore be anomalous for English law to give effect to the religious or moral principles prevailing in a particular country when the man is domiciled there, but to ignore them in the case of a woman."

102. Dicey and Morris, supra note 15 at p. 261. "Any rule under which it is impossible to predicate at the date of the marriage with knowledge of all the material factswhether it is valid or invalid is, it is submitted, undesirable."

103. Cheshire and North, supra note 25 at p. 337.

104. See this dissertation at p.40 ff.discussing this issue.

105. Supra note 3, at pp. 193, 224, 226-227, 234-235. But see per Lord Campbell, at pp. 193, 207, 212-213. This case can also support the matrimonial domicile doctrine.

106. Supra note 3. This case clearly supports the dual domicile doctrine.

107. E.g.: Re: Paine [1940] Ch. 46, at pp. 49-50. Pugh v. Pugh [1951] P. 482, at 484.

108. [1968] P. 314.

109. Ibid., at p. 336. This was decided regardless of Danish law. It is possible that the marriage would also be void according to Danish law, the law of the matrimonial domicile, but Danish law was not proven at this point.

110. For further support of the dual domicile doctrine, see also R. v. Brentwood Superintendent Register of Marriages ex. p. Arias [1968] 2 Q.B. 956, p. 968. Szechter v. Szechter [1971]

P. 286, at p. 295. For support of the matrimonial domicile, see Brook v. Brook, supra note 105. De Reneville v. De Reneville [1948] P. 100, at p. 114 (per Lord Campbell), at pp. 121-122 (per Buckhill, L.J.); Kenward v. Kenward [1951] P. 124, at pp. 144-145 (per Denning, L.J.).

111. [1973] Fam. 35. It should be noted however that this at present is an isolated case and can hardly be interpreted as a change in the attitude of the English courts. See also note 115 and accompanying text.

112. Ibid., at p.45. Cumming - Bruce J. was aware that he had to decide between the two doctrines.

113. Ibid., at p. 54.

114. Ibid.: "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."

115. Dicey and Morris, supra note 11 at p. 289. The decision was also criticized as applying to polygamous marriage; see Karsten, Capacity to Contract a Polygamous Marriage, (1973), 36 M.L.R. 291 at p. 297. "The decision is hard to support. It is hard to support on the authorities relied upon by the learned Judge and it is hard to support on principle. In view of the number of relevant authorities to which the learned Judge was unfortunately not referred, and which are quite inconsistent with his reasoning, it is submitted that his decision cannot be regarded as a safe guide to the law governing capacity to contract a polygamous marriage." For support of the decision in Radwan, see Jaffey, The Essential Validity of Marriage in the English Conflict of Laws, (1978), 41 M.L.R. 38.

116. Dicey and Morris, supra note 11, at p. 270.

117. Ibid., at p. 271.

118. Moreover, the lex loci's domestic law may regard the marriage as invalid, and yet the lex loci law including its rules of private international law may yet regard it as valid.

119. For the policy of validating a marriage, see in general, Hartley supra note 47.

120. [1964] P. 144. For criticism of this case, see Unger, Capacity to Marry and the Lex Loci Celebrationis, (1961), 24 M.L.R. 784.

121. Dicey and Morris, supra note 11, at p. 272.

122. (1879) 5 P.D. 94. Sottomayor v. De Barros (No. 1), supra note 3 was based on the fact that both parties were foreign domiciliaries.

123. Sottomayor v. De Barros (No. 2), supra note 122, at p. 103.

124. For a similar result but different reasoning, see Zusman J. in Funk-Schlesinger v. Minister of the Interior, supra note 65.

125. Sottomayor v. De Barros (No. 2), supra note 122, at p. 103.

126. Dicey and Morris, supra note 11, at p. 259. See Wolff, supra note 15, at p. 334 defining the principle of Sottomayor (No. 2) as an unfortunate one. But see Schmitthoff, supra note 15, at p. 332. He contends the decision can be sustained on two grounds: (1) that the President of the court was under the mistaken impression that he was dealing with penal or discriminatory incapacity and (2) that on the facts of the case England was the intended matrimonial home. See also note 132.

127. See also Halsbury, supra note 97, pp. 315, at p. 344, with regard to this exception as a matter of public policy.

128. Dr. Morris, Dicey and Morris, supra note 11, at p. 275.

129. Scott v. Att. - Gen. (1886) 11 P.D. 128; but see Warter v. Warter (1890) 15 P.D. 152 where the English court did not regard the Indian prohibition as penal, and gave it effect.

130. [1909] P. 67.

131. As such the case was upheld by Papadopoulos v. Papadopoulos [1930] P. 55.

132. See Chetti v. Chetti, supra note 130, at p. 87. At p. 83 the principle expressed in Sottomayor v. De Barros (No. 1), supra note 3 at p. 7, that "No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects." was cited with approval. See also Sottomayor v. De Barros (No. 2), supra note 122, at p. 104.

133. See this dissertation at pp.38-39.But see Englard, Religious Law in Israel Legal System, (1975), at pp. 139 ff.

134. Supra note 6.

135. Art. 64 of the Palestine Order in Council, supra note 6.

136. See this dissertation at pp. 25-27.

137. C.A. 29/66, Yania v. A.G., 20 P.D. (2) 147 by Silberg J. See also 77/66, Davis v. Woodall, 59 P.M. 151, where the law of nationality was not mentioned.

138. For support for the law of nationality, see Skornik v. Skornik, supra note 7; 1052/50 Bevinter v. Karpani, 8 P.M. 467; 954/64 Pachoski v. Pachoska, 41 P.M. 119; Latushinski v. Kirshen, supra note 58. See also Silberg, supra note 78, at pp. 228-235.

139. See Hirshoren v. A.G., supra note 14. Silberg J. utilizes this method of applying the English rules but subjecting them to the lex patriae.

140. Supra note 111.

141. 1234/54, Cook v. Solomon, 11 P.M. 321 at pp. 325-326. 579/50, Rokstein v. Rokstein, 14 P.M. 283 at p. 287. 1297/57, Rachman v. Rachman, 15 P.M. 68 at p. 74. All these decisions, however, were given by Kister J.

142. See Shava, Validity of Marriage Between Parties Subjected to Different Personal Laws: Is There a Weakening in the Position of the Cumulative System, (1974), 4 Iyune Mishpat 58.

143. Supra note 65.

144. Funk-Schlesinger, supra note 65, at pp. 233 ff.

145. Ibid., at pp. 253-254.

146. Ibid., at pp. 233-240. It is interesting to note that Silberg J. was ready to regard the Belgian lady as married if it were proven that Belgian law applies the distributive doctrine, and regards her as married, even though her "husband" had no capacity to marry her, according to his personal law. Thus Silberg is ready to recognize a wife to an unmarried man. In this case however as Belgian law was not proven on this point, it was presumed to be similar to the Israeli law. As Israel follows the comulative doctrine, i.e. dual nationality doctrine, Silberg J. held that the marriage was void. See also Shava, supra note 9, at pp. 80-81.

147. C.A. 373/72, Taper v. The State of Israel, 25 P.D. (2) 7, at p. 9. In that case the construction of doubtful marriage could not be used as the marriage is invalid under Jewish law.

148. Ibid.

149. See Zusman J. in Funk-Schlesinger, supra note 65. See also Cahan J. in Taper, supra note 147, at pp. 17- 18.

150. We have tried to refrain from mentioning our personal opinion with respect to the reign of Jewish religious law in Israel, and have unfortunately many a time, on the basis of legal analysis come to an unwelcome conclusion that the religious law should be applied. Cases of mixed marriage are an acute problem. However, it appears to us that this should be solved by the Legislator. In general, on the right to marry in Israel, see A. Rubinstein, The Right to Marry, (1973), 3 Lyune Mishpat, 433. The effects of an invalid marriage in Israel are mitigated, however, because of the rights Israeli law recognized, as due to the reputed spouse; on this matter see Friedmann, The Unmarried Wife in Israeli Law, (1973),

3 Iyune Mishpat 459; Shava, The Unmarried Wife, (1973), 3 Iyune Mishpat 484. Moreover, a further protection is given by the Penal Law Amendment (Bigamy) Law, 5719-1959, 13 L.S.I. 152 s.4 (1). For the crime of bigamy, it is irrelevant if the marriage is valid under the law of the state in which it was contracted. See also Cr.A. 291/64, Wineberg v. A.G., 19 P.D. (1) 150.

151. In general, on the validity of mixed marriages in Israel, see Shava, Validity of Mixed Marriages in Israel, Part I, (1976/7), 5 Iyune Mishpat 526; Part II, (1978), 6 Iyune Mishpat 14.

152. See Yania v. A.G., supra note10. See also Skornik v. Skornik, supra note 7. It should be mentioned that in the Israeli cases the conflict of different national, versus domiciliary law did not arise as both factors coincided.

153. It would also be invalid if the intended matrimonial home doctrine were followed, if the parties returned to Israel. See Funk-Schlesinger, supra note 65 at pp. 235-240.

154. Funk-Schlesinger, supra note 65; and Taper, supra note 147, at p. 9. There are writers who think a trip outside the country solves all problems - e.g. Shiloh, Marriage and Divorce in Israel, (1971), 5 Is.L.R.479 at p. 494: "...since civil marriages celebrated abroad are recognized in Israel, it is the practice of mixed couples to go abroad (the nearest place is Cyprus) for their wedding." But see E. Vitta, Codification of Private International Law in Israel?,(1977), 12 Is.L.R. 129 at p. 149. On the Funk-Schlesinger case: "The courts therefor have shown a degree of tolerance in relation to civil marriages abroad, mostly celebrated in the nearby island of Cyprus and, although refraining from a formal recognition of their validity, ordered the Minister of Interior to register the parties as married." (emphasis added).

155. See Art. 67 of Palestine Order in Council, supra note 6 and the regulations according to it, supra note 68.

156. See s.4 (b) of the Personal Status (Consular Powers) Regulations, supra note 68, which permits performing a ceremony when only one party is subject of the consul's country. In that respect however there is a sound basis to assume that section as ultra vires to Art. 67 of the Palestine Order in Council. See Rakover, supra note 68, and Shava, Validity of Mixed Marriages in Israel, Part I, supra note 151, at pp. 552 - 553.

157. See Taper v. State of Israel, supra note 147.

158. See Shava, The Personal Law in Israel, (1976), pp. 130-133. See Vitta, The Conflict of Personal Laws, (1970), 5 Is.L.R. 337 at pp. 345-348.

159. Supra note 6.

160. 23 L.S.I. 274.

161. Some support for this view can perhaps be found in the decision of Radwan v. Radwan, supra note 111 at p. 54. Cumming - Bruce J. limits his decision to matters of polygamy. A different choice of law is possible for other matters of capacity.

162. See Graveson, Matrimonial Domicile and the Contract of Marriage, (1938), 20 Journal Comp. Leg. 55 at p. 68. See also Maddaugh, supra note 5. Compare Levontin, supra note 80 who suggests that status should be decided according to the parties' new nationality.

163. We will not discuss all the advantages of the matrimonial domicile doctrine. Graveson, supra note 162 at p. 67 suggest that the doctrine can be regarded as a rule more likely to validate a marriage because it has to be valid according to one law only. (According to the dual domicile doctrine the marriage has to be valid according to both parties' antenuptial domicile.) It should be clear however, that the doctrine of matrimonial home does not necessarily validate a marriage. It is therefore criticised by Swan who suggests the doctrine should only be used to validate a marriage. See Swan, A New Approach to Marriage and Divorce in the Conflict of Laws, (1974), 24 U.T.L.J. 17, at pp. 23, 36. On the policy of validating a marriage see also Hartley, supra note 47.

164. This is Cheshire's proposition. See note 99 and accompanying text.

165. Maddaugh, supra note 5 at p. 137.

166. But see, for a wider validating rule, Swan, supra note 163.

167. Glenn, Capacity to Marry in the Conflict of Laws: Some Variations on a Theme, (1978), 4 Dalhousie L.J. 157, at p. 159.

168. Ibid., at p. 159. Compare Jaffey, supra note 115 at p. 41: If no matrimonial home was established it is reasonable to presume it will be established in the place of antenuptial domicile of one of the parties.

169. Glenn, supra note 167, at pp. 162-164.

170. See Part I note 48 and accompanying text.

171. Contra Pugh v. Pugh, supra note 107, a different approach was taken by the English courts.

172. See Jaffey, supra note 115, at pp. 45-46. He suggests the under-aged party's law should apply.

173. See s.5 of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, 23 L.S.I. 274 and see Part IV note 82 and accompanying text.

III

NULLITY OF MARRIAGE AND CHOICE OF LAW

In English law the same choice of law rules determine the validity of a marriage, whenever it is questioned before court in a suit for a decree of nullity or any other. This is so at least when the marriage is alleged to be void as a result of defect in form or incapacity, absolute or relative, of the parties to enter it. In Israel however this is not the case. The choice of law rules governing the validity of a marriage when its dissolution or a decree of nullity are sought, are very different from the rules governing its validity for any other purpose.[1]

This inconsistency has grave results especially when the marriage is alleged to be void, for the same court can arrive at the conclusion that a given person is married for one purpose, and not so for another. A situation that does not conform neither with uniformity of a person's status, at least so in the courts of one state, nor with justice, as anomalous results of a split status are a natural result of this situation.[2]

A. English Law

1. There Is No Clear Rule Which Law Governs Voidable Marriages

The grounds for nullity of marriage in English domestic law are stated in the Matrimonial Causes Act 1973.[3] Thus a marriage is void[4] when the parties are within the prohibited degrees of relationship, either party is under the age of sixteen, one party is already lawfully married at the time of the marriage, an English domiciliary enters a polygamous marriage, or when the parties are not male and female respectively. The marriage is also void when the formalities of marriage have not been complied with.[5]

Sec. 12 states the grounds which render a marriage voidable. These are incapacity to consummate, wilful refusal to consummate, lack of valid consent, mental disorder, venereal disease and pregnancy of the respondent by another man.[6]

Sec. 14 of the Act makes it clear that it does not preclude the application of foreign law when the English rules of private international law direct it.[7] It is clear therefore that the formal validity of a marriage is determined by the lex loci celebrationis, and matters of essential validity, at least when the marriage is alleged to be void (i.e, mainly matter of capacity) are decided by the lex domicilii, probably according to the antenuptial domicile of both parties.[8]

With regards to voidable marriages, however, English rules of choice of law are not quite clear. Different decisions have supported different views,and in most of them English law has been applied.

Until 1947[9] the question of choice of law did not arise, and English law was applied. Thus both in Easterbrook v. Easterbrook[10] and Hutter v. Hutter,[11] once the question of jurisdiction was settled, the court continued to apply English law. In both cases the husband was not an English domiciliary, the marriage was celebrated in England, the wife an English domiciliary. On a factual basis these cases could also support the view that lex loci celebrationis or the wife's antenuptial domicile decide her wilful refusal to consummate. The automatic application of the English law can support the view that the lex fori applies, yet both cases were undefended, foreign law was not pleaded, and no definite rule can therefore be derived.[12]

In Robert v. Robert[13] the question of choice of law arose. Both parties were domiciled in Guernsey and there the marriage was celebrated. The wife petitioned for nullity on the ground of the husband's wilful refusal to consummate. Barnard J. decided that the lex loci celebrationis should be applied.

> "... I ought to apply the lex loci celebrationis, for the following reasons. Wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent."[14]

He added however that if wilful refusal to consummate a marriage should be considered as affecting capacity, the lex domicilii should apply. In that case however the lex domicilii of the parties and the lex loci celebrationis was the law of Guernsey; moreover wilful refusal to consummate was also recognized by the English law, the lex fori.

In De Reneville v. De Reneville[15] the wife petitioned for nullity on account of incapacity and of wilful refusal to consummate. The law of the husband's domicile, also the law of the matrimonial domicile, was applied.

In Ponticelli v. Ponticelli[16] in a husband's petition for nullity on account of his wife's wilful refusal to consummate, English law, which was the husband's law of domicile and the lex fori, was applied, and the lex loci celebrationis, Italian law, which was also the woman's antenuptial domicile, was not applied. In this case, Sachs J. determined that wilful refusal cannot be categorised as a matter of form to which the lex loci applies. He stated his support for the lex domicilii over the lex fori, yet no choice between the two was needed in that case.

There appears therefore to be a tendency towards applying the law of the matrimonial domicile or the law of the husband's domicile.

With regard to consent[17] also, there is no conclusive rule that can be derived from the decisions. In some cases choice of law was not explicitly considered at all.

In Hussein v. Hussein[18] the wife's pre-marital domicile was English, the husband's Egyptian. The marriage was held void according to English law. This was the law of the wife's antenuptial domicile. Yet there was no discussion of choice of law.

In Mehta v. Mehta[19] also, English law, which was the law of the wife's antenuptial domicile, was applied. It is not clear whether this was because it was the law of her antenuptial domicile, since Indian law, which was the husband's domiciliary and the law of the place of celebration, was not proven, or more likely because English law was applied automatically as the lex fori.

In H. v. H.,[20] a question of choice of law arose. It was however not decided whether Hungarian law, the woman's antenuptial law of domicile, or English law, the lex fori, should decide the matter as by both there was no valid consent.[21]

In Parojcic v. Parojcic[22] it was decided that the lex loci celebrationis should apply.

We have mentioned several cases and no conclusive rule, except the tendency to apply English law, can be derived. It seems however that there is a strong tendency today to determine the validity of consent according to the law of domicile. In Apt v Apt[23] the right distinction between consent and the form of giving it was made.

> "In our opinion, the method of consent as distinct from the fact of consent is essentially a matter for the lex loci celebrationis ..."[24]

And in the later cases, Way v. Way[25] and Szechter v. Szechter,[26] the law of domicile of the parties was chosen. No definite rule can be formed however as in Way the law of the husband's domicile and the English lex fori were the same and there was no difference between it and the law of the woman's antenuptial domicile, Russian law, which was also the lex loci celebrationis. In Szechter the law of the parties' domicile and the lex loci celebrationis was Polish, yet there was no difference between that law and the English lex fori. The reasoning of Sir Jocelyn Simon P., however, is important.

> "The ... question is what is the proper law to apply in order to determine whether an ostensible marriage is defective by reason of duress. There is little direct authority on this matter. But the affect of duress goes to reality of consent and I respectfully agree with the suggestion in rule 32 of Dicey and Morris, Conflict of Laws, 8th ed. (1967), p. 271, that no marriage is valid if by the law of either party's domicile one party does not consent to marry the other. This accords with 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 ... Moreover in Way v. Way (1950) P. 71, Hodson J. said, at pp. 78-79: '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. This view is not covered by direct authority, but it is, I think, supported by the judgment of Lord Merriman P. in Apt v. Apt. ..."[27]

It appears therefore that with regard to consent there is support for the application of the law of the parties' domicile, in Szechter, either parties' antenuptial domicile.

Our short survey shows that there is no one rule applied to all grounds which render a marriage voidable, and the same grounds themselves have been subject to different choice of law rules.

Graveson submits[28] that the question which law should determine grounds of voidability of marriage depends on how those grounds are treated. They may be treated as relating to the formation of marriage; if so it rests to be determined if they are matters of formality to which the lex loci applies or matters akin to capacity to which the lex domicilii should apply. They may be treated as grounds similar to dissolution, in which case, as in divorce, the English lex fori is applied. A third possibility is that they be treated as a separate question of essential validity.

It is not clear how these grounds are treated in the case-law. Thus in Robert v. Robert[29] refusal to consummate was treated as part of the formation of marriage, and as a lack in form, but in Ponticelli v. Ponticelli[30] Sachs J. declined to categorize it as a matter of form.

In cases such as Easterbrook[31] and Hutter[32] there was no discussion as to choice of law. It appears however that they may support the second view, that these are matters of dissolution, since English law was automatically applied.[33]

Graveson suggested that De Reneville v. De Reneville[34] can be interpreted as treating voidability grounds as a matter of essential validity different from capacity and formation of marriage.[35] But this is probably because the wider implications of the decision, that the law of the matrimonial domicile should determine the essential validity of marriage, is usually rejected.

We see that it is not clear how grounds of voidability are treated in the English case law, and as a result, different choice of law was made in the various cases examined.

All the cases examined dealt with grounds of voidability which are recognized by the English domestic law. There is no authority whether an English court will annul a voidable marriage on grounds unknown to English law. There have been cases where foreign prohibitions rendering a marriage void have been recognized.[36] There is however no authority for application of foreign grounds which render a marriage voidable.

In principle there is no reason not to apply foreign grounds,[37] (unless, of course, the view is taken that grounds for annulment should be treated as grounds for dissolution, in which case the lex fori applies, and there is no selection and application of another law).[38] Application of foreign law is contemplated by Sec. 14(1) of the Matrimonial Causes Act 1973.[39] This question will probably have more importance now that the basis of jurisdiction for annulment has been broadened.[40] This will give rise to more opportunities for the involvement of a foreign law. Moreover, in practice, as the rules of basis for jurisdiction have been greatly simplified, the main issue of the case will no longer be the courts' jurisdiction as it was in the past, and more consideration may perhaps be given to the question of the selection of the proper law.

2. A Suggested Approach[41]

It is suggested that selection of the proper law should be made according to the ground of invalidity. In the process of selecting the proper law, all relevant laws, their purposes and the interests of the different states involved should be considered.

It appears to us that the English law's grounds of voidability are matters of the essential validity of the marriage.[42] As we have suggested with respect to other matters of essential validity, the choice of law should depend on the ground of alleged invalidity.[43] However, as a large part of the grounds of voidability have the same characteristics in common, characteristics different from most other matters of essential validity, in most cases a different choice of law is required.

An examination of the English grounds of voidability, which include impotence, wilful refusal to consummate, the wife's pregnancy by another man at the time of the marriage, and even venereal disease,[44] appears to show that their main purpose is the protection of the aggrieved party. They are of an individual character and not of a more public nature and knowledge, unlike, for example, affinity or polygamy.

In addition, the fact that the marriage is valid, unless one party chooses to invalidate it, indicates that the purpose for the ground of voidability is to protect the aggrieved party from a defective marriage.

The rule is not meant to protect any state's public policy from an offensive marriage, as the state is ready to accept the marriage as long as one party does not choose to invalidate it.[45]

Thus from the nature of the grounds and their effect, it appears that the policy behind them is to protect an aggrieved party from a marriage he would not have contracted had he known its defect.[46]

With regard to consent, the purpose of the invalidating rule is to protect the party whose consent was not valid, e.g. as a result of duress, from a marriage he did not contract wilfully.

It is suggested that the above mentioned ground of voidability[47] should be determined in most cases by the law of the antenuptial domicile of the aggrieved and non-consenting party,[48] and he should be entitled to the protection that his law confers upon him. He contracted a marriage not expecting it to be defective. His expectations at the time of the marriage would probably be according to the notions and concepts of his community. A party should not, however, be entitled to invalidate the marriage if it is invalid only by the other party's law and his law offers no protection.

It can be argued that the respondent, the 'defective' party, is entitled to the protection of his law, and if the law of his antenuptial domicile regards the marriage as valid, the invalidating rule of the aggrieved party law should not be applied. It seems however that:

> "...the value judgement should be made that it is more unjust to hold a party unwillingly bound to a marriage which by the notions of his community is defective than to deprive the other party of a marriage relationship which according to his law ought not to be annulled,..."[49]

The dual domicile doctrine would, therefore, not be appropriate.[50] The choice between the law of the aggrieved party's antenuptial domicile and the law of the matrimonial home is more difficult.[51] The invalidating rules do not represent any state's public policy. They do, however, indicate a policy to offer protection to the aggrieved party. As already discussed,[52] the state of the matrimonial home has a strong interest in the parties' status. As a result, it has an interest in the application of its protective invalidating rules, and in upholding the validity of the marriage when it does not offer any invalidating rules.

The interests of all th states involved cannot always be served. It seems to us that in the above mentioned cases a party's right to invalidate a marriage should not be refused because such right does not exist in the state in which he intended to live as a married person, on the assumption that the marriage would not be a defective one. Likewise, the law of the state of the matrimonial home should not apply to a party who did not validly consent to the marriage and never intended to establish a matrimonial home in that state.[53]

It appears to us that this case is different from the situation in which two parties marry in contravention of prohibitory rules of their domicile, and willingly choose to establish their home in a jurisdiction which approves of their marriage. Moreover, in the case of voidable marriages, the emphasis is on the parties' interest, as the decision to invalidate the marriage depends on their will.

We would like to emphasize, however, that the interests of the involved states and the purposes of their law should always be considered. The application of the law of the antenuptial domicile of the aggrieved or non-consenting party will be the proper law in most cases but not in all of them. Thus, for example, the state of matrimonial domicile may have a strong policy against upholding the validity of a marriage when one party is suffering from venereal disease,[54] in which case its law should be applied.

It is difficult to pinpoint the state with the greatest interest to determine the validity of marriage when mental disorder is alleged.[55] The state of the antenuptial domicile of the aggrieved party may seek to protect him from an unfitted spouse. The state of the matrimonial home may be interested to avoid an unstable marriage. The state of the mentally disordered party may seek to protect him from marriage, for which he is unfitted. In such a case there is no indication which law would usually have the strongest interest in the matter. All the relevant laws should be considered and their different interests evaluated in the specific circumstances.

As we have seen, there is no authority that foreign grounds of voidability unknown to English law have been applied. There is no reason

why they should not be.[56] It is suggested that foreign grounds of the same category, the same nature and effect, as most of the English grounds of voidability should be treated in the same manner. Thus, for example, if a decree of nullity is sought because at the time of the marriage another woman was pregnant by the husband, or because the petitioner was mistaken as to the attributes of the respondent,[57] the law of the aggrieved party's antenuptial domicile should be applied, unless, of course, some other law has a strong interest to regulate the matter.

B. Israel

1. Separate Choice of Law Rules in Suits for Annulment

Until 1969[58] a foreigner could not get a decree of dissolution of his marriage in a civil court in Israel.[59] The restriction was interpreted to include a decree of nullity for voidable and even void marriages. This was so as a result of the courts' interpretation that the prohibition against giving a decree of dissolution in Article 64(1) of the Palestine Order in Council included a decree of nullity.[60] The amendment of the Palestine Order in Council in 1935, which was a continuation of Article 65 which deals with the religious courts' jurisdiction, stated that: "for the purpose of this Article decree of dissolution includes a decree of nullity."

No such definition was added to Article 64(1), yet this wide restriction was also applied to the civil courts' jurisdiction.[61]

Having no jurisdiction, no choice of law rules were formed, of course.[62] The problem of the applicable law arose in Israeli internal conflicts which regard to a mixed marriage or a marriage of members of an unrecognized religious community in Israel, all of whom were Israeli citizens. There was jurisdiction but no applicable law.[63]

The Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969[64] gave the courts jurisdiction to dissolve marriages of foreigners and also gave choice of law rules, which solved also the problems of Israelis over whom there was jurisdiction in the past, but no applicable law. The solution is uniform for both void and voidable marriages,[65] and has no regard to any lex fori concept. This is understandable

because Israel has no territorial family law. Moreover in Jewish law there is no such thing as a voidable marriage.[66]

The choice of law rules in a decree of nullity are stated in Sec. 5 of the Law:

"5.(a) The District Court vested with jurisdiction under this Law shall apply one of the undermentioned to the matter, in the following order of preference:

(1) the domestic law of the common domicile of the spouses;

(2) the domestic law of the last common domicile of the spouses;

(3) the domestic law of the country of which both spouses are nationals;

(4) the domestic law of the place where the marriage was contracted:

Provided that the Court shall not deal with the matter in accordance with any such law as aforesaid if different rules would apply thereunder to the two spouses.

(b) In the absence of any law applicable under subsection (a), the Court may apply the domestic law of the domicile of one of the spouses, as it may deem just in the circumstances of the case.

(c) ..."[67]

The underlying principle in these rules, is to apply a law common to both spouses. Such a law will only be applicable if the same rules apply thereunder to both spouses. This provision is understandable because the Israeli legislator was, probably, interested in solving complex situations of mixed marriage, when both parties were Israelis subject to different personal laws.[68]

It appears, however, that even if this was an appropriate solution to solve Israel's internal conflict, these choice of law rules are not suitable to resolve problems of private international law.[69] It is difficult to understand why the law of the parties' last common domicile should determine the validity of their marriage. The last common domicile of the parties may of course coincide with the place of the established matrimonial home, but not necessarily so. Moreover, as already suggested in cases where the application of the doctrine of the matrimonial home is appropriate, the law of the first and not the last matrimonial home should be applied.[70]

Subjecting all grounds of invalidity to the same choice of law rules simplifies the process of selecting the proper law. It does not, however, provide an adequate choice in all matters. Thus the Israeli choice of law rules do not take into consideration the law of the parties' antenuptial domicile in cases where that law has the strongest interest to regulate the matter; for example, to protect an aggrieved party from a defective marriage.[71]

The most serious defect of this Law, which is felt in cases of nullity, especially when the marriage is alleged to be void, is that it brings inconsistency into the realm of personal status, and results in the splitting of a person's status. Thus when the validity of marriage arises before an Israeli court as a direct question, e.g. when a declaration that the marriage is valid is sought,[72] or as an incidental question, e.g. in a suit for maintenance, the validity of the marriage will be determined according to the parties' personal law at the time of the marriage.[73] When the validity of marriage is questioned in a suit for nullity, it will be determined by the law of the parties' last common domicile, or another law, as indicated by Sec. 5 of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969.[74]

The difference between the choice of law rules in Sec. 5 and the choice of law rules in the Palestine Order in Council, 1922-1947, makes different results and a splitting of status a most probable outcome. The main differences formed by the new Law are as follows:

a) Preferring the law of domicile over the law of nationality, which prevails in Article 64;

b) Preferring a law which is common to both parties in contrast to the dual nationality doctrine which is probably the doctrine accepted in Israel;[75]

c) Referring the court to an internal law, and not to a system of law including its rules of private international law to which the court is referred by Article 64.[76]

d) If one accepts the view that the English distinction between matters of form and matters of essentials is accepted in Israel,[77] an additional difference arises as the Law makes no reference to such a distinction.[78]

It appears that the legislator disregarded the fact that the validity of marriage and its annulment are linked questions. As a result of this new legislation, a person can have a divided status; he may be regarded as married and unmarried for two different issues.[79]

As yet, we know of no situation where the courts have been faced with such a divided status.[80] We would like, however, to give an example that might occur under the present law.

Suppose an Israeli Jew marries a Christian domiciled in England in a civil marriage in England, and the couple decide to live in England. There they build the matrimonial home and raise their children. There is no doubt that the center of their life is England. After ten years the husband returns to Israel and the wife sues him for maintenance. The court may well decide that she has no right for maintenance as the marriage is not valid.[81]

Upon hearing this the woman asks for a decree that her marriage is a nullity. The President of the Supreme Court will refer the matter to the secular court. That court will apply the domestic law of the common domicile of the spouses, English law.[82] By English domestic law the marriage is valid. The woman is therefore not entitled to a decree of nullity.

This example, which is quite conceivable, is linked to the problem of mixed marriage in Jewish law. But problems of split status can also arise with regard to foreigners. Thus, for example, a marriage valid by the parties' national law of the time of their marriage can be held void if void under their common domicile.

This problem of splitting of status is especially grave in Israel where a splitting of status is a possible result of the validity of a marriage being an issue in civil and religious courts.[83] The Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969 has added the possibility of a split status in the secular courts themselves.

This anomaly, as we have seen, does not exist in the English rules of choice of law.

III

FOOTNOTES

1. See Arts. 46, 47 and 64 of the Palestine Order in Council, 1922-1947, Drayton, Laws of Palestine III 2569; s.5 of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, 23 L.S.I. 274.

2. See our dissertation at p. 68-69.

3. Matrimonial Causes Act 1973, 1973, c.18.

4. s.11 of the Matrimonial Causes Act 1973. For the distinction between void and voidable marriage, see De Reneville v. De Reneville [1948] P. 100, at p. 111. "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is the issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction."

5. See s.11. See also comment in Halsbury's Statutes of England, (3rd ed., 1974) Vol. 43, at pp. 553-555.

6. See also Halsbury, supra note 5, at pp. 555-556. See note 4. The effect of the annulment of a voidable marriage is prospective, s.16 of the Matrimonial Causes Act 1973, 1973, c.18.

7. See s.14(2), for English law governing validity of marriage celebrated outside England according to English law.

8. See this dissertation, at pp. 32-33 and see Part II, note 1.

9. In Robert v. Robert [1947] P. 164, the question of choice of law arose. See also Kennedy, A Comment on Jurisdiction and Choice of Law in the Nullity of Marriage, (1947), 25 Can. Bar Rev. 1012 at p. 1015. "...the fact that the judge deliberately chose the law of a place other than the forum is a major step in bringing the matrimonial conflicts law into better shape."

10. [1944] P. 10.

11. [1944] P. 95.

12. See also Falconbridge, Essays on the Conflict of Laws, (2nd ed., 1954), at pp. 695-696.

13. Supra note 9.

14. Supra note 9, at pp. 167-168.

15. De Reneville v. De Reneville, supra note 4.

16. [1958] P. 204. See especially at pp. 214 ff.

17. Lack of valid consent was probably a ground which rendered the marriage void in the past.

18. [1938] P. 159.

19. [1945] 2 All E.R. 690.

20. [1954] P. 258.

21. The law of the husband's domicile, French law, was not considered, yet it was not pleaded.

22. [1959] 1 All E.R. 1.

23. [1948] P. 83.

24. Ibid., at p. 88.

25. [1950] P. 71.

26. [1971] P. 286.

27. Ibid., at pp. 294-295.

28. Graveson, The Conflict of Laws, (7th ed., 1974), at pp. 340 ff.

29. Supra note 9.

30. Supra note 16.

31. Supra note 10.

32. Supra note 11.

33. Graveson, supra note 28, at p. 341. It should be noted however that foreign law was not pleaded.

34. Supra note 4.

35. Graveson, supra note 28, at pp. 341-344. He contends that this is the right interpretation of the De Reneville case, and can find support to the view that grounds for voidability are a separate question of essentials also in Casey v. Casey [1949] P. 420, and Ponticelli v. Ponticelli, supra note 16. But see contra. Dicey and Morris, The Conflict of Laws, (9th ed., 1973),

at pp. 355-356. See also Morris, De Reneville Revisited, (1970), 19 I.C.L.Q. 424. See also Ross Smith v. Ross Smith [1963] A.C. 280.

36. E.g.: Sottomayor v. De Barros (No. 1) (1877) 3 P.D. 1.

37. Cheshire and North, Private International Law, (9th ed., 1974), at p. 407. See also Morris, The Conflict of Laws, (1971), at p. 167.

38. See note 35 and accompanying text.

39. Matrimonial Causes Act 1973, 1973, c.18.

40. Domicile and Matrimonial Proceedings Act 1973, 1973, c.45, s.5. See also Schmitthoff, The English Conflict of Laws, (3rd ed., 1954), at p. 355.

41. We have chosen to discuss our suggested approach after the discussion of the English grounds of invalidity, before the Israeli law has been discussed for two reasons. (1) The discussion is based on the English grounds of voidability. Israel has no uniform domestic law in these matters. Jewish law does not recognize a voidable marriage. A marriage is either valid or void ab initio. See Shava, The Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, (1970/71), 26 Hapraklit 302, note 27. (2) The suggested approach applies to Israeli law as well; but in Israel the inconsistency in the rules determining the validity of a marriage which results in the application of different laws depending on the issue before the court, is the principle problem.

42. For support for the view that these are matters of essential validity, see Ponticelli v. Ponticelli, supra note 16, at p. 214. Sachs J.: "Wilful refusal to consummate, clearly, cannot be said to fall within the categories of matters of form and ceremony." With regards to consent see Apt v. Apt, supra note 24; Szechter v. Szechter, supra note 27; Woodhouse, Lack of Consent as a Ground for Nullity and the Conflict of Laws, (1954), 3 I.C.L.Q. 454, especially at pp. 460 ff.

43. See this dissertation at p. 40. Some support for the view that each ground should be examined separately can be found in the distinction between matters of formal and essential validity. With regard to separate choice of law rules to different grounds of voidness see Cumming - Bruce J. in Radwan v. Radwan (No. 2) [1973] Fam. 35, at p. 54. His limitation of the decision in Radwan to polygamy can possibly be regarded as a support for our suggestion.

44. See also infra note 54 and accompanying text.

45. See Jaffey, The Essential Validity of Marriage in the English Conflict of Laws, (1978), 41 M.L.R. 38, at pp. 38, 47.

46. See s.13(3) of The Matrimonial Causes Act 1973, 1973, c.18.

47. Ibid., s.12 (a) (b) (c) (e) (f).

48. Wilful refusal to consummate is different from other grounds of voidability because it is post nuptial, while all other grounds of voidability, even if unknown, are present at the time of the marriage. It has, therefore, been suggested that a different choice of law rule should govern wilful refusal to consummate. See e.g. Falconbridge, supra note 12, at p. 701. He suggests that the law of the domicile at the time of the refusal to consummate, or at the time of the proceedings should be applied. See Ponticelli v. Ponticelli, supra note 16, for support for the application of the law of the matrimonial domicile. It is suggested that wilful refusal to consummate should not be treated separately. Consummation of the marriage is expected by the aggrieved party, as part of its formation. A different rule is appropriate to regulate refusal after the marriage has already been consummated. But, in that case, the refusal should be a ground for divorce, not a ground for nullity.

49. Jaffey, supra note 45 at p. 48.

50. The application of this doctrine to matters of consent is supported by Sachs J. in Szechter v. Szechter, supra note 26, at p. 294. See also Dicey and Morris, supra note 35, at p. 275, rule 35. But see pp. 276-277 where Dr. Morris takes the view that reference should be made exclusively to the non-consenting party's law. See also Cheshire and North, supra note 37, at p. 403.

51. Another law which has been suggested is the law of the husband's domicile. We see no reason for the application of such a discriminatory rule, especially today when a woman can have a separate domicile according to s.1 (1) of the Domicile and Matrimonial Proceedings Act 1973, 1973, c.45.

52. See this dissertation at p. 40.

53. See Jaffey, supra note 45, at p. 49. We admit however that this argument will have less strength if the aggrieved party moved to the state in which the matrimonial home was established for other reasons, such as a new job. This so, especially if he did so before the marriage but did not establish a domicile in the English sense.

54. Such a strong policy would probably be enforced by the determination that such a marriage is void, but not necessarily so.

55. Matrimonial Causes Act 1973, 1973, c.18, s.12 (d).

56. See note 37 and accompanying text.

57. Such a ground of voidability exists, for example, in German law. It was discussed in Mitford v. Mitford and Von Kohlmann [1923] P. 130. In that case, however, the issue was the recognition of a German decree of nullity in England.

58. When the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 1, was enacted.

59. On the Israeli courts' jurisdiction see this dissertation at p. 79-80 dealing with jurisdiction in divorce. Religious courts had wider jurisdiction. They had jurisdiction over stateless persons (not foreign subjects). In addition the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 L.S.I. 139, probably gave jurisdiction to dissolve a marriage of two Jews, foreign subjects, provided they consented to it. See s.9 of the Law and this dissertation at p. 3.

60. H.C.J. 29/66, Yania v. A.G., 20 P.D. (2) 147.

61. This interpretation was criticised. See Shava, Examination of the Validity of Marriages Contracted Outside Israel and the Authority to Declare Their Nullity, (1968), 24 Hapraklit 10; Shimron and Tzemach, Is the District Court Authorised to Give a Decree of Nullity to a Foreigner?, (1968), 24 Hapraklit 454. See also Shava, Jurisdiction of Civil and Religious Courts to Pronounce a Decree of Nullity With Regards to Israeli Subjects, Foreigners and Foreign Subjects, (1966/67), 23 Hapraklit 247.

62. The lack of jurisdiction gave rise to many practical problems. In practice many cases involved a Jew married to a non-Jew at the time both were foreign nationals. The Jew later emigrated to Israel and became an Israeli citizen, the foreigner stayed abroad. There was no way to dissolve the marriage. See Part IV notes 30, 31 and accompanying text.

63. See Part I note 39.

64. Supra note 1.

65. s.6 of the law defines dissolution of marriage. "In this Law - "dissolution of marriage" includes divorce, annulment of marriage and declaration of a marriage as void ab initio."

66. See note 41 and see Shiloh, Marriage and Divorce in Israel, (1970), 5 Is.L.Rev. 479, atpp. 494-495. "A marriage is valid if both parties are Jews of sound mind, of age, not related to each other within the prohibited degrees of affinity, acting on their free will fully realising the nature of the act, and if the bride is unmarried at the time of the marriage. Absence

of any of these qualifications or circumstances renders the marriage void ab initio."

Religious law also prohibits a series of other marriages such as between certain more remote degrees of affinity: Between a Cohen (member of priestly cast) and a divorcee or convert, the marriage of a bastard (issue of a union between Jewish parents which is void ab initio in Jewish law because of incest or adultery) except to another bastard or convert, and the marriage of a man who is married to another woman. (It should be noted that the above-mentioned is by no means an exhaustive list.) Marriages which are not void ab initio are valid ex post facto, and can only be dissolved by a Jewish divorce, a Gett.

67. Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 1.

68. See also this dissertation at pp. 37-39.

69. Ibid., at p. 91 with regard to divorce.

70. See this dissertation at p. 42.

71. Ibid., at pp. 63-66.

72. See Shifman, The Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, (1970), 2 Mishpatim 416, at p. 423.

73. See Arts. 47, 64 and 46 of the Palestine Order in Council, 1922-1947, supra note 1.

74. Supra note 1.

75. See this dissertation at pp. 36-39.

76. The renvoi doctrine is accepted in Art. 64, see Part I note 9; it has been excluded by the new Law, Compare, Jaffey, supra note 45, at p. 50 note 44.

77. See this dissertation at pp. 25-27.

78. With regard to this difference, see Shifman, supra note 72 at p. 423.

79. For criticism of this result, see Shifman, supra note 72, at p. 423; Shava, Choice of Law Rules in Matters of Dissolution of Marriage, (1971), 1 Iyune Mishpat 125, at p. 150.

80. Other sections of the Law have already been interpreted by the courts, we do not know of any case in which choice of law problems arose.

81. The husband's duty of maintenance will be decided, probably, according to his law alone, as in Israel law that duty of maintenance is decided according to the personal law of the respondent. See Family Law Amendment (Maintenance) Law, 5719-1959, 13 L.S.I. 73 s.2 (a). For maintenance when no valid marriage exists, see Shifman, Maintenance for a Wife in a Void Marriage, (1978), 6 Mishpatim 514.

82. If the man is already domiciled in Israel the English law will be applied, as the law of the last common domicile of the spouses.

83. See Part I of this dissertation.

IV

DIVORCE AND THE CHOICE OF LAW

1. English and Israeli Choice of Law Rules in Divorce

England has no choice of law rules in divorce as the English courts always apply English law in divorce suits. Israel, on the other hand, has statutory rules determining the selection of a proper law giving preference to the law of the common, or the last common domicile of the spouses.

A. England - The Application of the Lex Fori Is a Result of Jurisdictional Limitations

English law's lack of choice of law rules in divorce is probably a result of the courts' narrow jurisdiction to entertain divorce suits in the past. Judicial divorce was introduced in England in 1857. There was uncertainty as to jurisdiction until 1895 "though the weight of opinion and of practice was in favour of confining it to the courts of the domicile of the parties at the date of divorce."[1] In 1895 in Le Mesurier v. Le Mesurier,[2] it was settled that jurisdiction in divorce is confined exclusively to the courts of the domicile of the parties.

As the sole basis for jurisdiction was the domicile of the parties, problems of choice of law did not arise and English law was applied. The application of the English law can be regarded as the application of the parties' personal law, or as the application of the lex fori, if the view is taken that a dissolution of marriage in England should be according to English concepts and laws.

> "The English court when entertaining divorce ... proceedings applies nothing but English law because the question of the conditions under which the nuptial tie may be loosened or destroyed touches fundamental English conceptions of morality, religion, and public policy."[3]

The possibility of a difference between the lex fori and the parties' personal law first arose in 1938. The Matrimonial Causes Act, 1937[4] allowed a deserted wife to petition for divorce even though her husband's

domicile was not English. The Act did not give any rules of choice of law.

In 1948 in Zanelli v. Zanelli[5] the courts assumed jurisdiction in the case of a deserted wife and applied the English law without any discussion of the question of choice of law. Even though the husband returned to Italy and the parties' personal law was Italian, no reference to Italian law was made.

The application of English law in Zanelli v. Zanelli was later confirmed by sec. 1 (4) of the Law Reform (Miscellaneous Provisions) Act, 1949,[6] and the Matrimonial Causes Act, 1965, which extended the jurisdiction of the English courts to cases of a wife ordinarily resident in England for three years,[7] re-enacted the previous application of English law. According to sec. 40 (2) of the 1965 Act:

> "In any proceedings in which the court has jurisdiction ... the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings."

The Domicile and Matrimonial Proceedings Act 1973, has further extended the jurisdiction of the English courts.[8] Sec. 40 (2) has not been re-enacted. The Law Commission in its report suggested that English law exclusively would continue to apply.[9] Support for the application of the English law can also be derived from the silence of the Matrimonial Causes Act 1973, in this matter. No rules for the saving of the private international law are given in divorce and this stands in contrast to the provision for the application of rules of private international law with respect to nullity.[10]

Cheshire and North[11] submit that the question of choice of law is not finally resolved. Only future decisions will settle this question, yet it appears to us that English law will probably continue to apply.

The extent of the application of English law to cases involving foreign elements, to parties whose personal law is not English, will depend on the interpretation of habitual residence, because one year's habitual residence in England of either party confers upon the English court jurisdiction to dissolve the marriage.[12]

Habitual residence has not yet been interpreted fully, and there is still much doubt as to which cases it will include. The Law Commission

referred to a residence which establishes a belonging to England, emphasizing the factual elements. It regarded it as similar to ordinary residence.[13]

In Cruse v. Chittum[14] the interpretation of habitual residence[15] was the issue and several guidelines were given by Lane J.

a) Habitual residence "must indicate a quality of residence rather than a period of residence"[16]

b) Habitual residence "requires an element of intention, an intention to reside in that country"[17]

c) "... ordinary residence is different from habitual residence in that the latter is something more than the former and is similar to the residence normally required as part of domicile, although in habitual residence there is no need for the element of animus which is necessary in domicile."[18]

d) The residence must not be temporary, or of a secondary nature. Habitual residence denotes "a regular physical presence which must endure for some time."[19]

How specific issues will be determined is not clear. Thus, for example, does the English court have jurisdiction in divorce over a foreign student in England for fourteen months? The answer is not clear. It appears, however, that if jurisdiction is assumed, English law will apply. The evaluation of the application of English law to foreigners will be discussed further.[20] It must be clear, however, that the extent of the application of English law to foreigners depends on the assumption of jurisdiction which depends on the interpretation of habitual residence.[21]

B. Israel - Wide Jurisdiction and Choice of Law

Until 1969 the situation in Israel was similar to that in England, and secular courts had no jurisdiction to dissolve the marriage of a foreigner, i.e. divorce was limited to Israeli citizens.[22] Thus the question of choice of law did not arise. Religious courts had jurisdiction to dissolve the marriage of foreigners, provided they were not foreign subjects, i.e. they were stateless persons.[23]

The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5719-1953 gave exclusive jurisdiction to rabbinical courts in matters of

marriage and divorce of Jews, Israeli nationals and residents.[24] Further, if the parties were foreign nationals, they could consent to jurisdiction in order to dissolve their marriage.[25] Here again no choice of law rules were needed as the rabbinical courts always apply their religious law.

While choice of law rules were not needed in the realm of private international law, they were needed to resolve Israeli internal conflicts. Secular courts had jurisdiction over Israelis of non-recognized communities as a residuary jurisdiction, yet these parties had no personal law applicable[26] and difficulty was acute mostly in cases of dissolution as many other matters of personal status were regulated by secular territorial legislation.[27] Conflicts also arose with respect to mixed marriages of parties of two different recognized communities. If the matter were entertained before a secular court,[28] the courts had no choice of law rules to decide the issue involving parties with different personal laws.

It was clear that Israel needed choice of law rules to solve its internal conflicts but there was also great dissatisfaction with the narrow jurisdiction to dissolve marriages when one party was not an Israeli.[29] Israel is a state of immigration, and many unfortunate cases came before courts in a similar pattern. A foreign Jew married to a foreign Christian abroad. Later the Jew (or both) immigrated to Israel whereupon the Jewish party became an Israeli citizen. No court in Israel could dissolve their marriage.[30] On many occasions Supreme Court judges appealed to the legislator to find a solution for these unfortunate couples.[31]

To answer these problems the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969 was enacted. The Law gave secular courts wide jurisdiction to dissolve marriages and also supplied them with choice of law rules.[32]

The Law applies only to parties who are not under the exclusive or concurrent jurisdiction of the religious courts in Israel. That is, it does not apply to two parties belonging to the same recognized religious community.[33]

In cases where the Law applies, jurisdiction is very wide. There are no conditions attaching to the jurisdiction and there is no need to establish nationality, residence, or any other connecting factor such as

the celebration of the marriage in Israel. There is no need for any connection to Israel; a temporary presence is enough. Yet jurisdiction is not automatic and is left to the discretion of the President of the Supreme Court who may refuse jurisdiction if the parties have no connection with Israel.[34]

The Law lays down choice of law rules giving preference to a law common to both spouses:

"5 (a) The District Court vested with jurisdiction under this Law shall apply one of the undermentioned to the matter, in the following order of preference:

(1) the domestic law of the common domicile of the spouses;

(2) the domestic law of the last common domicile of the spouses;

(3) the domestic law of the country of which both spouses are nationals;

(4) the domestic law of the place where the marriage was contracted:

Provided that the Court shall not deal with the matter in accordance with any such law as aforesaid if different rules would apply thereunder to the two spouses.

(b) In the absence of any law applicable under subsection (a), the Court may apply the domestic law of the domicile of one of the spouses, as it may deem just in the circumstances of the case.

(c) Consent of the spouses shall always be a ground for divorce."

We see therefore that the Israeli solution is different from the English one: jurisdiction is very wide and choice of law rules are applied.[35] The reason for this may be the fact that Israel does not have a domestic territorial law of divorce. The Law determines, however, that consent is always a ground for divorce and this can be seen as an application of lex fori. In Jewish law, the law of the majority in Israel, consent is a ground for divorce.

2. Appraisal of the English and Israeli Rules

A. England

1) Jurisdiction and Choice of Law

We have seen that in England exclusive jurisdiction[36] in matters of divorce was given, in the past, to the courts of domicile. This has over-

shadowed any question of choice of law and English law was always applied. Outside matters of divorce, in most other branches of the law (e.g. contracts, tort), jurisdiction is not exclusive and choice of law rules are applied.[37] The special treatment of divorce was probably established to safeguard the interests of the country of domicile in matters which change the status of its domiciliaries. Moreover, in divorce more than in other branches of the law, the risk exists that parties will hide from the forum relevant foreign elements.[38]

The limitation on jurisdiction, however, placed hardship on parties seeking divorce for whom it was inconvenient and sometimes impossible to return to their state of domicile for a divorce.[39]

It is submitted that a preferable solution would have been to extend the jurisdiction of the courts and apply the appropriate law, the personal law of the parties as[40] "it matters little where the machinery is put in motion, provided that the correct law is applied."[41]

> "On general grounds it would seem sound to suggest that the question of choice of law is more important than that of choice of jurisdiction. It is more in the interests of uniformity of decision, of justice, and of the parties themselves that the proper law should be applied to the merits of their dispute than that some law should be applied by the courts of one country rather than those of another."[42]

Today the jurisdiction of the English courts has been greatly extended.[43] While this by itself appears to us commendable, we submit that with the wider jurisdiction, appropriate rules of choice of law might have been formed. For a connection justifying jurisdiction does not necessarily justify the application of the forum's law, the interests required to support an asserted jurisdiction need not be as great as those required to justify imposition of the forum's dispositive law.[44]

It appears to us that while one year's habitual residence is a commendable ground of jurisdiction, it may not justify the application of English law in divorce suits to all persons whose sole connection with England is that they have been habitual resident there for one year. We see fit to end this section with Graveson's words at a time when the residence in a limited manner was just introduced as a ground for jurisdiction[45] and the issue of choice of law was ignored by the court in Zanelli v. Zanelli.[46]

> "To submerge under a principle of jurisdiction the application of the personal law in matters of divorce would be regrettable; but it is considered that this traditional exclusion of the choice of law rule under vastly changed bases of jurisdiction is not yet sufficiently established to debar the courts on a fuller consideration from determining the rights of parties by their personal law."[47]

The view that jurisdiction based on residence would demand the application of choice of law rules found support in the Report of the Morton Commission.[48] It was rejected however by the Law Commission (in 1972) as impractical even though possible in theory.[49] And the Matrimonial Causes Act 1973 gives no saving rule for the English private international law rules in matters of divorce before an English court.[50]

2) Considerations Against the Routine Application of the Lex Fori

(a) Disregard of the parties' personal law

The application of English law when both parties, or one of them, have been habitually resident in England for one year might result in disregarding other laws which have a more legitimate concern to decide the parties' status.

Divorce changes the parties' personal status. Their personal law has therefore a major interest in determining the result of a suit for divorce.

> "The idea of the personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce ... may be governed universally by that system of law deemed most suitable and adequate for the purpose."[51]

It could be argued, of course, that the law of habitual residence should apply as some kind of personal law. A person's personal law is the law of the place where the center of his life is, and to which he is most closely connected.[52] It is doubtful if the law of the place of habitual residence can qualify as a personal law. Much will depend, however, on the interpretation of "habitual residence" in the English case law. It is, of course, possible that the quality of the residence required to establish an habitual residence will be very emphasized, and as a consequence the place of habitual residence will be the place where the center of a person's life is. Thus the concept of habitual residence will be

similar to the concept of domicile, without the technicalities overburdening the English concept of domicile.[53] On the other hand, it is possible that habitual residence will be interpreted by the courts as something similar to ordinary residence. In that case the law of the place of residence for one year will hardly qualify as a personal law. Moreover the place of habitual residence will not be the place in which the effect of the divorce will be felt.[54]

Which is the law with the greatest interest in the matter when the parties have different personal laws is a difficult question, and sometimes, whatever the choice, some law will be disregarded,[55] but it is submitted that the solution is not the routine application of the lex fori disregarding foreign law, but to try to select a proper law for divorce cases.

A problem may arise with regard to grounds of divorce that are completely alien to English courts. It then may be possible to disregard such grounds as contrary to the English court's public policy, but foreign grounds should not systematically be barred from recognition.[56] A similar problem will arise with parties whose laws are less progressive than the English law with regard to divorce. They may not allow divorce at all or be very fault oriented.[57] Here again English courts may decide that some help should be given to the suffering party which is not given to him by his personal law, i.e. if physical cruelty is not a ground for divorce by the suffering party's personal law, but the application of the English law should only be in very extreme cases where English public policy so requires.[58]

(b) Lack of uniformity and predictability

The routine application of English law to all divorce suits entertained in English courts under their extended jurisdiction, will not be in accord with such considerations as uniformity of result, certainty and predictability, and may cause injustice in the individual cases.[59] It might also be unfavourable to the expectations of the respondent.

Complete uniformity of result - i.e. that a given situation would be given an equal legal treatment no matter where the case were tried - is of course an unrealistic goal; especially so since an internationally accepted unification of the conflict of laws has not been achieved.

Absolute predictability is impossible to achieve, even in the internal legal system and especially when several legal systems are involved. The expectations of the parties and justice in the individual case cannot always be upheld and achieved.

It appears to us, however, that with respect to matters of status, especially where it is to be changed, as it is in divorce, one should strive for conformity, at least with a country to which the parties have a substantial connection.[60] One way of achieving uniformity is by selecting the proper law, the law of the country to which the parties are most closely connected. Selection of the proper law may help in the recognition which would be given to the English decree, and thus avoid the creation of limping marriages.[61] To some extent the problem of recognition has, however, been solved by international conventions on the recognition of foreign divorce decrees.[62]

With regard to predictability, it is clear that the application of the lex fori offers none to the respondent spouse (unless of course both parties agreed upon the jurisdiction) as there is no knowing where the suit for divorce will be tried and therefore which law will be applicable. Application of the lex fori, the plaintiff's choice, can of course undermine the respondent's expectations and bring him injustice. This leads us to another danger of the routine application of the lex fori - its encouragement of forum shopping.

(c) Forum shopping

The fact that English courts exercise jurisdiction in divorce over persons who are one year habitually resident in England and apply thereto English law might induce forum shopping. The Law Commission was aware that extended jurisdiction may induce forum shopping; that there is a danger that petitioners will be encouraged to bring their case before an English court to obtain divorce more easily or to gain financial advantages. They held the view however that most people's social obligation, employment ties, and the expenses involved in establishing residence in England will deter them from coming to England for the sole purpose of obtaining a divorce. They concluded that the danger of forum shopping while it could not be

disregarded, "should not be treated as a major determinant in formulating jurisdiction rules."[63] The Law Commission further decided it also should not be considered an important factor against the application of English law to divorce suits heard in England.[64]

We agree that the danger of forum shopping should not have been a deciding factor against the extension of the English courts' jurisdiction. It is submitted, however, that the application of the proper law to the matter would discourage forum shopping and this, among others, is a reason for the application of the parties' law, and against the English lex fori.[65] A similar view was taken by Seidelson:

> "By determining the availability of the grounds for divorce asserted and defences thereto by reference to the dispositive law of plaintiff's domicile, the forum would discourage the plaintiff from forum-shopping for that state having the most compatible statutory grounds for divorce."[66]

The result of the English application of lex fori is especially grave since jurisdiction can be based on the habitual residence of the plaintiff.[67] Forum-shopping of both parties for a convenient forum for a divorce which both of them are seeking may be unjustifiable according to some country's concepts - not to others - but allowing the plaintiff to submit the respondent to a law he chooses, solely in his own interests, will result in injustice to the other spouse.[68] We have no data on the number of foreigners who resort to the English courts for divorce. We admit however that it is possible, that in practice, the problem of forum shopping for an English divorce is slight.

3) Considerations for the Routine Application of the Lex Fori

The advantage of the routine application of the lex fori is that it is a relatively simple, swift and inexpensive procedure when compared to the application of foreign law.[69] This is true of course with respect to other matters besides divorce in which foreign law is applied. With respect to matters of divorce, however, the complexity of applying foreign law and the expenses involved may seem more disproportionate.

Many divorce cases are undefended[70] and requiring the plaintiff to prove foreign law may be regarded as unjustifiable hardship. Moreover, in matters of divorce, great difficulties may arise in the selection of the proper law, especially today when the wife and husband can have separate domiciles.[71]

In view of the complications and expenses of foreign law which might deter many plaintiffs from seeking relief in English courts, the Law Commission decided on the application of English law, thereby giving preference to such considerations as simplicity, swiftness, and inexpensiveness of the procedure.

> "It is our strongly held view that practical considerations should prevail and that, notwithstanding the theoretical arguments to the contrary, the grounds of, and defences to, a divorce suit heard in this country should continue to be those of English law."72

4) Conclusion

It is submitted that the considerations for the selection of a proper law in divorce cases in England as stated above are too strong to be set aside by the practical considerations in favour of the lex fori. It should be noted that one of the objectives set out in the Law Commission's Working Paper with respect to jurisdiction was England's interest in the divorce:

> "The rules should enable relief to be granted to those whose connections with the country are sufficiently close for the marriage and its breakdown to be a matter of real and substantial interest to the country."73

Thus it appears that the Commission took the view that England has a substantial interest in the divorce cases in which it has jurisdiction. The application of the English law may, however, result in disregarding strong interests forwarded by foreign laws, e.g. the laws of the country of both or one party's domicile.

To what extent substantial interests of foreign laws will be disregarded will depend on future cases. They will show in practice on a factual basis the extent of the connection of parties who come under English jurisdiction and English law to a foreign jurisdiction. Much will depend of course on the interpretation of habitual residence.

If the interpretation of habitual residence will be such as to convey upon the law of habitual residence the qualities of a personal law, the application of the English law will be justified.[74] On the other hand, habitual residence might be interpreted as similar to ordinary residence. It is submitted that in this case the interest England may have in the marital status of persons habitually resident in England sometimes only

for one year is smaller than an interest forwarded by other countries, e.g. the country of the parties' personal law to which they may very likely return.

B. Israel

1) A Preference for a Law Common to Both Spouses

The underlying principle of the Israeli choice of law rules in divorce is that the applicable law should be a law common to both spouses.[75] It is clear that, as a result, complexity of choice between the relevant laws, e.g. when husband and wife have different domiciles,[76] is avoided.

The Israeli legislation also provides that such a law will only be applicable if the same rules apply thereunder to the two spouses.[77] This provision is of course irrelevant when the court is referred to a law of a country in which there is one territorial domestic law. It has great significance when the court is referred to the law of Israel or another country in which several religious laws form the domestic law. This provision should therefore be understood against the background of the Israeli legal system. It is probably meant to avoid Israeli internal conflicts. Israel is ready to apply another state's law as long as one rule can be applied in cases of mixed marriages.[78] If such a possibility does not exist, the choice of law between husband's and wife's law will at that stage be at the court's discretion.[79]

2) The Choice of Law Rules

Before examining the different choice of law rules chosen by the Israeli legislator, it should be emphasized that they are set in order of preference, which is mandatory. In other words, the courts have to apply the first law indicated and can only apply the following law indicated if the first one cannot be applied, either because the parties do not have such a common law or because under that law different rules apply to both spouses.[80]

Only in a case where none of the indicated laws provides the same rules for both parties, the court has the discretion to apply the law of the domicile of one party, as it may deem just in the circumstances.[81]

(a) The law of the common domicile of the spouses

This preference for the law of the common domicile of the spouses is of course reasonable. (We assumed this is the law of both parties at the time of the proceedings.) The factual situation in which such a law exists - i.e. that both parties have the same domicile - is a very simple one for any choice of law to be made. As long as one does not take the view that the lex fori should apply, it is clear that the law of both parties' domicile, the law of the place which is the centre of their life, should apply.[82] The very complexity of the selection of the proper law arises when the parties do not have a common domicile at the time of the proceedings.[83]

(b) The law of the last common domicile of the spouses

When the parties have separate domiciles, the true problem of choice of law arises. The Israeli legislator selected the law of their last common domicile. It appears to us that in practice in the great majority of the cases, this will coincide with the law of the last matrimonial domicile. In theory of course there exists the possibility that these two do not coindice (e.g. if both parties lived as husband and wife in Germany, and on the breakdown of the marriage moved to France where they lived separately each acquiring a domicile there in the Israeli sense. At the time of the proceedings, the petitioner has already acquired an Israeli domicile).

In a great majority of the cases, however, the last common domicile will be identical with the matrimonial domicile. The state of the matrimonial domicile has a strong interest in the matter. It is the place where the parties lived together as man and wife. There they built their home and there their children may quite probably have been born. Most of the property to be disposed of may well be there and, in many cases, one of the spouses will still be domiciled in that state. Thus a major part of the effect of a divorce will be felt at the state of matrimonial domicile.[84]

The rule is less justified if both parties have left the place of the matrimonial domicile. It may however cause injustice even if only one spouse left the place and established a domicile somewhere else.[85]

If the last common domicile does not coincide with the matrimonial domicile and its sole purpose is to find a law common to both spouses, its merit may well be doubtful as a rule of private international law. Its application, however, is understandable in the light of the Israeli legislator's goal to find one law to be applied to a mixed marriage.

(c) The national law common to both spouses

The law of nationality is regarded by some countries as the personal law. The Israeli legislator, however, preferred domicile as the connecting factor. His reference to the law of nationality should be explained by his search for one law and one rule for both spouses. Thus if parties of a mixed marriage who are foreign nationals settle in Israel which then becomes their domicile, the court will refer to the law of their nationality, because under the law of their Israeli domicile different rules will apply to both spouses.

(d) The law of the place of celebration

When none of the above mentioned possible laws are common to both spouses, or more likely apply the same rule to both spouses, the court is referred to the law of the place of celebration. This is undoubtedly a law common to both spouses. (It may however not apply the same rules to both spouses.)

As a general rule of private international law, reference in a case of divorce to the law of the place of celebration has no great merit if the fact that the marriage was celebrated there is indeed the sole connection of the parties to that place.[86]

The Israeli reference to that law is, as has been mentioned before, to find one rule applicable to both spouses. Most mixed marriages will not be performed in Israel where no civil marriage exists. As they will be celebrated abroad, probably in a country where religious laws do not apply, the same rules will, in most cases, apply to both spouses.

3) Consent of the Parties Is Always a Ground for Divorce[87]

The provision that consent shall always be a ground for divorce appears to us to be reasonable modern concept[88] and a simple way to end a

mixed marriage when both parties so wish. It is also in accord with Jewish law,[89] the law of the majority in Israel. It is therefore an appropriate provision for the Israeli legislator to apply to Israelis, domiciliaries or nationals.

The provision however is not limited. Since the jurisdiction is very wide, it results in the application of this ground to foreigners as well. With the application of this ground to foreigners, Israel is applying the lex fori and the disadvantages discussed with respect to English law apply here as well. The dangers may even be greater because the jurisdiction is wider and divorce is very easy to obtain, unless of course the President of the Supreme Court does not give parties who have no connection with Israel the opportunity to be heard before an Israeli court.[90] Forum shopping cannot however damage the other party's position, of course, and the only possibility is forum shopping by both spouses.

4) Israeli Rules Are More Appropriate for Israel's Internal Conflicts

It appears to us that the Israeli rules of choice of law are appropriate to solve the internal conflict of the state. It is suggested that they should have indeed applied to Israelis, while for matters including foreign elements, different selection of law could have been made, and in the least, consent as a ground of divorce should have been limited to Israelis. They do not disregard the parties' interests but may well disregard another law which has a greater interest to regulate the matter.

The selection of one law applicable to both spouses is a conceivable solution to the complexity of choice of law in matters of divorce. It may however be inappropriate in some circumstances. It may well be that the problem of internal conflict has overshadowed the questions of international conflicts.

3. A Suggested Approach

There appears to be no one law that can successfully be applied. Finding one rigid rule that will take into account and serve the interests of all the legal systems involved, provide justice for both parties and comply with their expectations, and be predictable seems very difficult, if at all possible. Some compromise with respect to the above mentioned

goals seems necessary. No solution will be beyond criticism; none will be perfect.

In these circumstances both the Israeli and English solutions are understandable. England preferred the practical considerations of simplicity and inexpensiveness. English law is always applied, and all questions of choice of law are avoided. Israel formed choice of law rules which would refer the courts to a law common to both parties, thus again avoiding the difficulty of choice when the parties have different personal laws. It further simplified the process by enabling both spouses to have divorce when they consent to it, regardless of other legal systems to which the parties may be connected.

The merits and shortcomings of both rules have been discussed. It still remains to see whether a better rule can be formed.

The selection of the proper law in divorce has not been discussed in English or Israeli decisions. Both English and Israeli writers have mostly ignored the question of choice of law and dealt mainly with the jurisdictional question.

The selection of the proper law was dealt with by a few American writers who considered various relationships. This has not resulted in any agreed rule.

Thus, for example, Sumner discusses the law of the place where the ground for divorce was committed, the law of the place where the marriage was contracted and the law of the matrimonial domicile. He tends to prefer the latter, yet he regards it also as the law of the matrimonial domicile at the time the act, which is a ground for divorce, was committed.[91] A preference for the law of the matrimonial domicile has also been suggested by others.[92] Seidelson, on the other hand, suggests that the law of the plaintiff's domicile should be applied.[93]

The law of the matrimonial domicile, and of the place of celebration have already been discussed. The suggestion of the law of the place where the act which forms a ground for divorce was committed does not appear to be suitable in today's concepts of divorce, at least so with regard to England and Israel. In both countries the grounds for divorce are not fault oriented.[94] The importance is upon the relationship of the parties,

and the place where the so-called act, if such an act can be pinpointed at all, is mostly irrelevant.[95]

Robertson suggests that the lack of agreement between the different writers suggests a need for more flexible standard, and submits that "the answer may lie in the adoption of an approach similar to that used in contract actions."[96]

We respectfully agree that there seems to be no one rigid rule which could be applied successfully to determine grounds for divorce and that a flexible rule would be appropriate. This of course will undermine predictability to some extent. However, in cases where the appropriate law is clear predictability can be safeguarded.

We suggest that in a case where both parties have a common domicile at the time of the proceedings, the law of that domicile be applied. The parties' law of domicile will certainly have the strongest interest in regulating their status.

If the parties have no common domicile there appears no one law which can have the strongest interest in regulating the divorce in every case.[97] The courts should have the discretion to consider in specific cases which is the proper law to be applied. The possible laws for application are the law of each parties' domicile; in some cases the law of matrimonial domicile should also be given consideration.[98] The courts will examine and evaluate the purpose and interests of the above mentioned laws and their connection to the divorce which is sought, and the resulting justice or injustice of their application. Such factors as the place of the children, the property to be disposed, and other factors which will show where the effect of the divorce will mostely be felt, will also help indicate the legal system to be applied.

Thus, for example, if both parties have left the place of matrimonial domicile and have established domiciles somewhere else, and it is clear that the law of the place of matrimonial domicile has no longer an interest in the matter, it can be ignored. It should of course be given consideration if one party still lives there. If that party is the party who kept the children, most of the property remained in that place, it may be given more consideration than the other party's law of domicile. Yet,

the other party's law should not be ignored, if possible. The protection afforded to one party by his law of domicile should be considered. Complex situations are bound to arise. The courts will have to solve them in the specific cases. This lacks predictability. It also gives rise to complications but deciding the situation by flexible rules, examining the interest and connection to different legal systems, is not new and was accepted in other branches of the law.[99]

While it appears difficult to form a more rigid rule at such a stage, clearer indications of which law should apply in certain types of situations will probably be formed in time by the courts.[100]

It is clear however that the Israeli courts using a more flexible concept of domicile, unencumbered by technical doctrines, as applied to the English domicile,[101] can adapt to the flexible rules more easily. It will probably be easier for the Israeli judge to examine the true interests of the domiciliary laws as he will always be dealing with a true domicile, a law of the place where the person's real center of life is established. This is important, especially in today's society, where people do not necessarily stay in one jurisdiction, and rigid domicile doctrines do not portray the true factual situation.

IV

FOOTNOTES

1. Graveson, Comparative Conflict of Laws, (1977), Vol. I at p. 270.

2. [1895] A.C. 517.

3. Wolff, Private International Law, (2nd ed., 1950), at pp. 373-374. See also Dicey and Morris, The Conflict of Laws, (9th ed., 1973), at p. 312.

4. See s.13 of the Matrimonial Causes Act, 1937, 1 Edv. 8 & 1 Geo. 6, c.57.

5. 64 T.L.R. 556.

6. Law Reform (Miscellaneous Provisions) Act, 1949, 12, 13, & 14 Geo. 6, c.100.

7. See s.40 (1) of the Matrimonial Causes Act 1965, 1965, c.72.

8. See s.5 (2) of the Domicile and Matrimonial Proceedings Act 1973, 1973, c.45.

9. Report on Jurisdiction in Matrimonial Causes, Law Com. No. 48 (1972) para. 105 (hereinafter referred to as the Law Commission).

10. See s.14 of the Matrimonial Causes Act 1973, 1973, c.18 and see this dissertation at p. 59 . See also Law Com. No. 48 para. 108. They determined that there is no need to re-enact s.40 (2) of the Matrimonial Causes Act 1965, because the Divorce Reform Act 1969, 1969, c.55 "leaves no scope for the application of anything but English law to divorce proceedings."

11. See Cheshire and North, Private International Law, (9th ed., 1974), at p. 370 and slight authority for the application of the lex fori.

12. See s.5 (2) of the Domicile and Matrimonial Proceedings Act 1973, 1973, c.45.

13. See Law Com. No. 48 paras. 40-42.

14. [1974] 2 All E.R. 940. It should be noted that in this case the issue was the recognition of a foreign decree of divorce. The term "habitual residence" in s.3 (1) (a) of the Recognition of Divorces and Legal Separations Act 1971, 1971, c.53, was interpreted.

15. On the meaning of habitual residence after the decision of Cruse v. Chittum, see Hall, Cruse v. Chittum: Habitual Residence Judicially Explored, (1975), 24 I.C.L.Q. 1; Parry, A Comment on Habitual Residence, (1975), 53 Can. Bar Rev. 135.

16. Cruse v. Chittum, supra note 14, at p. 942.

17. Ibid.

18. Ibid., at p. 943.

19. Ibid.

20. See this dissertation at pp. 81 ff.

21. Ibid., at pp. 83-84.

22. In Israel the connecting factor is nationality and not domicile. See Part I of this dissertation. Art. 64 (1) of the Palestine Order in Council, 1922-1947, Drayton, Laws of Palestine III 2569, provides that the civil courts will have no jurisdiction to dissolve the marriage of a foreigner.

23. According to Art. 65 of the Palestine Order in Council: "...The courts of the religious communities other than the Moslem religious courts shall not, however, have power to grant a decree of dissolution of marriage to a foreign subject." (emphasis added.) On the difference between the limitation in Article 64 (1) and Article 65, see Misc. App. 57/65, Plonit v. Almoni, 19 P.D. (2) 404.

The reason that the Israeli courts (secular and religious) had no jurisdiction to dissolve the marriage of a foreign subject was probably to avoid placing a foreigner in a conflict with his personal law which might not recognize the possibility of divorce. See also Vitta, The Conflict of Laws in Matters of Personal Status in Palestine, (1947), at p. 256. "The aim of the disposition is to prevent persons whose national law forbids divorce from looking to Palestine as a place where divorce may easily be obtained."

24. See s.1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 L.S.I. 139. The term resident in s.1 of the law has been interpreted to mean a permanent resident in Israel. See Cohen J. in H.C.J. 129/63, Matalon v. The Rabbinical Court, 17 P.D. 1640, at p. 1651. This interpretation was followed in later decisions. See H.C.J. 95/63, Plonit v. The Rabbinical District Court of Tel-Aviv-Jaffo, 17 P.D. 2222; H.C.J. 228/64, Plonit v. The Rabbinical District Court of Jerusalem, 18 P.D. (4)

141; H.C.J. 14/72, Sasson v. The Rabbinical District Court of Tel-Aviv-Jaffo, 26 P.D. (2) 104.

25. See s.9 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, supra note 24. See also Part I note 8 and accompanying text.

26. See Part I note 39.

27. See Part I note 3 and accompanying text.

28. By virtue of Art. 47 of the Palestine Order in Council, 1922-1947, supra note 22.

29. It was sufficient that one party was not an Israeli in order to deny the secular courts' jurisdiction. See C.A. 199/51 Izkovitz v. Izkovitz, 5 P.D. 1667, at p. 1669.

30. See for example Misc. App. 39/57, S. v. S., 11 P.D. 921; Misc. App. 141/64, Ploni v. Almonit, 19 P.D. (1) 382; Misc. App. 66/66, Weisman v. Weisman, 20 P.D. (2) 151.

31. See for example S. v. S., supra note 30, at p. 921; Ploni v. Almonit, supra note 30, at p. 384; C.A. 29/66, Yania v. A.G., 20 P.D. (2) 147, at p. 150.

32. See s.5 of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, 23 L.S.I. 274. For criticism of the title of the law, which implies that the law deals only with jurisdiction, see Shava, Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, (1970/71), 26 Hapraklit 302 at pp. 303-304.

33. s.1 (a) & (b).

34. See s.3.

35. On the relationship between jurisdiction and choice of law see this dissertation at pp. 81-83.

36. On exclusive and non-exclusive jurisdiction, see Graveson, supra note 1, at p. 106 ff.

37. See Currie, Suitcase Divorce in the Conflict of Laws, (1966), 34 U. Chi. L. Rev. 26, at p. 48: "Outside the swamp of divorce, it is common for a disinterested forum to entertain an action based on foreign law." (This article, as many others which will be cited with respect to the relationship between choice of law and jurisdiction, is written on American law. American writers have been more concerned with the above mentioned relationship, probably as a result of the ease with which American

citizens move from one state to another, and the full faith and credit doctrine. One should take into account, however, that their reference to "domicile" is to the American concept of domicile, which is more easily acquired than domicile in the English sense. For comparison between the English and American concept of domicile see Graveson supra note 1, pp. 239-252.) For other cases where choice of law has not been considered see Von Mehren and Trautman, Jurisdiction to Adjucate: A Suggested Analysis, (1966), 79 Harv. L. Rev. 1121, at p. 1129.

38. Anon., Developments in the Law - State-Court Jurisdiction, (1960), 73 Harv. L. Rev. 909, at p. 976.

39. Law Commission No. 48, para. 17.

40. For a similar approach see Seidelson, Interest Analysis and Divorce Actions, (1972), 21 Buff. L. Rev. 315, at p. 329. See also Robertson, Dissolution of Marriage - Jurisdiction over Non-Domiciliary Service Members: Time to Adopt a New Jurisdictional Analysis, (1977), 52 Wash. L. Rev. 369, at p. 391; Developments in the Law - State-Court Jurisdiction, supra note 38, at p. 975.

41. Cheshire, Private International Law, (3rd ed., 1947), at p. 447. (This remark was said in context of suits for nullity.)

42. Graveson, supra note 1, at p. 112.

43. See s.5 (2) of the Domicile and Matrimonial Proceedings Act 1973, 1973, c.45.

44. Seidelson, supra note 40, at p. 319. See also p. 330. For support of this view, see also Sumner, Full Faith and Credit for Divorce Decrees - Present Doctrine and Possible Changes, (1955), 9 Vand. L. Rev. 1, at p. 20.

45. s.13 of the Matrimonial Causes Act 1937, 1 Edw. 8 & 1 Geo. 6, c.57.

46. Supra note 5.

47. Graveson, supra note 1, at p. 107.

48. Report of the Royal Commission on Marriage and Divorce, (1956), Cmd. 9678, para. 835.

49. See Law Com. No. 48 paras. 103-105; Working Paper No. 28, para. 83.

50. See note 10 and accompanying text.

51. Graveson, The Conflict of Laws, (7th ed., 1974), at p. 188. See also Anton, Private International Law, (1967), at p. 155.

52. See Shava, Personal Law in Israel, (1976), at p. 55.

53. It is difficult to determine at this stage, to what extent habitual residence is likely to outflank domicile in English law as a prime connecting factor. An argument in favour of habitual residence is that the English concept of domicile, overburdened with technical doctrines, does not necessarily reflect the true factual circumstances of a given case, and does not necessarily direct the court to the law of the place to which a person is most closely connected.

54. See this dissertation at pp. 89, 93.

55. Ibid., at pp. 91-94.

56. But see Working Paper No. 28 para. 83.

57. Compare Robertson supra note 40, at p. 394, note 110 and accompanying text.

58. It should be noted, however, that if a significant public policy reservation against foreign grounds of divorce is formed, then there would be no difference between the application of the lex fori as compared to applying a choice of law process but excluding the application of the foreign law because its application is against the English public policy.

59. See also Graveson, supra note 42.

60. On the importance of uniformity, see Shava, supra note 52, at p. 55. See also Anton supra note 51, at pp. 155-156.

61. On limping marriages see Law Com. No. 48 paras. 8-9.

62. Problems of recognition will of course be avoided if other countries base recognition on the correct assumption of jurisdiction, and not on the application of the proper law, and recognize habitual residence as a sufficient factor to ground jurisdiction. This is in accord with the English recognition. Recognition of Divorce and Legal Separations Act 1971, 1971, c.53, s.3 (1) (a), implementing the draft Convention of the Hague Conference on private international law in 1968. See also Anton, The Recognition of Divorces and Legal Separations, (1969), 18 I.C.L.Q. 620.

63. Law Comm. No. 48, para. 10.

64. Ibid., para. 104.

65. See contra. Shapira, "Grasp all, Lose All:" On Restrain and Moderation in the Reformulation of Choice of Law Policy, (1977), 77 Colum. L. Rev. 248, at p. 259: Suppressing forum shopping should be by such tools as jurisdictional reform and the forum non conveniens doctrine, and not by choice of law.

66. Seidelson supra note 40, at p. 336. The applicable law is not necessarily the plaintiff's law of domicile. See this dissertation at pp. 91 ff.

67. Even if jurisdiction based on a plaintiff's habitual residence is acceptable for his convenience, the other party should have the security that the proper law is applied and not a law the plaintiff chose. (On the choice in jurisdiction, see Law Comm. No. 48, paras. 38-39.

68. Compare to the Israeli law which recognizes divorce by consent. If there is no consent however the proper law should be applied. s.5 of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1962, supra note 32.

69. Law Comm. No. 48, para. 104. Working Paper No. 28, paras. 82-83.

70. Morris, The Conflict of Laws, (1971), at p. 134: 95% of divorce cases are undefended.

71. For an example of possible complications see Working Paper No. 28, para. 82. See also Robertson, supra note 40 at p. 391. "The major obstacle to the adoption of a choice of law rule in dissolution actions is the lack of any single standard that can be applied successfully in every case."

72. Law Comm. No. 48 para. 105. Currie, supra note 37, at pp. 51-53, gives other reasons for the non-application of foreign law: It seems to us that the most important ones are that a foreign law giving the judge discretion whether to grant divorce or not, may prove difficult to apply to a forum whose general outlook may be different. The forum country may not have reconciliation services provided under some divorce laws. It appears to us that this could lead to the conclusion that jurisdiction should not be assumed. But once jurisdiction is assumed, the foreign law will not be better served if it is completely ignored. There can however arise situations where its full application is impossible.

73. Working Paper No. 28, para. 13.

74. See note 53 and accompanying text. It should be noted, however, that even if the law of habitual residence can be regarded as a personal law, if it is only one party's law, the possibility of disregarding the interests of the other party's law is a serious problem. See also this dissertation at p. 83-84.

75. See the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 32 s.5 (a), referring to common domicile, last common domicile, etc.

76. See note 71.

77. s.5 (a).

78. On problems of mixed marriages see this dissertation, at pp. 37-39.

79. s.5 (b).

80. s.5 (a).

81. s.5 (b). On the flexibility in determining the domicile, see this dissertation at p. 8.

82. It seems that in many cases this will also coincide with the matrimonial domicile, unless for example both parties have left the place of matrimonial domicile and both have settled in another state. Yet whatever the case it seems clear that if they have a common domicile at the time of the proceedings its law should be applied.

83. Applying the law of the domicile of both parties at the time of the proceedings was also the English solution, when jurisdiction in the past was more limited and English law, which was applied, was the law of both parties' domicile at the time of the proceedings. See also Matrimonial Causes Act 1965, 1965, c.72, s.40 (2). We see no point in applying the law of domicile of some other time, such as the law at the time the ground for divorce was committed. See this dissertation at pp. 92-93.

84. See Developments in the Law - State-Court Jurisdiction, supra note 38, at p. 972; Sumner, supra note 44, at pp. 21-22.

85. See this dissertation at pp. 93-94.

86. See Developments in the Law - State-Court Jurisdiction, supra note 38, at p. 972 and note 374. The rule's ad-

vantage, however, is that the state of celebration is easy to pinpoint which would make for uniformity.

87. s.5 (c) of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969, supra note 32.

88. "No fault" divorce, which is gradually accepted may be a stage in a development which will lead to the acceptance of divorce by consent. See also note 94 and accompanying text.

89. Schereschewsky, Family Law, (1967), at p. 276.

90. See note 34 and accompanying text.

91. Sumner, supra note 44, at p. 21.

92. See Developments in the Law - State-Court Jurisdiction, supra note 38, at p. 972.

93. Seidelson, supra note 40, at p. 332.

94. "No fault" divorce is also the trend in the United States. See Freed, Grounds for Divorce in American Jurisdictions, (1974), 8 Fam. L.Q. 401.

95. Against the law of the place where the act was committed see Robertson, supra note 40, at p. 391, note 100; Seidelson, supra note 40 at p. 331; Sumner, supra note 44 at p.21.

96. Robertson, supra note 40, at p. 391. See also p. 392.

97. If the case is heard in the court of one party's domicile, the court will probably give preference to its own law.

98. If the law of the place of matrimonial domicile does not coincide with either party's law of domicile at the time of the proceedings, it should only be given very slight consideration.

99. For example, contracts and torts. See Dicey and Morris, supra note 3, at pp. 721 ff., especially pp. 724-726 on contracts; pp. 930 ff. on torts.

100. See Powers, Jr., Formalism and Non-Formalism in Choice of Law Methodology, (1976), 52 Wash. L.R. 27.

101. See this dissertation at p. 8.

V

CONCLUSION

We have compared English and Israeli rules of private international law concerning the validity of marriage, nullity and divorce. The differences between the two have been pointed out. We shall therefore limit ourselves to a short summary, emphasizing the principle differences between the two systems.

1. English law regards domicile as the prime connecting factor in matters of personal status. In Israeli law, on the other hand, nationality was the prime connecting factor in the past. Today, both nationality and the Israeli concept of domicile serve as connecting factors, each with respect to different matters.
2. In English law, the formal validity of a marriage is governed by the lex loci celebrationis; the essential validity by the antenuptial lex domicilii. Under Israeli law all matters of the validity of the marriage should be decided according to the parties' personal law. The situation is not clear, however, and there is also support for the view that the formal validity of marriage is determined, as in English law, by the lex loci celebrationis.
3. In Israel, special provisions apply to a Jewish religious marriage. It is always valid, if valid by the religious law. This is so even if it is invalid by the law of the place of celebration and the parties' national law. In England there are no special validating rules for religious marriages.
4. In English law the same choice of law rules apply to the validity of marriage, regardless of the way in which the question of validity arises before the court. In Israeli law, on the other hand, different choice of law rules apply to the validity of the marriage, depending, for example, on whether relief in the form of divorce or annulment is being sought, or whether the court is being asked to make a declaration as to the validity of a marriage, or grant maintenance.

5. In English law, the choice of law rules with regard to voidable marriages are not clear. In Israel, there are clear statutory choice of law rules to determine the validity, voidness or voidability of a marriage, when a decree of nullity is sought.
6. It appears that English law applies to every divorce suit heard in an English court. In Israel, on the other hand, there are choice of law rules for divorce. Preference is given to the law of the spouses' common domicile.
7. In English law divorce and annulment are treated differently. Choice of law is used in annulment, but English law is always applied in divorce cases. In Israeli law the same choice of law rules are applied to matters of annulment and divorce.

Notwithstanding the above mentioned differences, countless similar rules can be found in both systems, since Israeli rules of private international law are based on the English rules. Thus, for example, we have seen that in determining the time factor an Israeli court referred to English law; in determining the validity of a marriage, the dual nationality doctrine was adopted, following the English dual domicile doctrine.

In Israeli law, many choice of law problems are not yet settled. Moreover, in some cases there is discord within the Israeli rules of private international law. This discord should be understood against the Israeli background. It derives mainly from the fact that both the Mandatory and the Israeli legislators have been reluctant to interfere with religious laws in matters of marriage and divorce. This reluctance has affected mainly Israeli domestic law. But as we have seen, it has also reflected upon situations in which foreign elements are involved.

In this dissertation we have attempted to show that the choice of law process should be employed not only in matters of the validity of marriage, but also in matters of divorce.

Our basic approach has been that the same method of selecting the proper law should be applied to matters of marriage, annulment and divorce.

In the process of selecting the proper law, all the relevant laws and their purposes should be considered. The interests of all the con-

nected states in regulating the matter, in the specific case, should be evaluated. In every case, the law of the state with the predominant interest should be applied.

Considering the probable purposes of the laws involved, in some cases it has been possible to give a general indication of the proper law, viz. the law of the state with the strongest interest in regulating such matters in most cases. Thus, for example, we indicated that the validity of a marriage, in respect of its acceptability or offensiveness to the moral and religious concepts of society, should be determined according to its conformity with the notions prevailing in the state of the established matrimonial home.

In other cases, no general indications of the law which would probably have the strongest interest in the matter could be given, because several laws could have a strong interest in regulating the matter. Thus, for example, in divorce, the law of both parties' domicile may have a strong interest in the matter. In such cases, the issue of selecting the proper law should be left to the discretion of the court, and it will select the proper law examining the interests of the compating laws in the specific situation.

It appears to us that this flexible rule will enable the court to arrive at the appropriate decision in the specific circumstances.

Our approach is not presently accepted in either English or Israeli rules of private international law in marriage and divorce. Such an approach has been accepted in other matters, e.g. contracts. Implementation of our approach would necessitate a change in the courts' attitude to choice of law rules in marriage and divorce. This could be accomplished gradually, in England. In Israel, most of the choice of law rules are statutory. A major change in the laws would therefore be needed as well. It is doubtful that with the Israeli legislator's reluctance to change any rules dealing with marriage and divorce, such a change in the choice of law rules will be made for a long time to come.

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