Public Policy in Adult Relationships in English Private International Law

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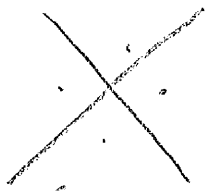

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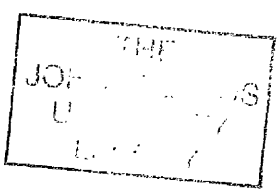

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ABSTRACT

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By Yvette S Tan

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Public Policy in Adult Relationships in English Private International Law

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This thesis analyses the role played by public policy in the recognition of adult relationships in English private international law. Traditionally, public policy is a discretion available in the common law which excludes foreign laws in private international law. Therefore, judges and academics have historically termed this wide discretion as an 'unruly horse.' It was feared that its usage would not have boundaries, and could not be contained by the judiciary. However, this author argues that the operation of public policy in modern times has taken on a different role than in the past. While the residual 'trumping' function of policy is still available in either the common law or statutory form for the judiciary to use, this author argues that policy is also present covertly in considerations which ultimately manipulate judicial decision making in relation to jurisdiction, choice of law and recognition.

In this thesis, an overview is given of how public policy operates throughout private international law generally. The author discusses several academic perspectives on the role and use of policy in judicial decision making. This author concludes that policy is present in judicial decisions although it is not always expressly acknowledged. The thesis then examines public policy in relation to the recognition of heterosexual marriages. It analyses what topical issues are pressing for private international lawyers in relation to the rules relating to the formal and essential validity of heterosexual marriages. The thesis then goes on to examine public policy in relation to the recognition of new forms of cohabitation, overseas partnerships and same-sex marriages, and discusses what problems are left for English private international law post the Gender Recognition Act 2004 and the Civil Partnership Act 2004. The thesis examines the operation of public policy with respect to jurisdiction, choice of law and recognition for foreign nullity and divorce decrees. It goes into a critical examination of the particular provisions of the Family Law Act 1986 and the "Brussels II bis" (Council Regulation EC No 2201/2003). An analysis is given of the change, if any, in public policy with the onset of European harmonisation. The thesis concludes by analysing what potential future trends may shape public policy that stem from international and European law.

DECLARATION

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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DEDICATION

For the Buddhist Boddhisatva (Saviour and Saint) of Compassion Kuan Yin for my spiritual strength and Her guidance.

For my great - grandparents, Mr & Mrs K.L. Chitty, and my granduncle Mr L.A. Chitty.

And for my grandparents, Mr G. & Mrs Lina Saurajen and Mr Tan Chin Liang & Mrs Deo Boh Lian.

"If I have seen a little further, it is by standing on the shoulders of Giants"

- Sir Isaac Newton (5 February 1676)

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I am privileged to have had the guidance of my joint supervisor Dr Francesco Giglio who gave unstintingly of his time and keen intellect. His perspectives on Chapter 4, as well as issues relating to private international law were remarkable and insightful. Thank you, Dr Giglio, for your exceptional and superb supervision of my thesis.

Thanks to the University of Manchester Law Librarian, Mrs Sue Bate. She was competent, organised and provided indispensable help in the securing of cases and legislation.

Thanks to Jackie Boardman and Mary Platt of the Postgraduate Office for their kind assistance throughout the writing of this project. They were always pleasant, thorough and efficient.

Thanks to Jonathan, Deepak and Lee for their kind encouragement and friendship over the years.

The materials in this thesis concern the jurisdiction of England and Wales.

Reference is made, where appropriate, to the law(s) of other jurisdictions in order to illustrate certain points.

The author has sought to include developments in the law until 1 June 2010.

Chapter One

The Workings of Public Policy in English Private International Law

I. Introduction

Legal systems around the world consist of a variety of territorial systems, and each deal with the problems of life such as birth, marriage, death, contracts, bankruptcy and wills in a different way. The moment a case in the English court is seen to be affected by a foreign law or foreign element, the court must look beyond internal law to a foreign law. This procedure is taken because there may be a conflict with the relevant rule of the internal foreign law to which the case belongs and the law of the forum (English law). Private international law is the part of domestic law that arises when the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. [1]

Thus, notions of comity, reciprocity and justice underpin English private international law. [2] While private international law strives to give effect in most cases to the appropriate foreign law or status, there are still instances where foreign law is considered offensive or repugnant to English notions or ideals. Scarman J has described this process as "an English court will refuse to apply a

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[1] See generally Cheshire and North *Private International Law* 13th Ed (Eds. P. North and J. Fawcett) (Butterworths London 1999) Chapter 1.
[2] See generally Cheshire and North *Private International Law* 14th Ed (Eds. P. North, J. Fawcett and J. Carruthers) (Oxford Oxford University Press 2008) at 4.

law which outrages its sense of justice and decency." [3] This refusal to apply a foreign law or status is known as public policy, and is available for the court to use in any proceedings that are brought forth in the forum.

Dicey and Morris say of public policy in their treatise *Conflict of Laws*[4]

> "The English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

Dicey and Morris set out clearly that public policy plays a role in private international law. Defining and evaluating that role is a harder task. This is because policy could be likened to an unruly horse that may run wild with judicial activism. In *Richardson v Mellish* [5] Burrough J elaborated on the perils of using policy

> " I, for one, protest...against arguing too strongly against public policy; - it is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

We shall see that policy (and policy considerations) surface expressly as well implicitly in relation to the recognition of adult relationships in private

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[3] *Re Fuld's Estate (No 3)* [1968] P 675 at 698.
[4] A. Dicey, CGJ Morse, A. Briggs, L. Collins, J.Harris, C.McLachlan and J. Hill (Eds.) *Conflict of Laws* 14th ed. (London Sweet and Maxwell 2006) at 92.
[5] (1824) 2 Bing 229, 130 ER 294,303.

international law.[6] They appear in a number of guises as later chapters of this thesis will show. The express manifestations of policy surface as the fundamental trumping discretion. The implicit manifestations of policy surface as considerations in either recognition (or non recognition) issues or in the choice of law stage.

Few academics in the United Kingdom have written articles and books on the role that public policy plays in adult relationships in English private international law with the exception of John Murphy and Kenneth Mc Norrie. [7] Additionally, our judiciary has rarely expounded on policy when deciding issues of adult relationships in private international law. Throughout this thesis, we will see that there are few cases *expressly* discussing policy. Policy operates more often than not in a covert manner. This characteristic has lead the academic J.D. Mc Clean to describe policy as "being an elusive doctrine...footprints are often found in the snow but reliable sightings are very few." [8] Therefore, this thesis seeks to examine an area which needs to be explored and analysed more in light of the new developments in marriage,

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[6] This thesis concentrates upon adult relationships in English private international law but policy could arise in other areas of private international law outside of adult relationships such as the law of contract, the law of tort, the law relating to children, property and trusts.

[7] There have been few authors focusing specifically in public policy in adult relationships. J. Murphy has written a series of books and articles on policy in family relationships in private international law. See J. Murphy 'The Recognition of Overseas Marriages and Divorces; Some Opportunities Missed?' (1996) 47 (1) *Northern Ireland Legal Quarterly* 35 – 49. Also, J. Murphy 'Rationality and Cultural Pluralism in the Non – Recognition of Foreign Marriages' (2000) 49 *International and Comparative Law Quarterly* 643 – 659. See also J. Murphy *International Dimensions in Family Law* (Manchester Manchester University Press 2005) and J. Murphy *Ethnic Minorities and the Law* (London Hart Publishing 2000). See also K. Mc Norrie's article 'Reproductive Technology and Transsexualism and Homosexuality; New Problems for Private International Law ' (1993) 43 *International and Comparative Law Quarterly* 757 – 774.

[8] J.D. McClean *Recognition of Foreign Judgements in the Commonwealth* (London Butterworths 1983) 53 – 54.

cohabitation trends, as well as new legislation stemming from Europe. [9] We shall see that judges often engage in policy fuelled decisions throughout the area of adult relationships in English private international law. We shall observe that in some instances, judges have engaged knowingly in exposition of what policy is or should be, but we shall also discover that in many cases they are not aware of their use of policy considerations. [10] Furthermore, a difficulty that is always present for the judiciary is that too much change in policy would lead us away from the basis of private international law and too little change would not prevent repugnance or injustice. These are all questions that judges confront and may take into account before making a decision in a private international law case.

II. Survey of Attitudes Towards Policy

This author suggests that it is through an initial survey of the theories of several academics that we can glean an understanding of how judges are using/ or should use public policy in private international law. This section of the chapter shall first examine Dworkin's theories specifically in relation to public policy and judicial decision making, and then survey opposing theories to Dworkin's. For instance, Dworkin is of the opinion that policies and principles

[9] Such as the Brussels II Bis (The European Communities Regulation Brussels II Bis 2201/ 2203 in *Jurisdiction and Enforcement in Matrimonial Matters and Matters of Parental Responsibility* (European Communities) [2003] OJ 338 SI.

[10] The academic J. G. Collier has noted that policy evaluation methods in English private international law have had limited appeal this side of the Atlantic, as opposed to academics from the USA. See J. G. Collier *Conflict of Laws* 3rd Ed. (Cambridge Cambridge University Press 2001) at pp 383.

can be separated, and that judges should only use principles in adjudication. [11] Other academics such as Fish, Greenawalt and Stevens are of the opinion that there is no distinction between policy and principle and that judges do and should use policy (or policies) in adjudication. [12] Academics such as Beever and Stapleton also agree that judges utilise policy and that policy should be used in adjudication in a limited manner. [13] We will finally see that at the end of this brief survey, that perhaps the best question to ask when analysing policy in private international law is whether or not the policy aim is a legitimate one. We can now turn to the various academics who discuss the use of policy in judicial decision making.

Throughout his career, Ronald Dworkin was very much against the use of policy in judicial decision making. [14] He also stressed that a judge should not voice their own moral or political convictions, even if he thinks that the convictions are held by the legislature or the majority of the electorate. This is known as Dworkin's vision of 'law as integrity.'[15] Dworkin argued that a judge should only think of himself as 'an author in the chain of the common law.'[16]

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[11] See generally Ronald Dworkin *Law's Empire* (Cambridge Massachusetts Harvard University Press 1986) and Ronald Dworkin *Taking Rights Seriously* (London Duckworth Press 1977).
[12] See generally S. Fish *Doing What Comes Naturally* (Durham and Duke University Press 1989), K. Greenawalt *Policy, Rights and Judicial Decision* (1977) 11 *Georgia Law Review* 991, R. Stevens *Torts and Rights* (Oxford Oxford University Press 2009).
[13] See generally A. Beever *Rediscovering Negligence* (Oxford Hart Publishing 2007) and P. Cane and J. Stapleton (Eds.) *The Law of Obligations; Essays in Celebration of John Fleming* (Oxford Clarendon Press 1998).
[14] See Ronald Dworkin *Taking Rights Seriously* (London Duckworth Press 1977) pp 22-29.
[15]See Ronald Dworkin *Law's Empire* (Cambridge Massachussetts; Harvard University Press 1986). pp 95-96.
[16] *Ibid.* 238-239.

As Dworkin stated

> " He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgement of how to make the developing story as good as it can be." [17]

Dworkin's attempt to distill principles governing judicial creativity resulted in several concepts; rules, principles and policies. Rules are what the law is, and so rules are applicable in an all or nothing fashion. Dworkin tries to show that in all cases there are principles which cannot be reduced to legal rules that are used by the court. A principle is a standard to be observed. It does not advance an economic, social or political situation but it is a requirement of justice or fairness or some other dimension of morality. Dworkin argues that principles are treated by the courts as legal authorities, and are essential for reaching decisions. Principles, unlike rules, have a dimension of weight. [18] Dworkin asserts that principles describe rights. Thus, this concept of rights centers around much of Dworkin's work. [19] Additionally, principles, unlike rules, can conflict. [20]Therefore, the judge has to weigh conflicting principles in every case.

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[17] *Ibid.* 239.
[18] Ronald Dworkin *Taking Rights Seriously* (London Duckworth Press 1977) pp 22.
[19] See Ronald Dworkin's book generally *Taking Rights Seriously* (London Duckworth Press 1977) and also R. Dworkin *Law's Empire* (Cambridge Massachussetts Harvard University Press 1986).
[20] Legal rules do not conflict. If they do conflict - one must be an exception to the other. See again, Ronald Dworkin *Taking Rights Seriously* (London Duckworth Press 1977) pp 26-27.

Policies, as opposed to principles, describe goals. A policy is defined by Dworkin is 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.' Therefore, Dworkin states that individual rights should be upheld over community goals. The main question for Dworkin in any case is whether or not the claimant has the right to 'win' the case and not whether there are community interests at stake. [21] So, all civil cases are and should be decided by principles. [22] Even if a judge seems to be advancing a policy argument, we should read him to be referring to principle because he is deciding the individual rights of community members. [23] Dworkin asserts that judges do not make law, but make a decision based upon existing rules and underlying legal principles, which inform the applicable rules.

Therefore, before making a decision in a hard case, the judge has to understand the whole doctrinal structure of the existing law. In order to make a decision the judge needs to have broader understanding "of the patterns of values that have gradually developed in the legal system." The values are expressed in the combination of rules and principles, but not policy. Therefore, Dworkin believes that the judicial role is creative, but not the same as the role of a legislator. [24]

Cottrell sums up Dworkin's analysis of the task of judges as

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[21] R. Wacks *Understanding Jurisprudence* (Oxford Oxford University Press 2005) pp 124.
[22] *Ibid.* pp 124.
[23] *Ibid.* pp 124.
[24] See R. Cottrell (2nd ed) *The Politics of Jurisprudence – A Critical Introduction to Legal Philosophy* (London LexisNexis UK 2003) at pp 165. See *Infra.* note 28, Dworkin, *Law's Empire* .

" Their task is undoubtedly creative. Yet it is not legislative. Properly understood the judicial role is not the dynamic role of making law like a legislator, nor it is the purely passive role of 'finding law'. The judge must make the law the best it can be through c*reative* interpretation of existing legal resources."[25]

Dworkin argued that there will be an answer for every hard case by employing this methodology. As we have seen, the distinction between principle and policy is fundamental to his thinking and characteristic of his writings in jurisprudence.

However, can policy and principle be truly separated? Is policy according to Dworkin the same as policy in private international law? I would suggest that Dworkin's reasoning would not be suitable for our present inquiry of public policy in adult relationships in private international law. It is notable that Dworkin's distinction between policy and principle has been contested by certain critics, who we will discuss now.

Stanley Fish, in his book, *Doing What Comes Naturally* [26] titled a whole chapter 'Still Wrong After All These Years'[27] in objection to Dworkin's thesis, *Law's Empire.*[28] One[29] of Fish's objections was levelled at Dworkin's distinction between policy and principle. Fish argued that this distinction was untenable because it is a political distinction. This means that this is just a

[25] *Ibid.*
[26] S. Fish *Doing What Comes Naturally* (Durham and London Duke University Press 1989). pp 356 – 370.
[27] *Ibid.*
[28] R. Dworkin *Law's Empire* (Cambridge Massachussetts Harvard University Press 1986).
[29] *Supra.* note 26 at pp 357.

disguise for calling some policy the label of principle. [30] Fish argues that the line between policy and principle will only be visible to assumptions of policy so deeply in force to be beyond challenge. [31] However, Fish states that the line that distinguishes policy and principle is always open to challenge, and when the challenge is made, the line will be drawn again.[32]

Fish reasons that

> "Either the forum of principle -"the perspective of no institution in particular" – is empty and therefore incapable of guiding or constraining, or it is a name of the policy(of an institutional perspective) that has achieved a particular and political and institutional success. Either we could never ascend it or we are always and already within it – always in the grip of some vision that is at once the content and the set of practices of the enterprise in which we are embedded. I believe the latter to be the case, and therefore any discourse striving to operate within a 'pure' form of principle will always be thin and (to say the least) uncompelling..."[33]

Fish is not the only academic to refute Dworkin's distinction between principle and policy. Notably, Professor Greenawalt disagreed with Dworkin's argument that judges decide hard cases solely upon the grounds of principles. Greenawalt argues that judges often give weight to the interests of third parties when making their decisions. According to Greenawalt, these third parties are persons who are not parties to the litigation in question.[34] Greenawalt asserts that some conduct may be legally justified because the contrary conduct would

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[30] *Supra.* note 26 at pp 369.
[31] *Supra.* note 26 at 369.
[32] *Supra.* note 26 at 369-370.
[33] *Supra.* note 26 at pp 370.
[34] K. Greenawalt, 'Policy, Rights and Judicial Decision' (1977) 11 *Georgia Law Review* 991.

have violated or risked damage to the legal rights of nonparties. He gives the example of a driver of a car who swerves to avoid a baby may argue that if he had not swerved he would have violated that baby's right. Or, certain conduct could be unjustified because it violated, or risked damage to the rights of third parties.[35]

Greenawalt believes that judges do use policy, and so Dworkin's contention that judges decide hard cases on grounds of principle instead of policy is wrong. This author agrees with Fish that the distinction between policy and principle is a political one and that the line can always be challenged and redrawn. This author contends that while the rights of the parties are important to the court, judicial decision also is based on the rights of nonparties or a social policy. If we look to the decision in *Vervaeke v Smith* [36] one could reason that the English court does not want to give effect to sham marriages in English law even if the parties have legal valid marriage under the foreign law. Similarly, as we shall see in Chapter 2, if a foreign capacity to marry offends English law the marriage will not be recognised. Or, if a foreign incapacity to marry offends English law, the marriage will be recognised. [37] Therefore, this author does not agree with Dworkin's distinction and notion of a principled approach by the judiciary.

The use of policy has been acknowledged by other academics such as Robert Stevens and Alan Beevers. However, their role for policy differs from Dworkin's anti-policy approach as they both envisage a limited role for policy.

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[35] *Ibid.*
[36] [1983] 1 AC 145 [1982] 2 ALL ER 144.
[37] See Chapter 2 on forced marriages.

Stevens and Beevers have given recommendations for the use of policy which shall be discussed now. Robert Stevens, in his book *Torts and Rights*[38] stated that judges should not use public policy arguments because judges should adjudicate on rights, and leave policy issues for the legislature. Firstly, within a liberal democracy, unelected judges lack the political competence to weigh competing policy claims. Stevens states that "whatever the imperfections of a parliamentary democracy, it provides the best available method in a pluralist society for the accurate expression of different interests to be taken into account."[39] Secondly, judges are not social scientists or economists. Therefore, they lack the technical competence to assess all of the reasons which could, in theory, be taken into account in reaching a decision. [40] Thirdly, if the reasons which can be used to reach a decision are not restricted, the outcome becomes more difficult for a judge to reach.

While Stevens is against the use of policy, he recommended that policy could be used only in a few situations. For instance, where the legislature has used a policy choice for the purpose of setting down one rule, it may be permissible for the courts to use that policy choice for setting down another rule. [41] Courts may also use policy choice(s) that have already been embedded in statutes when determining the purpose of other rules.

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[38] R. Stevens *Torts and Rights* (Oxford Oxford University Press 2009)
[39] *Ibid.* pp 308.
[40] *Ibid.* pp 308.
[41] *Ibid.* pp 309.

Allan Beevers carries on the disdain for policy in his work, *Rediscovering Negligence*. [42] Beevers acknowledges that policy is used when the court outside the legal rules and doctrines looks to something else, and that something else is known as 'policy.' [43] However, if we can take an example from negligence, many policy concerns have been raised against the imposition of a duty of care. For example, Beever states that Jean Stapleton [44] has listed 50 factors against and for the imposition of a duty of care in her book. Beevers states that these are not the determinants of a duty of care " but are invitations to engage in wide-ranging debates on issues about which there is nothing even approaching a general consensus." [45] Therefore, because of the lack of consensus there are major disagreements as to the shape and the direction of the law. [46] Any argument(relevant or irrelevant) is now prima facie relevant. The law now has many conflicting policy arguments that can be used to support any viewpoint. In this manner, policy considerations have overtaken the law of negligence and it is now so indeterminate some have suggested that it should be abolished.[47] Thus, policy use should also be used with restraint by the judiciary in private international law cases. Otherwise, policy considerations would distort certainty in private international law.

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[42] A. Beevers *Rediscovering The Law of Negligence* (Oxford Hart Publishing 2007).
[43] *Ibid.* at pp 3.
[44] J. Stapleton 'Duty of Care Factors ; A Selection from the Judicial Menus' in P. Cane and J. Stapleton (Eds.) *The Law of Obligations; Essays in Celebration of John Fleming* (Oxford Clarendon 1998).
[45] *Supra* . note 42. at pp 5.
[46] *Cf* C Witting 'Justifying Liability to Third Parties for Negligent Misstatements' (2000) *Oxford Journal Lgeal Studies 615* and C. Tettenborn 'Property Damage and Economic Loss; Should Claims by Property Owners Themselves be Limited? (2005) 34 *Common Law World Review* 128.
[47] See P.S. Atiyah 'Personal Injuries in the Twenty-First Century; Thinking the Unthinkable' in P. Birks (Ed) *Wrongs and Remedies in the Twenty-First Century* (Oxford Clarendon Press 1996) and also J. Smillie 'Certainty and Civil Obligation' (2000) 9 *Otago Law Review* 633, 651.

Allan Beevers [48] is of the opinion the judges' commitments to principles of law has always been insincere because judges have always been engaging in policy making. In fact, Beevers contends that judging has always been about overt but often covert policy-making. The same rings true for policy cases in private international law – policy making by the judiciary is often a covert process without express acknowledgment from the judge in the instant case. [49]

Jean Stapleton's quest is radically different from the others. She proposes the question that should be asked when considering policy is whether or not it is a legitimate concern that arises in conjunction with the foundational doctrines of the topic. This means that the judge who utilises Stapleton's methodology must find a core legal concern/legal stand in existing law before allowing the policy in question to be used.[50] At this point we will discuss Stapleton at length.

Jean Stapleton advocated the use of policy in judicial decision-making, but used policy in limited circumstances as long as judges elucidated their reasons for doing so. Unlike Dworkin, Stapleton did not believe in the distinction between principle and policy and discusses only policy. Thus, following the academic John Fleming in his work *The Law of Torts*, [51]Stapleton undertook the task of unmasking the concerns of appellate judges that run throughout their claims underlying the duty of care in negligence. Stapleton stated that what is needed is the unmasking of factors (described as moral or

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[48] *Supra.* note 42. at pp 10.
[49] See marriage choice of law cases and nullity choice of law cases in Chapter 2.
[50] As we shall see later, to find a legal concern in every situation can be at times tricky.
[51] (8th Ed LBC Information Services Sydney 1992).

policy concerns) that judges weigh in each individual case in the determination of the duty.

Stapleton stated that

> "What was needed is the unmasking of whatever specific factors in each individual case weighed with judges in their determination of duty. It is not acceptable merely for a judge baldly to assert that the plaintiff was proximate; or that a duty was justified because the parties were in a 'special relationship' or because the plaintiff had 'reasonably relied' on the defendant, or merely because it was 'fair, just and reasonable.' Without more, these are just labels. Judges should focus explicitly on why this plaintiff is proximate, why the relationship is special, why reliance is reasonable, and so on."[52]

Throughout her career, Stapleton had a continuing project in unmasking factors taken in the duty of care[53]test in negligence. She outlined in numerical form, factors in favour of and against the recognition of a duty of care. However, for the purposes of this chapter, we shall only examine her views in her edited book *The Law of Obligations; Essays in Celebration of John Fleming* where she listed and discussed the reasoning behind each factor that could be in favour of recognition to the duty of care or countervailing to the duty of care in negligence.[54] She listed these factors as 'Convincing factors countervailing to the recognition of duty' and also 'Unconvincing factors

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[52]Eds. J. Stapleton and P.Cane *The Law of Obligations; Essays in Celebration of John Fleming* (Oxford Clarendon Press 1998) pp 62.

[53] J. Stapleton ' Duty of Care; A Wider Agenda' (1991) 107 *Law Quarterly Review* 249; J. Stapleton ' In Restraint of Tort' in P.Birks (Ed.) *Frontiers of Liability* (Oxford Oxford University Press 1994); J.Stapleton 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820.

[54] Eds. (J. Stapleton and P. Cane) *The Law of Obligations; Essays in Celebration of John Fleming* (Oxford Clarendon Press 1998) pp 59 – 96.

countervailing in favour of recognition of duty.' Additionally, Stapleton listed 'Convincing Factors In Favour of Recognition of a Duty' as well as 'Convincing Factors Countervailing to the Recognition of a Duty.' Though space does not allow the discussion of every one of Jane Stapleton's factors in this thesis, this author will proffer a few in the manner that Stapleton did.

Stapleton has a list[55] of 'Unconvincing Factors In Favour of Recognition of Duty.'

> "(1) Recognition of a duty will promote compensation (of the plaintiff)
>
> (2) Recognition of a duty will promote deterrence (of the defendant)
>
> (3) Recognition of a duty will promote loss –spreading (E.g. via the insurance of the defendant)
>
> (4) The defendant is (and the defendant class is likely to be) insured.
>
> (5) The defendant has (and the defendant class is likely to have) a deep pocket."

Stapleton's second part of the list are unconvincing factors 'Countervailing to the Recognition of Duty.'[56]

> "(1) The plaintiff is (and the plaintiff class is likely to be) insured.

[55] *Ibid.* at pp 92 – 93.
[56] *Ibid.* pp 92.

(2) The plaintiff has (and the plaintiff class is likely to have) a deep pocket.

(3) A duty would expose the defendant to a large volume of claims.

(4) The law has never recognised a duty here before.

(5) Imposition of liability would have a substantial socio-economic and/or re-distributive effect."

Stapleton also outlined 'Convincing Factors That are In Favour of Recognition of a Duty.'[57]

"(1) That the proper vindication of the law's concern with the physical security of persons and property justifies a duty being imposed on a party by whose careless act the plaintiff's person or property has been physically damaged.

(2) Denial of a duty would tend to discourage rescue.

(3) Denial of a duty would tend to discourage abortion.

(4) That the relevant risk was in the exclusive control of the defendant on the plaintiff was, therefore 'exclusively dependent."

[57] *Ibid.* pp 93.

Finally, Stapleton listed 'Convincing Factors that are Countervailing to the Recognition of Duty. ' [58]

> "(1) That the proper vindication of the law's concern with the liberty of the individual justifies a refusal to recognise any duty of affirmative action towards a stranger.
>
> (2) The defendant is causally only a peripheral party.
>
> (3) The plaintiff himself had adequate means of avoiding the risk eventuating and causing loss.
>
> (4) The imposition of a duty might produce a specified unattractive socio-economic impact such as the disproportionate distortion of the budgets and/or activities of public bodies to the detriment of a specified public interest.
>
> (5) A duty here would expose the defendant to the risk of liability for an indeterminate amount of time or to an indeterminate class or for an indeterminate (not merely extensive) extent of damage (the 'floodgates' or 'indeterminacy' concern.
>
> (6) Imposition of a duty might threaten the control of public order, the conduct of military operations or national security."

Stapleton acknowledged that the lists of judicial factors are never complete and are never closed. [59] With the diversity of social circumstances,

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[58] *Ibid.* pp 92.

there will undoubtedly be new factors that reveal themselves over time which the courts will weigh when determining the limits of the duty of care in negligence. Moreover, the weight that judges allocate to each of the factors will change over time. However, Stapleton notes that one revelation that can be gleaned from these judicial menus is that there can not be no single test for the duty of care. The fact situations are various and each individual judge may allocate different weights to each factor.

Stapleton, however, proposed a new test (or what she terms the most powerful judgements in the field of novel duties of care) for determining the duty of care in new cases. Firstly, the judge should not rely on 'formulaic labels' or rely on any 'directive test' before relying on the duty of care. Judges should approach the problem by balancing the substantive factors weighing for and against the recognition of a duty. [60] Stapleton states that when factors are balanced together as opposed to separately or in sequence, there will be no bias that is "pro-plaintiff" or "pro-defendant."

Stapleton also recommended that judges should not look to analogous cases or "pockets of law" that are based on 'crude factual similarity' but where the substantive facts were similar. [61] Therefore judges may consider cases which may not look similar but have the same substantive factors at hand. Stapleton also warned that instead of a caution of incrementalism, there should

[59] *Ibid.* at 87.
[60] *Ibid.* at 87 – 88.
[61] *Ibid.* at 90.

be caution to not depart too radically from past judicial weightings in substantive policy factors. [62]

Despite the incantations of the dangers of judicial activism with policy, we shall see that judges are either overtly or covertly using policy in its residual form, and also implicitly in policy considerations. [63] We shall see that judges often engage in policy fuelled decisions throughout the area of adult relationships in English private international law. In some instances, judges have engaged knowingly in exposition of what policy is or should be, but we shall also observe that in many cases they are not aware of their use of policy considerations. Futhermore, a difficulty that is always present for the judiciary is that too much change in policy would lead us away from the basis of private international law and too little change would not prevent repugnance or injustice. These are all questions that judges confront and may take into account before making a decision in a private international law case.

III. Drastic Change in Policy – Too Much or Too Little?

Donoghue v Stevenson[64] represents a case in which policy resulted in a drastic change to tort law. The claimant alleged she was injured when she drank from a bottle of ginger beer that had the remains of a decomposing snail due to

[62] It is notable that Stapleton stated at *Supra.* note 54 at pp 87. "The changing nature and diversity of social circumstances will continue to reveal factors which may convincingly weigh with courts in determining the appropriate limits of the obligation in negligence. Moreover, just as the lists will change over time, so too may the judicial weight given each factor. In both these phenomena lies the richness and flexibility of the common – law method."
[63] See generally Eds. Cane and Stapleton *The Law of Obligations; Essays in Celebration of John Fleming* (Clarendon Press Oxford 1998).
[64] 1930 SN 138 (IH).

the negligence of the defendant. The case revolutionised the duty of care by allowing the claimant to recover from the defendant. However, the development of the duty of care has been criticised by John Fleming. Fleming describes the development of duty of care as such.

> "Lord Atkin's proximity has cast a baleful shadow over judicial ruminations on duty...it soon became a convenient screen for not disclosing any specific reason behind a decision for or against a finding of duty. The judicial tendency to take refuge in seemingly bland, neutral concepts like foreseeability and proximity, under the pretence that they represent 'principle' has its roots in the embarrassment with which the British conservative tradition has generally treated the role of policy in judicial decision making. The more recent inclusion [in judgements] of what is just fair and reasonable 'is a discreet acknowledgement at long last of what in academic and popular discourse is more forthrightly referred to as policy."[65]

Fleming argues that if a court were to decide that liability should not be imposed on a defendant, the court should elucidate the reasons for the decisions in the judgement. Fleming supposes that such arguments would not stem from legal principles, but policy-related issues such as morality, justice and economic efficiency.[66] Fleming argues throughout his book that judges have been utilising policies instead of principle in the law of negligence. Moreover, the judges do not elucidate their reasons.

Similarly to public policy in private international law, the term 'public policy' itself is nebulous and warrants deeper investigation. What is common

[65] J Fleming *The Law of Torts* 9th Ed (LBC Information Services Sydney 1998) 153.
[66] *Ibid.* 184.

sense, good manners and a reasonable degree of tolerance? What is good reason? Even the words " a policy consideration" is not good enough to define public policy. [67] Additionally, the judiciary often fail to elucidate their reasons when using public policy in private international law cases. [68] Therefore, there is much room for the expansion or contraction of policy by our judiciary. What could be construed as necessary or not necessary for the use of policy is taken on a case by case basis in private international law.

In Beever's opinion, there can be many concerns taken into account that could be relevant to judicial decision making. There are relevant concerns and also irrelevant concerns. Beever proposes that concerns should not be taken into consideration because they are irrelevant. Beever believes that considerations are being continuously weighed against each other. For instance, concern X is outweighed by concern Y. Therefore, concerns which are deemed irrelevant are simply "outweighed" by other concerns. [69] However, Beever notes that some may argue that the outcome in *Donoghue v Stevenson* was not weighed but is the "preferred result." This author agrees that judicial decisions are sometimes made as to a preferred result.[70] However, more often than not, there is legal basis behind the decision.

Beever[71] considers Fleming's arguments and then also considers the extent of judicial activism in the expansion of the duty of care. It was feared that

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[67] See Murphy *Ethnic Minorities, their Families and the Law* (Oxford Hart Publishing 2000) pp 72.
[68] *Ibid.* pp 72.
[69] *Supra.* note 42 at 15.
[70] As we shall see in the following chapters.
[71] *Supra.* note 42 at 11, 12.

judicial power may be used for a purpose other than that for which it was granted, namely doing justice according to law in the particular case.[72] Beever states that if it is possible to consult policy but judges should exercise care or restraint in doing so. [73] Beever ponders what is 'care' or 'restraint'? What do these terms mean? Beever contends that there are two answers to the why judges should be careful and restrained when using policy. [74] Firstly, judges need to be careful and restrained *just because*. Beever states that this is a form of obscurantism. However, the reason 'just because' does not explain why judges should be careful and restrained. Secondly, another argument is that judges should be careful and restrained for some reasons. [75] Beever states that these reasons will therefore be reasons of policy in themselves, and he notes that this is Stapleton's argument in disguise.[76]

Beever argues that the appropriate method of extending the duty of care is do to do slowly. This is known as the 'incremental approach.' [77] Beever cites that Heydon J defines justice as following precedent or adapting precedent through analogy. [78] But one could ask the question that when one incrementally extends or contracts legal principle why does one do so?

Heydon replies with this statement

> "When new cases arose, existing principles could be extended, or limited if their application to the new cases was unsatisfactory. As business or technical conditions

[72] J. Heydon 'Judicial Activism and the Death of Rule of Law' (2003) 23 *Australian Bar Review* 110 at 113.
[73] *Supra.* note 42.
[74] *Supra.* note 42 at 12.
[75] *Supra.* note 42 at 12.
[76] *Supra.* note 42 at 12.
[77] *Supra.* note 42 at 12 and Chapter 5.
[78] *Ibid.* pp 113.

changed, the law could be moulded to meet them. As inconveniences came to light, they could be overcome by modifications. The changes could be affected by analogical reasoning, or incremental growth in existing rules, or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed. Particular rules might be modified by the detection of more general principles, underlying them or more rigorous reformulation of some traditional concept."

Beevers questions the language of Heydon's assertion. What do terms 'unsatisfactory' 'inconveniences' 'rational' 'detection of more general principles' and 'rigorous formulation' mean in this context? Beevers states that these are, in fact, covert references to policy.[79] So, we can see policy creeping in again under the guise of other terms. Consequently, our judiciary should always be conscious of policy's nebulous nature as well as the availability of possible policy considerations when deliberating upon cases in private international law.

IV. Some Examples of the Use of Public Policy in Adult Relationships in Private International Law

"Next to the law of immovables, status has traditionally been considered the area of conflicts law with the strongest and most effective claim to

[79] *Supra.* note 63 at 12.

international ubiquity – and thus most vulnerable to the corrective of public policy" [80]

I shall now give some examples of instances where 'fundamental trumping discretion of public policy' affects the recognition of a foreign marriage or dissolution of marriage. Again we can look to *Vervaeke v Smith*,[81] where the English court considered the problem of recognition of a foreign nullity decree, which was granted on grounds that the marriage was a sham marriage. English law does not have sham marriage as a ground for nullity. Therefore, the Lords expressly considered using the residual discretion of public policy when deciding whether to refuse recognition. [82] Judicial discussion of public policy is rare in case law relating to adult relationships in private international law, and so *Vervaeke* is important when considering policy arising in its fundamental 'trumping discretion' form. The facts of the case are as follows.

The petitioner, who was a woman, obtained a nullity decree from Belgium on the grounds that she had entered a sham marriage, and the marriage did not constitute a lifelong marriage between the parties. However, English law does not have grant nullity decrees on the grounds of sham marriages. In the House of Lords, it is notable that there was no criticism of the foreign law,[83]

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[80] A. Ehrenzweig *Private International Law; A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty* (Leyden New York Oceana Publications A.W. Sijthoff Publishing 1974) pp 115.
[81] *Supra.* at note 36. [1983] 1 AC 145, [1982] 2 ALL ER 144.
[82] [1983] 1 AC 156 per Lord Hailsham.
[83] [1983] 1 AC 156 per Lord Hailsham.

but the Lords deemed that the institution of marriage should be taken seriously. Furthermore, the Lords noted that the petitioner had previously brought a bogus case in the English courts, but failed.[84] The Lords deemed that the institution of marriage in England is to be taken seriously, and the enforcement of marriage laws in England is an important matter. Therefore, the enforcement of English marriage law compounded with the petitioner's behaviour made it contrary to public policy to recognise the Belgian nullity decree. Although the Lords decided the case on *res judicata*, this care was a rare instance in which public policy was directly stated as an alternative ratio.[85]

When considering public policy the court relied[86] on Lord Merrivale's statement in *Kelly (Orse. Hyams) v. Kelly* [87] when he said

> ' In a country like ours, where the marriage status is of very great consequence and where the enforcement of the marriage laws is of great public concern, it would be intolerable if the law of marriage could be played with by people who thought it fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they so did not regard it.'

Thus, the judges did not recognise the Belgian nullity decree. Additionally, the decision in *Vervaeke* has been upheld by the academic editors of *Cheshire and North on Private International Law*. They commented on (and

[84] [1983] 1 AC 156-157, 163-167.
[85] [1983] 1 AC 145 as per Lord Hailsham.
[86] [1983] 1 AC 145 as per Lord Hailsham pp 5, 6 and 7 of Westlaw document.
[87] (1932) 49 T.L.R.99.

affirmed) the decision of *Vervaeke* in their 13th edition. [88] North and Fawcett stated that [89] " a policy of upholding sham marriages is odd enough, but to give this policy overriding force in the international context is even stranger."

While *Vervaeke* is a good example of an overt trumping policy, I shall now suggest that public policy can also be used in a covert manner by the court. The judge may not use policy expressly in its fundamental form to explain why a decision has been made, but have utilised a creative interpretation of what is policy. This method of manipulation is policy in disguise. In *Radwan v Radwan,*[90] I shall argue that policy was used(but not asserted) by the judge to validate a polygamous marriage although the wife had an English domicile at the time of the marriage and therefore applying classic choice of law rules the marriage would have been invalid.

In April 1951, the husband, whose domicile of origin was Egyptian, married his first wife, a woman whose domicile of origin was also Egyptian. The marriage was thus a valid polygamous marriage. In September 1951, the husband met another wife "E". Ten days later, the husband and "E" were married at the Egyptian consulate in Paris according to Muslim law. "E" was a domiciled Englishwoman. The marriage was polygamous. The couple very briefly visited England, and then returned to Egypt. The husband divorced his first wife in 1952. In 1956 the husband and "E" moved to England and established a permanent home. The husband acquired an English domicile of

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[88] Cheshire and North *Private International Law* (Eds. P. North and J. Fawcett) 13th Ed. (London Butterworths 1999) at 132.
[89] *Ibid.*
[90] [1972] 3 WLR 939, [1972] 3 WLR 939.

choice, and the parties continued to live in England until 1970 when "E" started divorce proceedings. The issue for the proceedings was whether "E's" marriage in 1951 was valid in English law.

There was much confusion as to which choice of law should govern "E's" capacity to enter a polygamous marriage. If the dual domicile rule was utilised, "E" would not have capacity to enter into a polygamous marriage, and her marriage would be void. After surveying various common law and statutory authorities[91], the court decided that the essential validity of a marriage should be determined by the law of the country in which the parties intended to make their matrimonial home, instead of the dual domicile rule. In this case the intended matrimonial home was Egypt and so essential validity would be governed by Muslim law. Therefore, the court recognised what was an English domiciliary's polygamous marriage. The case makes no mention of the term 'policy' but I suggest that the reasoning employed by the judge to choose the intended matrimonial home theory as opposed to the dual domicile theory is a covert form of policy[92] in an effort to do justice for the parties, and ultimately, marriage recognition.

As *Vervaeke* and *Radwan* show, public policy can arise absolutely or contextually, and is available to use by the court throughout private international law in the areas of jurisdiction, choice of law and recognition. As we have seen earlier in this chapter, the use of policy is potentially wide and flexible and thus

[91] *Ibid.* at pp 950, 951, 952- 954.
[92] Policy that arises outside of its fundamental form as stated by Dicey and Morris in the common law. I shall elaborate on the number of forms policy surfaces later in this chapter.

has far reaching implications for law. [93] If policy can be used to significantly derogate from rules of law (principles) and/or precedent, it may dramatically change the existing law. As we have seen in *Radwan*, the judge chose *not* to follow the academic authorities,[94] the current common law authorities, [95]as well as the interpretation of legislation at the time. [96] Instead, the judge arrived at a decision to bring justice in the instant case in accordance with the party's common law rights. [97] Given the far reaching implications of policy, judges and academics have implored for it to be used cautiously.[98]

V. The Author's Findings and Recommendations for Public Policy in this Thesis

Throughout this thesis, we shall find that policy surfaces throughout English private international law in relation to jurisdiction, choice of law and recognition. We shall uncover policies in relation to marriage, same-sex relationships and cohabitation. We shall also uncover policies in the areas of

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[93] *Supra.* note 5. and *Supra.* notes 72 – 78. Also, it should be noted that there are areas where policy has not been used or should be used more. See the proxy marriage cases of *Apt v Apt* [1947] P 127 [1948] CA [1947] 2 ALL ER 677; *McCabe v McCabe* [1994] 1 FLR 140. See also discussion in Chapter 2 of this thesis of the ways in which policy should be used more. Additionally the common law notion of fundamental public policy has also been encompassed in statute such as the Family Law Act 1986 and also the Brussels II Bis 2201/2203 in Jurisdiction and Enforcement in Matrimonial Matters of Parental Responsibility (European Communities) [2003] 338 SI. This shall be discussed in Chapters 4 and 5.

[94] *Supra.* note 90 at 946.

[95] *Supra.* note 90 at 947-953.

[96] *Supra.* note 90 at 947-953.

[97] *Supra.* note 90 at 951, 952.

[98] P. Carter ' The Role of Public Policy in English Private International Law' (1993) 42 *International Comparative Law Quarterly* 1 at 3 and also N Enonchong 'Public Policy in the Conflict of Laws – A Chinese Wall Around Little England?' (1996) 45 *International and Comparative Law Quarterly* 661-663. See also Lord Hodson's comments in *Boys v Chaplin* [1971] AC 956 as well as *Richardson v Mellish* (1824) 2 Bing 229.

nullity and divorce, and in the European context. We shall also proffer an opinion in areas in which policy should be used more. [99] During our inquiry in this thesis, we shall find that policy considerations tend to surface in the following categories.

1.) Situations that are offensive or repugnant outright – a status or a foreign law that is completely incompatible with domestic law (for example, a foreign mother and son marrying) and the English court is asked to recognise that marriage, which is contrary to English law. [100] Other than situations that are case – specific, the infringement of morality could also extend include circumstances that threaten the national order or national interests. Therefore the residual discretion[101] (fundamental concept) of public policy could be utilised in such circumstances.

2.)Policy considerations may also be used in situations where there is injustice to the parties in question (divorce cases, questions of jurisdiction, choice of law in marriage recognition). The injustice may not be outwardly repugnant or trigger the residual discretion of public policy, but may be unfair in a contextual sense. For example, if a status that comes forth for recognition is outwardly repugnant to English law but the issue is one of succession or legitimacy, there

[99] *Ibid.* See generally J. Blom 'Public Policy and Its Evolution in Time and Space' (2003) 50 *Netherlands International Law Review* 373 – 399.
[100] See P. Carter 'Rejection of Foreign Law; Some Private International Law Inhibitions' (1985) 55 *British Yearbook of International Law* pp 111 – 131.
[101] *Supra.* note 4.

still will be recognition. In these circumstances, there may be a creative interpretation of policy to bring justice to the parties.

A corollary of the above category are instances that would be incongruous to parties legitimate expectations. Therefore, English law would find a creative interpretation of policy again in order to have justice for the parties.

3.) Policy considerations would also be used in relation to choice of law and the manipulation of choice of law rules in relation to the recognition of foreign marriages. We shall see that the judiciary often utilise policy considerations implicitly to achieve the result that is needed/or the judge wants in the instant case.

4.) We shall also see that policy in its residual form has been increasingly encompassed in statutory form encompassing common law notions, and procedural fairness in relation to human rights.

5.) Policy in both its residual and implicit forms is utilised to preserve notions of predictability and uniformity in our national laws.

6.) Policy, at certain times, may also be used to preserve international comity.

VI. Conclusion

As we have learned from our examination of the perspectives of specific academics to policy in this chapter, our judiciary is often unaware that policy is creeping into their decision making. Even more confusingly, each jurisdiction is left to devise its own concept of policy through either case law or statutes. [102] Therefore, while the list compiled by the author above has attempted to be inclusive, it is envisaged that the manner in which policy is wielded and the situations in which policy could be used is always subject to change. [103] Therefore, as we have seen from Stapleton's account, a characteristic of policy that will be apparent throughout our examination in this thesis is in both its residual and implicit form policy that is almost completely subjective to a particular judge's preferences. Therefore, the calculation of present and future policy will always tend to be variable. [104] For judges, determining what is offensive to society, and therefore, to English ideals, is necessarily a difficult task. [105] This is because policy (in both its implicit and residual form) is always evolving through judicial decisions, recent legislation and public opinion with new situations/circumstances arising in English private international law. We shall see that the usage of policy by the judiciary has changed from being a negative role (of exclusion) to a more positive one (of inclusion) in certain

[102] See generally Lloyd *Public Policy; A Comparative Study of English and French Law* (London Anthelone Press 1953); W. Holder 'Public Policy and National Preferences' (1968) 17 *International and Comparative Law Quarterly* pp 984 – 951.
[103] *Supra*. note 99.
[104] See Michael J. Whincup and Mary Keyes *Policy and Pragmatism in the Conflict of Laws* (London Ashgate Publishing 2000) pp 1 – 3. See also *Fender v St John Mildmay* [1938] AC 1 at 40; *Vervaeke v Smith* [1983] 1 AC 145 at 164.
[105] See J. Blom 'Public Policy in Private International Law and its Evolution in Time and Space ' (2003) 50 *Netherlands International Law Review* 373 – 399.

circumstances. [106] Furthermore, while the predictability and certainty of outcomes in English private international law is valued, the usage (or non – usage) of policy by the English judiciary will always be on a case by case basis. We shall see that the judiciary is not always beholden to predictability and certainty.

Because of the lack of awareness in both academic literature as well as adjudication, an examination of policy and its operation in adult relationships is sorely needed. [107] With an ever growing mobile society, the bearing that laws and therefore, policies have upon personal relationships would be of significance to many individuals who utlilise the English courts. Therefore, this thesis seeks to fill this gap in English private international law literature. We shall see that there is a need for more fully reasoned adjudication, as well as express acknowledgement of policy in judgements involving adult relationships in English private international law. This venture is important not only for the judiciary, but also the parties to the litigation. [108] Furthermore, the exposition of policies both explicit and implicit would be of significance for all who have an interest in the judicial process and the underpinnings of English private international law.

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[106] That is, to include (as opposed to exclude) recognition of a decree such as in Chapter 3 (the recognition of same sex relationships and new forms of cohabitation) and Chapter 5 (recognition of divorce and nullity decrees) in certain situations in which considerations of justice necessitate recognition.

[107] *Supra.* note 93. See also R. Leflar 'Choice – Influencing Considerations in Conflicts Law' in R. Fentiman *Conflict of Laws* (Aldershot Hants England Dartmouth Publishing Aldershot 1996) pp 427 – 488.

[108] See M. Coper, A. Blackshield, G. Williams (Eds.) Oxford Companion to the High Court of Australia (Australia New Zealand Oxford University Press 2001) at 373 – 376. See also D. Dyzenhaus *Judging the Judges – Judging Ourselves – Truth, Justice and Apartheid* (Oxford Oxford University Press 2003)

Chapter Two

Policy and the Recognition of Foreign Heterosexual Marriages

I. Introduction

Even before the free movement provisions of the European Community, the recognition of marriages with a foreign element was a well-trodden path in English private international law. The last two centuries had seen a similar migration of persons from many countries including Russia and Central Europe. Additionally, the British Empire brought many families to this country whose marriage laws and customs differed from those endorsed by domestic law. Many inter-racial couples (British or Indian or British or African) met overseas and came to England. In this manner, England has had a long history of recognising foreign marriages. [1] Additionally, the aftermath of the Second World War created a host of disputes about the validity of foreign marriages. More recently, since the 1950's, there has been an influx of immigrants from the Carribean, African, and Indian subcontinent as well as Southeast Asia.

Perhaps because of this history, the recognition of marriages in English private international law will be seen to be far from culturally and ethically imperialistic in 2010 because the use of policy in its residual "trumping" discretion in relation to non-recognition has rarely been seen. This chapter shall prove that policy considerations do exist in the area of foreign marriage

[1] See L. Tabili 'Empire is the Enemy of Love; Edith Noor's Progress and Other Stories' (2005) 17 *Gender and History* 5 – 28.

recognition. We shall analyse areas where policy has been used in the past, and also situations in which policy should be used more in the future. This chapter shall discuss the instances in which policy has been used in its residual discretion, where there has been a foreign law or foreign status that fundamentally offends English sensibilities. This chapter shall examine areas where policy could be used *more* in its residual form such as in the area of forced marriages and also potential marriages that may offend English sensibilities. Additionally, there are instances where policy considerations have changed over the years in order to accommodate recognition instead of non - recognition.

For example, the gradual acceptance of foreign polygamous marriages by English private international law is a prime example of how English law, and therefore, English policy changed over time and slowly became more liberal in recognising non-Christian forms of marriage. *Hyde v Hyde* [2] is regarded as the high water mark of the common law's dislike of polygamy. In *Hyde v Hyde* the husband and wife were of the Mormon faith. They met in London and got engaged. They then emigrated to Utah in the United States and were married in 1853 in a form of marriage that allowed the husband to practice polygamy. The couple lived together for four years and had children of the marriage. The husband left the family and moved to Hawaii, where he renounced the Mormon faith. The wife was left free to re-marry, and she did. The husband then returned to England and petitioned the English court for divorce on the ground of the wife's adultery. The court rejected the prayer of the petitioner.

[2] (1866) LR 1P & D 130.

The decision of the court was an overt policy stand against the recognition of a polygamous marriage. A marriage that was contracted in a country where polygamy is lawful is not marriage as permitted in Christendom. Since *Hyde v Hyde* was decided in 1866, a whole range of issues stemming from the decision have been considered by the English courts for nearly a century.[3] It was only with the legislation embodied in Section 47(1) of the Matrimonial Causes Act 1973 that foreign polygamous couples could obtain recognition and matrimonial relief by a court in England and Wales. Therefore, the operation of policy changed over the years in favour of recognising a foreign polygamous marriage.

Similarly, the use of policy in its residual trumping discretion was debated recently in *KC, NNC v City of Westminster Social and Community Services Department, ICC (a protected party)*.[4] The family concerned involved former Bangladeshi nationals who acquired British citizenship. The family was domiciled in England and their son, IC, was born in England. IC was severely mentally disabled, vulnerable and highly suggestible. IC, who was domiciled in England, was married in a telephone ceremony (while IC was in England) with a girl in Bangladesh. This marriage was valid according to the law in Bangladesh. However, the marriage was not valid under English law, as IC did not possess capacity to marry in English law. The local authority applied to the court for several declarations. The court made several declarations in a hearing in

[3] What is a polygamous marriage? How is the nature of the marriage as polygamous or monogamous to be determined? Can the nature of marriage change? What effect is to be given to a polygamous marriage? See P. North's discussion in *Private International Law Problems in Common Law Jurisdictions* (Dordrecht Boston London Martinus Nijhoff Publishers 1993) 46-56.
[4] [2008] EWCA Civ 199. (At Westlaw).

December 2007. However, the appellant filed notice attacking the court's declarations of an invalid marriage, challenging the court's jurisdiction to prevent the removal IC to Bangladesh and also asking for cessation of the proceedings to consider best interests.

In the hearings there were several issues of policy discussed that were contentious and weighed in favour of non- recognition. There was no capacity to consent to the marriage. The lack of capacity in the marriage constituted a possible offence under English criminal law. Therefore, this union would be an abusive marriage. Since it is an abusive marriage, the court has a duty to 'protect' the party (IC) from getting married. The judge proposed that even if the use of public policy was unprecedented, the refusal of recognition of such an abusive and offensive marriage to English sensibilities would be justified. This is public policy in its residual discretion, operating in a protective manner by not recognising a foreign status or foreign law.

Apart from policy in its fundamental form of residual discretion, it is this author's contention that policy also operates in foreign marriage recognition as a policy that manipulates choice of law in essential validity. This author suggests that these policies are often unarticulated by the judiciary when reaching their decisions. These policies can play either a positive role (of recognition) or a negative role of exclusion (and therefore, non - recognition) in either residual discretion or choice of law. This chapter shall uncover these policies in formal and essential validity. However, we shall see that some policies used by the judiciary are not confined to formal or essential validity but could enjoy

ubiquitous application. For instance, if an issue affects ideas of justice, goes against the legitimate expectation of a party/parties or involves an issue involving autonomy the courts may use the particular consideration/policy in its decision making. Furthermore, we shall see that policies sometimes stem from law but also could stem from ideas/philosophies that underpin private international law or domestic law.

We shall examine in this chapter areas in which policies should be considered more before recognition or non-recognition, or before a particular law is to be applied. We shall see that judges often turn to the most appropriate (or most convenient) choice of law when determining essential validity in order to do justice in the instant case and therefore, have marriage validation. For instance, would a foreign marriage that is considered incestuous by English law be recognised under certain circumstances? Or under what circumstances would the English court recognise or not recognise a foreign incapacity to marry? There are also situations where the English court will encounter recognition of a foreign capacity to marry. Under what circumstances would the English court recognise a foreign capacity to marry that differs from English law? And given English law's distaste for forced marriage, would there be any situations where the English court would recognise a forced marriage?

This author proposes that it is only with an analysis of the underlying policies in foreign marriage recognition that we can fully appreciate and understand the nature of policy. Many of the hypothetical situations above warrant greater exploration and discussion. Therefore, along with a discussion of

the rules regarding formal and essential validity, this chapter shall now analyse the manner in which policy considerations shape foreign marriage recognition in English private international law.

II. Formalities of Marriage

Before we examine the role that policy plays in the formalities of foreign marriage recognition, a brief overview of the basic conflict of laws rules that pertain to formalities is needed. If a marriage is valid in the place of the celebration, English law is satisfied that the requirement relating to formal validity has been fulfilled. The intention of the parties is not taken into account, and therefore, a couple wishing to marry may escape the strict marriage formalities of their country and go to another country with more lenient formalities to celebrate their marriage. An illustration of marriage formality 'escapism' is offered by *Simonin v Mallac*.[5] Two French domiciliaries went through a marriage ceremony in London, and were married according to the law of England but without the observance of certain formalities and consents required by the law of France in respect of the personal status. The parties returned to France, when the man refused to celebrate the marriage according to French law, and the French courts, which the husband did not defend. The wife then obtained a decree of nullity in France. The wife then came back to England, and tried to obtain a decree of nullity. The English court held that since the place

[5] (1860) 2 Sw & Tr 672.

of the celebration had been England, the lack of consent [6] which was determined to be a matter of capacity by French law was irrelevant, and so the marriage was valid.

At one stage in legal history, the whole marriage contract was thought to be governed solely the place of the celebration. Slowly, however, the courts began to distinguish between formalities and capacity.[7] For example, in 1744, Lord Hardwicke stated that "in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it is solemnised."[8]

Later, Sir Edward Simpson remarked that[9]

> "It is of equal consequence to all that one rule in these cases should by all countries – that is, inconvenience can arise; but infinite mischief will ensue if it is not."

For example, in the case of *Compton v Bearcroft* [10] the parties did not comply with the requirements in Lord Hardwicke's Marriage Act. The requirements in the Act were held to be formalities, and since the ceremony was in Scotland, non-compliance with the Act was irrelevant and the marriage, was valid. Later on, in 1861, Lord Cranworth in *Brook v Brook*[11] emphasised

> "I think that there is no doubt that the state of the law in England is this... it leaves the ceremony of marriage to the country of solemnization."

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[6] What is a formality and what is deemed to be essential validity differs from jurisdiction to jurisdiction

[7] See in D. Mendes Da Costa 'The Formalities of Marriage in the Conflict of Laws' (1958) 7 *International and Comparative Law Quarterly* 217 -261 and also in E.Sykes 'The Essential Validity of Marriage' (1955) 5 *International and Comparative Law Quarterly* 159-169.

[8] *Omychund v Barker* (1744) 1 Atk. 22, 50.

[9] *Scrimshire v Scrimshire* (1752) 2 Hag. Con. 395.

[10] (1769) 2 Hag. Con 444n.

[11] (1861) 25 JP 259..

Further support can be found in *Sottomayer v De Barros (No. 1)* when Cotton L.J. firmly stated [12]

> "The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but as in other countries...personal capacity must depend on the law of the domicile."

By 1922, the requirement of formal validity had been well-established. Judges when deciding foreign marriage cases were used to considering formal and essential validity. Thus, came the oft-quoted statement of Viscount Dunedin.

> "If a marriage is good by the laws of the country where it is affected it is good the world over, no matter whether the proceedings or ceremony which constituted marriage according to the law of the place would or would not according to the law of the place constitute marriage in the law of the domicile of one or other of the spouse. "[13]

Viscount Dunedin went on further to say:[14]

> "If the 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' domicile would be a good marriage."

[12] (1877) 3 P.D.1.
[13] *Berthiaume v Dastous* [1930] A.C. 79.
[14] *Ibid.*

It is not well-documented why there came to be a distinction between formal and essential validity. [15] It is submitted that, perhaps, the two hurdles of validity ensure the best balance between the place of the celebration and the law of the domicile. P.M. North, in *Essays in Private International Law* [16] identified several policies that may underlie the rule-selection of Western legal systems. Determining formal validity by reference to the *lex loci celebrationis* promotes certainty. If a couple follows a certain procedure, they will expect a valid marriage. Therefore, requiring formalities ensures that the marriage shall be easily proved if contested in the future.

On the other hand, if the parties to a marriage do not comply with the *lex loci celebrationis* this will not necessarily preclude them from fulfilling the requirements of formal validity. The operation of the presumption of marriage is very strong in English law. [17] While non-recognition of a marriage is a draconian measure, there will be circumstances in which the parties will not be able to follow the local form of the marriage. So, there are exceptions in English conflicts law as to the rule *lex loci celebrationis.* As we shall examine, there is the common law exception and also the two statutory exceptions. A marriage which is not valid by the *lex loci celebrationis* may still be held valid by English private international law if it satisfies the formalities required by English common

[15] To date, there has not been any academic or judicial exposition found in this area...this is noted by L. Collins, C.G.J. Morse, D. McClean, J. Hill, C. Maclachlan and A. Briggs (Eds.) *Dicey and Morris and Collins on the Conflicts of Laws* (London Sweet and Maxwell 2006) at pp 90.
[16] (Oxford Oxford University Press 1993) at pp 151.
[17] *Infra.* note 29. Cheshire and North at pp. 721 - 737 As we shall see in the section in relation to essential validity and again in A. Borkowski 'The presumption of marriage' (2002) Vol 14 No 3 *Child and Family Law Quarterly* 251-266. A few cases have been emphasised in relation to the presumption of marriage such as *Chief Adjudication Officer v Bath* [2000] 1 FLR, CA and *Pazpena De Vire v Pazpena De Vire* [2001]1 FLR 460.

law. [18] The common law exception is policy oriented as it upholds the English law's presumption to uphold marriages whenever possible.

In the early days of English colonialism, it was thought that English common law travelled with British settlers to foreign lands, or only so much common law as possible.[19] In Singapore, certain charters of the law were introduced, but it required that it should be administered in the manner as the religions, manners and customs of the country permits.[20] For instance, in *Penhas v Tan Soo Eng*[21] there was a marriage ceremony in Singapore between a Jewish man and a Chinese woman. The man followed the Jewish custom of marriage. The woman followed the Chinese rites of marriage. The man and the woman intended to take each other as man and wife in the ceremony. Thus, the marriage was recognised under common law. Parties can still avail themselves of the common law exception today in different ways. The parties can show insuperable difficulty[22] when trying to comply with the local form of the marriage. [23] In each case, the court will have to examine what the local form should have been, as well as the extent of the difficulty.

Although there is no direct authority, Dicey and Morris state [24] that it is possible to have a valid marriage on the high seas[25] either by the law according to

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[18] When Christians go to foreign, Islamic countries, the only form of marriage that may be available is a Muslim one. Or, to another country where the Foreign Marriage Acts do not extend. In countries such as these, the exceptions kick in. See L. Collins (et. al) *Dicey and Morris and Collins on the Conflict of Laws* 14th Ed (London Sweet and Maxwell 2006) pp 799.
[19] Blackstone *Commentaries on the Laws of England* I 108.
[20] *Penhas v Tan Soo Eng* [1953] AC 304.
[21] *Ibid.*
[22] Provided that it was impossible for the couple to wait until sufficient facilities were available – the court must be satisfied that waiting was impossible.
[23] See *Cattrall v Cattrall* (1847) 1 Rob Eccl 580 and also *Wolfenden v Wolfenden* [1945] 2 ALL ER 539.
[24] See L. Collins (et al) *Dicey and Morris on the Conflict of Laws* 14th Ed (London Sweet and Maxwell 2006).

the ship's port of registry or if the couple took each other per *verba de praesenti.* [26] In *Taczanowska v Taczanowski*[27] the marriage was upheld. [28] The marriage was celebrated in an Italian church and the husband was with Polish forces but serving the British army in Italy. The wife was a Polish domiciliary. The Roman Catholic priest conducting the marriage was army chaplain. The marriage was invalid by Italian as well as Polish law. However, the English court decided that all the requirements of a common law marriage had been fulfilled. Today, the problem in *Taczanowska* would be able to fall under the exception of 'members of the British forces serving abroad' as well as the belligerent occupation exception. [29]

Now we can proceed to examine the exceptions that have been encompassed in a statutory vein. The Foreign Marriage Order 1970[30] provides that a marriage officer must not solemnise a marriage in foreign country when he is satisfied that;

> (a) at least one of the parties is United Kingdom national; and
>
> (b) that the authorities of that country will not object to the solemnization of the marriage; and

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[25] *R v Millis* (1844) 10 Cl & Fn 534 and again *Wolfenden v Wolfenden* [1945] 2 ALL ER 539.
[26] Verba de praesenti means the exchange of immediate, present consent to marry. For example, if a couple were to say respectively to each other " I take you to be my wife, I take you to be my husband" This would amount to verba de praesenti.
[27] [1957] P 301, [1957] 2 ALL ER 563; see also *Kochanski v Kochanska* [1958] P 147; *Kuklycz v Kuklycz* [1972] VR 50 at 42.
[28] [1957] P 301 [1957] 2 ALL ER.
[29] Cheshire and North *Private International Law* (Eds. P. North and J. Fawcett) 13th Ed (London Butterworths 1999) 771.
[30] SI 1970 No 1539.

(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 validly married by the law of the country in which each party is domiciled.

The Act leaves a discretion to the marriage officer not to solemnise the marriage if to do so would be 'inconsistent with the comity of nations.'[31] Cheshire and North are unsure as to what this phrase means, but venture that a marriage which is valid under some other exception to the general rule is still to be regarded as valid. [32] Additionally, another provision validating marriages in extenuating circumstances is Section 22 of the Foreign Marriage Act 1892, which has provisions for marriages for members of the British forces serving abroad.

As these scenarios have shown, English law strives to validate a marriage under the most exceptional circumstances. This author suggests that this is policy operating in a positive manner of validation. The Law Commission, in its Report, considered at length[33] whether the common law rule of presumption of marriage should be retained. The Law Commission put forth several advantages when it considered change. They believed that the statutory exceptions provided by the Foreign Marriage Act 1892 did not cover all the circumstances in which the common law exception may be applicable. The Law Commission also

[31] N. Enonchong 'Public Policy in the Conflict of Laws – A Chinese Wall Around Little England ' (1996) Vol No 3 *International and Comparative Law Quarterly* 633 - 661.
[32] Cheshire and North 13th Ed (Eds P. North and J. Fawcett) *Private International Law* (London Butterworths 1999) pp 712.
[33] Law Commission Working Paper No. 89 Private International Law Choice of Law Rules in Marriage (1985) (London HMSO) pp 31 – 55.

believed that because the common law safety net will only be called into play on rare occasion does not make it less valuable to the person who avails himself of it. It is still a necessary discretion.

If (*common law marriage*) [34]were to be retained, the question to consider is - how would it be enshrined? The three solutions which were considered are; to preserve the common law exception without amendment, or to leave the matter to public policy. The Law Commission went further to examine the operation of public policy. Public policy would have a two-fold role. Firstly, public policy would exclude the application of the *lex loci* rule in exceptional circumstances. Secondly, to uphold the formal validity of a marriage in circumstances where the *lex loci* is inapplicable. The Law Commission reasoned that although public policy would introduce an amount of uncertainty into the law, more detailed guidance on these matters should be forthcoming from judicial decisions. This author feels that perhaps the common law exception should not be left to judicial development, but a restatement is needed. In this manner, clear guidance would be given as a reference point for the judiciary when deciding future cases for recognition and non - recognition of purported common law marriage cases.

III. Public Policy in Formalities

[34] By this, the Law Commission means the operation of presumption of marriage and not the myth of 'common law marriage' itself. The presumption of marriage asserts that the parties are validly married although there may be lack of evidence to conclusively show this. See *Chief Adjudication Officer v Bath* [2000] 1 FLR 8, CA, *Pazpena de Vire v Pazpena de Vire* [2001] 1 FLR 460. See the discussion of the presumption of marriage in G. Douglas and N. Lowe (10th Ed.) *Bromley's Family Law* (Oxford Oxford University Press 2008) pp 64 - 65. See also A. Borkowski 'The Presumption of Marriage' [2002] *CFLQ* 251.

Policy is a powerful tool and confers a wide discretion upon judges to disregard foreign rules. Judges are generally cautious about using policy, and its use in relation to formalities of marriage remains relatively unexplored in conflicts of law. However, the possibility that it could or should arise in relation to formalities needs to be explored. One helpful example is proxy marriage. Several countries allow marriages by proxy.[35]English law does not allow proxy marriage as a form of celebration within England. Therefore, this divergence in national requirements makes recognition contentious, because the English marriage could be radically different in form and still be recognised in England as long as the required formalities of the *lex loci* were followed. The requirements for the formal validity of the marriage must be in accordance with the local law and local understanding.[36] An English domiciliary could escape the stringent requirements of English formalities or essential validity, marry a foreign domiciliary abroad and then come back to the English court for recognition. Therefore, the marriage could circumvent immigration rules, which may require a certain amount of time spent in England in order to establish residence. In *Apt v Apt*[37] one spouse was an English domiciliary and the other spouse an Argentinian. A proxy marriage was celebrated in Argentina. Lord Merriman P. spoke of his distaste for proxy marriages, but eventually recognised the marriage in question.

[35] To date, proxy marriages have been prevalent in Bangladesh , South America and Africa. See B. Stark *International Family Law; An Introduction* (USA Aldershot Publishing 2005) 9-23.
[36] The evidence of expert witnesses must be taken.
[37] 1948 (CA).

Lord Merriman pointedly said[38]

> " that the problem should be sub-divided into categories and the test of public policy be applied to each topic separately...I do not think that it is necessary to pursue further than to say that I am not satisfied that a single test of public policy can be applied to all proxy marriages indiscriminately." [39]

It is unfortunate that Lord Merriman did not expound further on whether public policy should ever be used in relation to formalities. This has been deemed a missed opportunity by Murphy because the court had the opportunity to provide dicta in this case but failed to do so.[40] But what Lord Merriman did emphasise is that "there was nothing in the legislature to prevent Parliament from enacting in relation to British domiciled subjects generally that proxy marriages shall not be recognised in this country wherever celebrated."[41]

In *McCabe v McCabe*[42] the court was confronted yet again with the opportunity to consider the use of policy in formalities but failed to do so. In *Mc Cabe,* one spouse was as Ghanaian domiciliary, and the other had an English domicile. They married according to Ghanaian customary law in 1985. Neither party was present at their marriage. One provided a bottle of gin and the other provided one hundred pounds (known as "aseda") in lieu of

[38] [1947] P 127 , 141.
[39] [1947] P 127, 141.
[40] See J. Murphy 'The Recognition of Overseas Marriages and Divorces; Some Opportunities Missed?' (1996) 47(1) *Northern Ireland Legal Quarterly* 35.
[41] [1947] P 127 at 139 per Lord Merriman P..
[42] [1994) 1 FLR 410.

presenting themselves for the ceremony.[43] At first instance, Judge Compton held that a valid marriage did not exist because an essential formality of an Akan marriage had not been fulfilled because there had not been any publicity. Therefore, the marriage should not be recognised.

After hearing several opinions on what constituted a valid Akan marriage it was held that the formalities of the Akan marriage had been observed and therefore, the parties had a valid marriage. *Mc Cabe v Mc Cabe* has equally been branded as a 'missed opportunity'[44] by Murphy. [45] The judge in *McCabe* had the chance to consider whether the proxy marriage in question would be offensive to English law. Murphy argues that the decision by Butler Sloss L.J. is not incorrect, but should have encompassed some discussion as to the extent of public policy, thus providing lawyers with much needed dicta. In *McCabe*, the proxy marriage required the husband to provide one hundred pounds and a bottle of gin represented the wife. There was difficulty in adducing evidence as to what, exactly, were the required formalities for the marriage. Also, Murphy notes[46] that in *McCabe*, it was far from clear whether or not that a proxy had been formally and consensually appointed. Murphy supposes that if the marriage were deemed to be a sham marriage, then the discretionary veto of public policy should be

[43] And in fact, it was debateable whether or not the ceremony was necessary at all, according to one expert witness. See (L.Collins et al)*Dicey and Morris and Collins on the Conflicts of Laws* 14th Ed (London Sweet and Maxwell 2006). pp 794.
[44] See J. Murphy 'The Recognition of Overseas Marriages and Divorces in the United Kingdom' Spring 1996 47(1) *Northern Ireland Legal Quarterly* 37, 35-49.
[45] *Ibid.* at 35.
[46] See J. Murphy *International Dimensions in Family Law* (Manchester Manchester University Press 2005) 44.

wielded. [47] Murphy believes that the option of withholding recognition to all proxy marriage would be culturally imperialistic and heavy-handed.[48] So, should judges provide more dicta in this area, or is the recognition of sham marriages, or marriages that might circumvent immigration rules something that could be left for Parliament?

It is notable that in the recent case of *KC, NNC v City of Westminster Social and Community Services Department, IC (a protected party, by his litigation friend the Official Solicitor)*[49] the English court was confronted with a telephone marriage and discussed its formal validity. The marriage had taken place by telephone between a mentally disabled man in England and woman in Bangladesh. The court debated which law would be applicable when determining the *lex loci celebrationis.*

[50] If English law governed the *lex loci celebrationis* the formalities would not be recognised. However, according to Bangladeshi law, the telephone marriage and its formalities would be recognised. The English court found that the place of the celebration was Bangladesh because of the many factors connecting the marriage to Bangladeshi customs and law. Thorpe LJ acknowledged the difficulties in ascertaining the place of the celebration in relation to telephone marriages and stated that though English law allows proxy marriage, there are public policy issues underlying such marriages.

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[47] See J. Murphy's arguments in 'The Recognition of Overseas Marriages and Divorces;. Some Opportunities Missed? (1995) *Northern Ireland Legal Quarterly* 35.
[48] *Ibid.* pp 35.
[49] *Supra.* note 4.
[50] *Supra.* note 4 at pp 2 – 18.

[51]However, in the instant case, Thorpe LJ believed that the place of the celebration was Bangladesh and so he would not consider the extent of policy in the case. [52]

If a legal system wishes to develop private international law in formalities, there are several methods. Firstly, legislation could be developed, but this author suggests that this route is highly unlikely to be on the governmental agenda. Another option would be to develop private international law by judicial dicta. As we have noted earlier, Murphy has called for the judiciary to reason more when adjudicating upon cases in private international law.[53] A third option would be to have greater analysis of the issue in academic literature, by academics. We have seen much academic debate has contributed to law reform in European law, and in the USA.

This author would opt for greater analysis of the issue by academics and the judiciary because the author predicts that the circumvention of sham marriages and reform of the rules relating to marriage recognition in private international law is currently not on, and will never be on the national agenda in the future. With respect to the judiciary, why has there been a reluctance to provide full and reasoned dicta? Murphy attributes[54] this inadequate form of reasoning to the fact that judges in the Family Division

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[51] *Supra.* note 4. at pp 3 - 18.
[52] *Supra.* note 4 at pp 10 - 18.
[53] *Supra.* note 46.
[54] *Supra.* note 46. See Murphy's comments on inadequate/incomplete reasoning in adjudication in *International Dimensions in Family Law* (Manchester Manchester University Press 2005) pp 115-119.

are not used to, or equipped to deal with conflicts of law. But, on the other hand, to allow almost any kind of formality could undermine the institution of marriage in England. Other countries may not place such importance of marriage formalities. The current use of the *lex loci celebrationis* brings certainty and predictability to English private international law. [55] This author suggests that although the *lex loci celebrationis* has its merits, she agrees with Murphy that there is a need for greater adjudication and analysis. Otherwise, if analysis and reasoned adjudication is not done, individuals and lawyers will be unclear about the use of the *lex loci celebrationis*.

The next question to ponder is whether formalities that are valid and required in the *lex loci celebrationis* but may be repugnant to English policy. One formality that has had little consideration is the dower. As seen in the earlier discussion of *McCabe v McCabe* included a £ 100 dowry to be presented at the time of the marriage ceremony. Since English law prohibits any sort of purchase or contract in the law of the marriage, it is questionable as to whether an English court would recognise money or some sort of medium of exchange as part of a valid foreign marriage. It is notable that this issue was not discussed in *McCabe*. As with other formalities, one could argue that recognition is needed because it is a valid formality of the foreign

[55] The manner in which English law uses the *lex loci* is if the marriage does not follow the requirements of the place of the celebration then the marriage is not valid. See also L. Palsson *International Encyclopedia of Comparative Law* iii Ch 16 *Marriage and Divorce in Comparative Conflict of Laws* (1974) 26-28. Also, P. North in *Essays in Private International Law* (Oxford Oxford University Press 1993) at 152-153 has called for the use of a 'floating' *lex loci celebrationis* such as in *Berthiaume v Dastous* [1930] AC 79 because North believes that critics of this rule would attack it as being too formalistic. It takes no account of the policies underlying the rules. North then elaborates upon how a court could balance two or more competing laws for the *lex loci*.

marriage. [56] The argument in favour of non - recognition would tend to reflect a conservative approach, as contract law and marriage do not mix in England.[57] This author would argue in favour of recognition of a foreign formality that is akin to a purchase or contract in English law because of the underpinning need in private international law for international comity and to give effect to foreign laws. Particularly if the different foreign formality does not breach a human right or harm an individual's life, the formality should be recognised by the English court.

On the other hand, a different situation may develop if foreign marriage formalities involved a breach of human rights,[58] in such a case, recognition in England would be questionable. Particularly if the foreign marriage was from a non-Western jurisdiction, the English court may call into question the nature of the formality, and consider if it breached the notion of human rights. For example, if one of the domiciliaries to the party is English and enters into the marriage without the appropriate consent or knowledge [59] would it be right to recognise the marriage in England? Or what if one of the parties is underage? Or, what would happen if an English domiciliary is forced to undergo a marriage formality that puts a person into

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[56] S. Poulter *English Law and Minority Customs* (London Butterworths 1986) 42-43. See also *Shahnaz v Rizwan* [1965] 1 QB 390 [1964] 2 ALL ER.

[57] See generally English law's historical distaste of contract mixing with marriage. Atiyah *An Introduction to the Law of Contract* 3rd Ed. (Oxford Oxford University Press 1981). See also C. Barton *Cohabitation Contracts; Extra – Marital Partnerships and Law Reform* (Aldershot Gower Publishing 1985).

[58] Later in this chapter we shall examine the recognition of foreign forced marriages in English private international law. Because of this topical nature it warrants a separate treatment in the chapter.

[59] Capacity and/or consent could be classified as a marriage.

danger? Although there has been a reluctance to use public policy in questions of formality validity, this should not be viewed as a completely erroneous path to be taken for marriage recognition in English private international law.

The reluctance to use policy shows that marriage recognition in English private international law has taken a pluralistic approach to formalities of marriage. The acceptance and recognition of the many different ceremonial forms worldwide is indicative of a developed and tolerant conflicts law. Furthermore, the acceptance of many different types of formalities indicates that English law does not 'force' non-Western countries to conform to English marriage formalities.[60] Additionally, one could argue that since marriage recognition is a double barrelled[61] test the need to resort to public policy has been reduced because the parties still have to fulfill the requirements for essential validity. Moreover, English law still retains public policy as a residual discretion that may 'kick' into operation separately from formal validity and essential validity.

What path should private international law take? A lenient approach would be the status quo - which means public policy is hardly invoked. Going in the other direction would mean that English law would be less tolerant of foreign laws. A balance must be struck between the two. What I would suggest would be for the judiciary to deliberate what is important in terms of our marriage laws and in relation to formalities of marriage.

[60] See Chapter 5 generally where we shall examine that this liberal approach is not followed when it comes to English divorce recognition.
[61] Double - barrelled because there are two hurdles to clear – formal and essential validity.

Additionally academics could analyse marriage law in private international law in the same manner. What policies do we want to promote? What English policies do we want to protect? Should the presumption of marriage prevail in difficult decisions? It is only through elucidation of such principles that we can develop our rules.

The Law Commission in its Working Paper considered the possibility of reform of the *lex loci celebrationis* rule. Given that the current adherence to the *lex loci celebrationis* promotes certainty, predictability, convenience and uniform results, the Law Commission felt uneasy about advocating reform in an area which works well. This author would also agree with the Law Commission's findings. [62] This author proposes that what is needed is a 'list' of cases or circumstances in which public policy should be involved, which could be produced in another academic Practice Direction. It is not necessary to encompass the list in a statute, but the uncertainty inherent in leaving things purely to policy and judicial discretion is undesirable. If we were to approach this ambiguity as to when we should use policy (and therefore policy considerations) as Jean Stapleton does in her list of factors for and against the duty of care in tort, we will then confine the use of policy to a possible list of situations. The list could encompass instances where policy could or could not be used in relation to formalities of marriage. And by doing so, this would strike a balance between certainty and flexibility in private international law. As we have examined in *Apt v Apt* and *Mc Cabe*

[62] Law Commission Working Paper No. 89 'Private International Law Choice of Law Rules of Marriage' (London HMSO 1985.)

and Mc Cabe, the judiciary has been left with little case law in this area. The existing case law is also inarticulately reasoned. Therefore, this list of circumstances in which formalities should not be recognised would give certainty in an area which is underexplored. [63]

IV. Essential Validity

The previous section has demonstrated why courts are, and should be reluctant to use public policy to refuse recognition to a marriage celebrated in the form required by the *lex loci celebrationis*. What is now considered is the essential validity of a marriage with a foreign element, in particular, capacity to marry. It will be seen that once again, resort to policy in its residual form of non-recognition is rare. This author proposes that the principles of 'rule selection' are themselves heavily, if covertly, policy oriented. Therefore, this author suggests that more often than not the judge in the instant case manipulates the rules to achieve the desired outcome without resort to the discretion of non-recognition. Hence, we shall see that the policies underlying these decisions when the judges engage in rule-selection stem from a concern such as legitimate expectation or the presumption of marriage.

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[63] See J. Murphy's arguments in 'The Recognition of Overseas Marriages and Divorces; Some Opportunities Missed' (1996) 47 1 *Northern Ireland Legal Quarterly* 35-49. See generally J. Murphy 'Rationality and Cultural Pluralism in the Non- Recognition of Foreign Marriages' (2000) *International and Comparative Law Quarterly* 643.

Therefore, some fairly extensive explanation of these rules is required. The *lex loci celebrationis* is thought to be unsuitable when determining matters of essential validity. Often the *lex loci celebrationis* may only be remotely connected with determining essential validity. Therefore, private international law looks to the personal law of the parties to marry. However, as we shall see later in this chapter, the *lex loci celebrationis* does, under certain circumstances, have a limited part to play when determining essential validity.

With the increased migration of individuals around the world, ascertaining the appropriate law for determining essential validity of a marriage may seem to be a formidable task for the court. There are several theories as to what is best, and each had its own advantages and disadvantages. It is now appropriate to discuss each in turn.

A. Dual domicile theory

The dual domicile theory[64] states that a marriage will be invalid unless each party to the marriage has the capacity to contract the marriage by the law of the domicile of both contracting parties at the time of the marriage. The dual domicile theory is the predominant rule[65] in English private international law.

[64] See Cheshire and North *Private International Law* (Eds. P. North and J. Fawcett) 13th edn. (London Butterworths 1999). 724.
[65] *Ibid.*

The dual domicile theory has its advantages and disadvantages.[66] The main advantage is that it is easy to apply. However, there have been a number of disadvantages identified with this theory. [67]Firstly, it has been said to rely too much on the connecting factor of domicile. As domicile is a connecting factor that is difficult to acquire and to lose, the dual domicile theory may be considered too inflexible, and a person's capacity may be governed by the law of the country which he or she has never visited. Cheshire and North provide an example of a woman domiciled in England who wished to marry her uncle domiciled in Egypt.[68] The problem for the marriage is that English law would prohibit such a marriage, and the intended marriage would thus be invalidated. However, if a woman were to move from Egypt *before* the ceremony with the intention of remaining there, she would not acquire a new domicile of choice. Her domicile would still be Egyptian, and the marriage would thus be valid in English law.

B. Intended matrimonial home theory

Another theory proposed for marriage recognition in English private international law is known as the *intended matrimonial home*[69] theory. The presumption that operates is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage. [70] The place where the

[66] See discussion at the Law Commission Working Paper 1985 No. 89 'Private International Law Choice of Law Rules in Marriage' (London HMSO) at 88-91.
[67] As expounded by T. Hartley 'The Policy Basis of the English Conflict of Laws Marriage' (1972) 35 *Modern Law Review* 571, 578.
[68] *Cheni v Cheni* [1965] P 85 [1962] 3 ALL ER.
[69] *Supra.* note 64.
[70] *Supra.* note 64 at pp 724.

husband establishes his home is normally where he is domiciled. This presumption, however, is rebuttable. If the parties are able to prove that they intended to move, or establish their matrimonial home in a different country, then they are able to rebut the presumption inferred by the place where they first set up their home at the time of the marriage.

As with the dual domicile theory, the intended matrimonial home theory has its advantages and disadvantages.[71] From a policy standpoint, the intended matrimonial home theory pays more attention 'socially' to the place of the marriage where the couple will reside, work and socialise. Therefore, the law of the marriage when using the intended matrimonial home focuses upon where the couple actually *lives,* and that is where the greatest impact is, socially. In this manner, the rule-selection gives foremost importance to party expectations and therefore, satisfies them easily.

The problems with the intended matrimonial home theory are as follows. First, it operates retrospectively. The matrimonial home can only be ascertained after the parties have set up home. Thus, the theory is uncertain in application. What if the parties had originally intended to set up home somewhere but later changed their minds? Their marital status is in doubt if they have to 'wait and see' if their status has changed. Let us consider some of the case - law. Support for the seat of the intended matrimonial home can be found in the case of *De Reneville v De Reneville*[72] where Lord Greene M.R. said

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[71] *Supra.* note 64 at pp 723.
[72] [1948] P 100, [1948] 1 ALL ER 56.

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

Further support for the intended matrimonial home can be found *Kenward v Kenward* [73] where Denning L.J. stated that the 'substanial validity' of the marriage contracted between persons who are domiciled in different countries is governed by the law of the country where the couple intended to live, and this is the basis of which they may be supposed to enter into the bonds of marriage. Another case that demonstrates strong support for the theory is *Radwan v Radwan (No. 2).* [74] In April 1951, the husband, whose domicile of origin was Egyptian, married a woman whose domicile of origin was also Egyptian, and the marriage was polygamous in nature. In September 1951, the husband met another wife "E" who was domiciled in Paris. In the ceremony in Paris, the husband and the wife, who was a domiciled Englishwoman, were married according to Muslim law. The marriage was a polygamous union. The couple briefly visited England, and the couple returned to Egypt, where, before their marriage, the couple had decided to make their matrimonial home. In 1952, the husband divorced his first wife. In 1956, the parties moved to England where the husband

[73] [1951] P 124 [1950 2 ALL ER 959.
[74] [1973] Fam 35.

subsequently decided to establish his permanent home, thus acquiring an English domicile of choice. The parties continued to live together in England, with their children, until 1970 when the wife started divorce proceedings. The issue for the proceedings was whether the wife's marriage to her husband in 1951 was valid in English law. It was held that in English law, the essential validity of a marriage is to be determined by the law of the country in which the parties decided to make their matrimonial home.

Radwan v Radwan (No 2) is the most blatant example of an English court manipulating the choice of law rules to validate the marriage in question. Even though the wife had an English domicile at the time of the marriage, a polygamous marriage was held to be valid. The decision of the court was fuelled by the desire to do justice to the parties. Policy was used in a positive manner to recognise the marriage. One could even argue that the decision taken in the *Radwan* case might be persuasive in matters other than polygamous marriages despite Cumming Bruce LJ's warning that "nothing in this judgement bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous union."[75] If the choice of law rule in *Radwan v Radwan (No 2)* is confined solely to polygamous marriages, there is still the problem of a domiciled Englishman or Englishwoman, who, while being monogamously married, enters into a second marriage abroad, which is in polygamous form. In *Radwan,* there was no evidence taken as to the wife's capacity in Egyptian

[75] [1972] 3 W.L.R. 93, 953 D.

law, since she was an English domiciled Christian, but it would appear to have capacity.

In the greater scheme of private international law, the *Radwan v Radwan (No 2)* decision has thrown choice of law into disarray into this area by using policy considerations to uphold the marriage. This decision should only be viewed as an extreme circumstance in which the courts wanted to do justice.[76] Furthermore, this decision is a good example of how the judiciary uses a policy consideration[77] that stems not from any legal notions or statutory basis but from a sense of justice underpinning the common law.

C. Real and substantial connection test

Yet another suggested test for choice of law in relation to finding out the essential validity of marriage is known as the 'real and substantial connection' test. This theory, is exactly what is implies – that the test for marriage should be connected to the country that has the most real and substantial connection akin to the law of the contract. Lord Simon of Glaisdale expounded this theory is *Vervaeke v Smith*[78] when he suggested that the sham marriage that had to be decided before him, should be governed by the law of the country with the most real and substantial connection.

[76] See J.A. Wade 'Capacity to Marriage and Choice of Law Rules and Polygamous Marriage – Radwan v Radwan No. 2' (1973) Vol 22 *International and Comparative Law Quarterly* 572-574.
[77] Or it could be several policy considerations.
[78] [1981] Fam 77 [1981 1 ALL ER.

The Law Commission, in its review of choice of law in recognition of marriage, however, has rejected the test by stating that:

> "It is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore, unsuitable in an area where the law's function is essentially prospective....ie... a yardstick for future planning."[79]

While this test has not been completely dismissed by the judiciary [80] Cheshire and North deem the real and substantial test as unworkable as this test could create a substantial connection with more than one country.[81]

Yet another test that could be used is the alternative reference test. [82] This test for the validity of marriages is a combination of both the elective [83] dual domicile test is satisfied. Such a 'rule' gives weight to many factors and is policy oriented. The 'rule' again endorses a presumption that is in favour of validating marriages. But how would the court weigh the laws of several different countries if the law of more than one country applies? Again, this is a policy based orientation in which the court would weigh which law would be 'better.' Similarly, the elective dual domicile test has been rejected for the same reasons as the alternative reference test has been. The Law Commission did not want to have a discretion that would appear to

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[79] Law Commission Working Paper No. 89 Private International Law Choice of Law Rules in Marriage (London 1985 HMSO) 94 – 96.
[80] *Ibid.*
[81] Cheshire and North *Private International Law* 13th Ed. (Eds. P. North and J. Fawcett) (London Butterworths 1999) 736.
[82] *Ibid.* 736-737.
[83] Elective dual domicile meaning either party's domicile.

prefer the rules of one country over another. Yet, as we shall see later, reform in this area has not been forthcoming.

D. The Rule in *Sottomayer v De Barros* (No 2).

Another theory for determining essential validity is known as the rule in *Sottomayer v De Barros* (No 2).[84] Cheshire and North [85] consider it an exception to the two principal choice of law theories (dual domicile and the intended matrimonial home). Two decisions relating to the same marriage must be evaluated. The couple in the *Sottomayer v De Barros* case was actually the subject of three separate cases. [86] So, for the purpose of our immediate discussion, it is (No 2) that is of relevance for essential validity.

The couple in *Sottomayer v De Barros* were first cousins. [87] They were domiciled in Portugal, where the marriage between first cousins was prohibited without a Papal dispensation. They were both presumed to be domiciled in Portugal, but had married in England and lived together in the same house for 6 years. In the year 1858, the petitioner, her father and mother, her Uncle De Barros and his family, including the respondent, his eldest son, came to England and the two families lived jointly in Dorset. On 21 June 1866, the petitioner, at the time, was fourteen and a half years and

[84] *Sottomayer v De Barros* (No 1) (1877) 3 PD1 .
[85] *Supra.* note 64. at pp 730-731.
[86] *Sottomayer v De Barros* (No 1) (1877) 2 PD 81 (Phillimore J); on appeal, *Sottomayer v De Barros* (No 1) (1877) 3 PD 1 (Cotton, Baggallay, James LJJ); on remission to the PDA, *Sottomayer v De Barros* (No 2) (1879) 5 PD 94 (Hannen P.)
[87] *Ibid.*

the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied the marriage. The petitioner also claimed that she went through the marriage contrary to her own inclination, under the persuasion of her family members. From 1866 to 1872, the couple lived under the same roof, but never consummated the marriage. In 1873, the petitioner returned to Portugal. In 1874, the respondent returned. The petitioner then filed a claim for decree of nullity stating that the parties lacked capacity under Portuguese law. Phillimore J. dismissed the petition in the first *Sottomayer v De Barros* case. [88] The Court of Appeal then sent the case back to the Probate Division so that a finding as to the domicile of the parties could be made.

Therefore, in *Sottomayer v De Barros (No 2)* the question then became the actual determination of the parties' domiciles. The court decided that the husband was domiciled in England and the wife domiciled in Portugal. Hannen P [89] concluded that the respondent was domiciled in England and that capacity to marry was governed by the *lex loci celebrationis*. [90] By Portuguese law, the marriage would be void because of the incapacity. The decision, and the judgement of Hannen P. has never been overruled. Therefore, Dicey then incorporated the case as an exception to the general rule that domicile determined capacity. With this in mind, it is difficult to reconcile the exception in *Sottomayer* with the dual domicile rule.

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[88] *Sottomayer v De Barros* (No1) (1877) 2 PD 1.
[89] *Sottomayer v De Barros* (No 2) (1879) 5 PD 94.
[90] See the judgement of Sir James Hannen P (1879) 5 PD 94 at 104. at pages 4-7 of Westlaw document.

Sottomayer has been called "xenophobic" [91] "anomalous" and "unworthy in a place in a respectable system of conflict of laws."[92] The Law Commission has also criticised it[93] in their Working Paper.[94] Cheshire and North have termed the *Sottomayer* decision as an 'inelegant exception' to the dual domicile theory. Or, alternatively they state that another reason for *Sottomayer* would be support of the intended matrimonial home theory.[95]

V. *Sottomayer v De Barros* (No 2) as Policy?

It is submitted by this author that the *Sottomayer* (No 2) decision represents policy in its form as a consideration underlying judicial decisions creeping in again under the cloak of exception to the 'rules.' Although it may be argued that the exception in *Sottomayer* (No 2) is anomalous, this author believes that it may not be as unjust as it seems. The basis of the rule would seem to protect the interests of English domiciliaries extra-territorially. In the particular case of *Sottomayer* (No 2), recognition of the marriage has a positive effect for the parties involved. Therefore, the positive validation in *Sottomayer* (No 2) could be seen as a good strategy for marriage recognition.

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[91] Xenophobic in the sense that it gives preference to the law of the celebration if it is English but will not give preference if it is a foreign place. Dubbed "xenophobic" by Cheshire and North *Private International Law* 13th Ed. (London Butterworths 1999) 731.
[92] Falconbridge *Conflict of Laws* as noted in Cheshire and North *Private International Law* 13th Edition (London Butterworths 1999) pp 711.
[93] Cheshire and North *Private International Law* 13th Ed (Eds. P. North and J. Fawcett)(London Butterworths 1999) 731.
[94] Law Commission Working Paper No 89 'Choice of Law Rules in Marriage in English Private International Law' (London HMSO 1985) para, 3.17 and see paras 3.45 - 3.48. See Law Com Report 165 'Choice of Law Rules in Marriage' (London HMSO 1987) paras 2.7 – 2.8. 2.15.
[95] Because it could be argued that the intended matrimonial home was England.

It seems, from an explanation of all the theories, that the English courts will resort to a variety of different theories (intended matrimonial home, dual domicile, *Sottomayer*, alternative reference) to validate a marriage. Because the court strives so hard for a way to ensure that essential validity is fulfilled by using policy considerations to pick the most convenient rule in favour of marriage validation, one could say that it is unnecessary to resort to the discretion of public policy, and therefore, non-recognition of the marriage. Therefore, that may be why policy is rarely overtly used in marriage recognition. Whatever the authorities call this manipulation, whether it be "material justice" "conflicts justice" or "substantial justice" or "governmental justice" - it is ultimately, policy.[96]

VI. Reform of the Ambiguity in Choice of Law?

The confusion surrounding the rules and ambiguity in choice of law in relation to essential validity calls for reform. In 1978, the Hague Conference on Private International Law produced a Convention on the Celebration and Recognition of the Validity of Marriage, but only a few states have ratified the Convention. The United Kingdom is not a signatory.[97] In England, in

[96] See generally Chapter 6 in P. North's *Essays on Private Interational Law* (Oxford Oxford University Press 1993) and also P. Smart 'Interest Analysis; False Conflicts and the Essential Validity of Marriage' (1985) 14 *Anglo—American Law Review* 225.

[97] See Cheshire and North 13th Ed *Private International Law* (Eds P. North and J. Fawcett) (London Butterworths 1999) at pp 741 where the Convention is called 'incomplete and unacceptable.' Furthermore, criticisms of the Hague Convention on Marriage have been made by other academics. See also Glenn (1977) 55 *Canadian Bar Review* 86 and Reese (1987) 25 *American Journal of Comparative Law* 393.

1985, the English Law Commission produced a Working Paper [98] on choice of law rules in relation to marriage, as did the Irish Law Commission and the Scottish Law Commission.[99] Radical change was not forthcoming. The few recommendations were merely an elaboration of existing rules. The most proactive proposal was that the exception encompassed in *Sottomayer v De Barros (No 2)* should be abolished.

The Law Commission believed that reform was not necessary when there were no major areas "where in practice, the law seems to go wrong, and ie, leads to an udesirable result."[100] The Law Commission believed that in order to resolve the uncertainties, complex legislation was needed. However, since the Law Commission considered this area of law to be still in a state of development, statutory intervention at the time was considered undesirable.[101] However, this author submits that this was a wrong approach to take. If English private international law is to operate in a rational, just and coherent manner, while taking into account the expectations of the parties involved, the rules which create uncertainty should be re-evaluated. Perhaps what would be the catalyst for change in marriage rules is trend

[98] Law Commission Report No. 64 (1985) Private International Law Choice of Law Rules in Marriage (London HMSO) and also R. Fentiman 'Activity in the Law of Status; Domicile, Marriage and the Law Commission' (1986) 6(3) *Oxford Journal of Legal Studies* 353, 354 -360.
[99] *Supra.* note 93. and The Foreign Marriage (Amendment) Act 1988.
[100] Law Commission Working Paper No. 64 (1985) 'Private International Law Choice of Law Rules in Marriage' (London HMSO) at para 2.14 and the Law Commission Report No. 165 (1987) (London HMSO). See again Fentiman's criticisms in 'Activity in the Law of Status; Domicile, Marriage and the Law Commission' (1986) 6 *Oxford Journal of Legal Studies* 353-363.
[101] Law Commission Report No. 165 (1987) (London HMSO) paras 2.13 – 2.14.

towards new forms of cohabitation and same-sex marriages in Europe and worldwide.[102]

While English law takes a flexible and extremely pluralistic to foreign marriage laws, one could overlook the fact that the manipulation of the rules in relation to essential validity has restrained the role of policy as a trumping discretion in marriage recognition. As we have seen from the analysis in this chapter, policy is not out of control in marriage recognition, but rather, is elusive. Furthermore, because the role of policy has not always been acknowledged, English private international law rule *have not been developed* to consider what *would* be repugnant if an offensive case were to come forth for recognition. Marriage in many foreign jurisdictions defines a woman's legal status, and since a woman's relationship to a male or a husband's family may deny her rights,[103] many breaches of policy could occur which may be offensive to English law.[104]

VII. Non - recognition of an Incapacity

In most cases, an English court deciding a foreign marriage would try to exhibit tolerance and recognise the particular incapacity, therefore holding the marriage valid. However, there are incapacities[105] that are repugnant to

[102] See generally Chapter 3 of this thesis.

[103] See B. Stark's discussion in *International Family Law; An Introduction* (USA Aldershot Ashgate 2005) 22-24.

[104] *Ibid.*

[105] See Sir James Hannen P (1879) 5 PD 94 at 104 where he describes repugnant incapacities.

English sensibilities. Therefore, English private international law reserves the right not to recognise a certain foreign incapacity to marry. Or, the English court could recognise a marriage that would be void under the foreign law as valid in English law. *Sottomayer v De Barros (No 2)* needs to be re-visited at this point. The court had to decide the validity of a marriage where a Portuguese domiciliary married an English domiciliary. In Portugal, first cousin marriages were not allowed without a papal dispensation, and so the petitioner came to the English court with the hope that the marriage would be declared null and void. The *lex loci celebrationis* had been England. It was deliberated upon whether such a marriage should be held null and void, as it was a recognised principle of law that the question of personal incapacity to enter the marriage was to be decided by the law of the domicile of each party. Nonetheless, Cotton L.J. was of the opinion that no country was bound to recognise the laws of a foreign state when they work injustice to its own subjects and this principle would prevent the judgement in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English domiciliary in England.

Sottomayer v De Barros (No 1) was noted earlier, as one of the authorities supporting the doctrine that matrimonial capacity is governed by the law of the domicile. So, *Sottomayer v De Barros* (No 2) can be regarded as an inelegant exception to the dual domicile rule. However, in another context, *Sottomayer v De Barros* (No 2) seems very much to be a crystallisation of *ordre public* to some academics. For example,

Falconbridge[106] and more recently, Clarkson[107] attempted to 'fit' *Sottomayer v De Barros* (No 2) into a general system of 'rule selections' but never succeeded. *Sottomayer v De Barros* (No 2) has never been overruled.[108]

One could liken the rule in *Sottomayer v De Barros* (No 2) to the tort case of *Phillips v Eyre*.[109] (The common law rules in relation to foreign torts are derived from three leading cases, [110] and the decision in *Phillips v Eyre* forms the first limb of the double actionability rule.)[111] This is what happens when a certain rule has come about or "crystallised" rules of public policy have been split off and applied by the judges irrespective of the conflict of laws. Therefore, in English law we often have the "rule of X and Y." This often happens as a result of precedent and therefore if an English judge applies English law in a case involving foreign elements, he therefore 'makes law.' The judge is literally making law because the case is foreign, and because the English court has not heard such a case before. Hence, the judge is actually creating a rule without regard or reference to policy.[112]

Sottomayer[113] was followed in *Chetti v Chetti.* [114] The petitioner was a domiciled Englishwoman who had married a Hindu husband domiciled in India.

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[106] Falconbridge *Essays on the Conflict of Laws* 2nd Ed. (1954) 711.
[107] C. Clarkson 'Marriage in England; Favouring the Lex Fori' (1990) 10 *Legal Studies* 80,84.
[108] And the Law Commission has criticised it in their Working Paper No. 89 (1985) para 3.17 and also paras 3.45 – 3.48.
[109] *Law Quarterly Review* (1870) 6 B.1
[110] Actionability by the law of the forum and the law of the place of the tort *Phillips v Eyre* (1870) LR 6 QB *Boys v Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd Bouygues S.A.* [1995 1 AC 190.
[111] See Cheshire and North (Eds. P North and J. Fawcett) 13th Ed. *Private International Law* (London Butterworths 1999) pp 609 – 616.
[112] *Transactions of the Grotius Society* (1954) Vol 9. 40 – 89.
[113] And the ratio in *Sottomayer* had been supported by dicta in *Ogden v Ogden* [1908] P 46 at 74-77 and *Vervaeke v Smith* [1981] Fam 77 at 122. See also *R v Brentwood Superintendent Registrar of Marriages ex parte Arias* [1968] 2 QB 956 at 968-969.
[114] [1909] P 67 [1908-10] ALL ER Rep 49.

The marriage had been celebrated in England. The husband had an incapacity imposed by his domiciliary law, as he was prohibited from marrying anyone who was outside his caste within the Hindu religion. Afterwards, he left his wife, and refused to cohabit with her or make proper provision. On a petition being presented by the wife for a decree of judicial separation, he alleged that, according to Hindu law which was his personal law and the law of his domicile, he could not marry someone outside of his caste, or was not Hindu by religion. The court held that the husband could not be allowed to rely on any disqualification imposed by the law of his domicile against the validity of the marriage which had been duly celebrated in England by English law.

Historically, the non-recognition of an incapacity to marry in private international law arose most commonly from national laws which banned marriages among the races. [115] Laws which ban mixed marriages are known as anti-miscegenation laws. The objective of such laws is to prevent the mixing of races or genes. Several countries passed anti-miscegenation laws in the past. Many of the same countries today ban the practice as it is considered discriminatory.[116] England, however, has never condoned anti-miscegenation laws. Therefore, if any foreign anti-miscegenation laws were to come forth for recognition in the English court, the law(s) would not be recognised because they would be offensive to the English notion of freedom to marry regardless of caste or race.

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[115] See M. Wolff *Private International Law* (Oxford Clarendon Press 1950) pp 338 – 340.
[116] See www.historyplace.com/worldwar2/timeline/nurem-laws.htm. (Website last visited 2009 but now defunct website). In 1935, a number of racist laws were enacted against Jews in Germany. For example, it was forbidden for a Jew and an Aryan to marry.

For example, when the Nazis came into power in Germany, they enacted legislation decreeing that Jews were classed as lower citizens. Specifically, The Reich Flag Law[117] classified the Jews as lower citizens than the Aryan Germans. The law forbade marriages between German nationals and Jews, and refused to recognise such marriages even if celebrated abroad.[118] This law (though it is not in force in Germany today) would be classed as insulting to English public policy. Similar incapacities existed in the United States,[119] such as the 30 states that had anti-miscegenation laws that were still part of the law until the civil rights movement. Of these states, 16 still kept their laws on the books until the Supreme Court threw them out in 1967: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

For this reason, to cover possible future laws of such a kind, English private international law still needs to retain policy as a residual discretion and also as a policy consideration in recognition. In these modern times, the

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[117] This is one of many laws in Germany under Nazi rule known as The Reich Flag Law or *Reichflaggensetz* of 15 September 1935.

[118] www.eugenics-watch.com/roots/chapter07.html (Website last visited in 2009 but now defunct website).

[119] Note the leading civil rights case of *Loving v Virginia* 388 U.S. 1 (1967). This was a trial that finally made its way to the US Supreme Court which involved a couple, Mildred Jeter and Richard Loving. On January 6, 1959 they pleaded guilty to the charge of miscegenation and were sentenced to a year in jail. The only way they could avoid the jail sentence was the leave the state for 25 years. The trial judge has said Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And, but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he does not want the races to mix. The Lovings challenged the trial judge in a Federal Court, which in 1967 found that distinctions between citizens because of their ancestry was odious to a free people whose institutions were founded upon the doctrine of equality.

recognition of such discriminatory laws would be offensive to English public policy.

A. Penal prohibitions as incapacity?

As we have seen, the incapacities may relate to race, religion or caste, but an incapacity may also exist as a prohibition against remarriage. Certain foreign divorces when dissolving a marriage have put a restriction or a prohibition on remarriage for one or both of the parties. [120] A prohibition on remarriage has historically fallen into two categories – those which have a time limit which postpones the date at which one of the parties can remarry, and those which are similar to a penalty upon a party and prohibit a marriage completely. For the first type of marriage, the English court has upheld the incapacity to marry for the length of the prohibition.[121] However, what is uncertain is the time-length of prohibition. What if the time-length lasts for more than 6 months or even a year? What if the prohibition lasts for 25 years or more? Although we do not have case law to refer to on this issue, one could surmise that if the prohibition lasts for an unduly long period of time, or if the prohibition is penal in nature, then the English court may not recognise it. The author suggests that this is because policy would surface as an underlying consideration of justice and fairness. Non - recognition of the

[120] See M. Mann (1952) 42 *Transactions of the Grotius Society* 133, 138 – 141.
[121] *Warter v Warter* (1890) 15 PD 152.

unfair incapacity would then be an appropriate avenue under these circumstances.

The most well-known example is that of *Scott v Attorney General* [122] in which two South African domiciliaries were divorced in South Africa. Under South African law, one party cannot remarry as long as the other party remained unmarried. The wife was the party who broke this restriction, and she remarried in England. The question for the English court was whether her incapacity to re-marry under South African law should be recognised. It was held that South African law was penal in nature, and penal laws should not be applied extra-territorially. Secondly, it was believed that the wife had acquired a new domicile in England, and therefore, the fact that she could not re-marry according to South African law should be disregarded. Therefore, in answer to the question proposed earlier, if the English court feels that the length of time to wait to re-marry is too onerous, or penal in nature, it may well be disregarded.

As we can see, public policy is always circumstantial. In every case, the context in which the repugnant incapacity arises is of importance. For example, if a mixed-race couple were to marry in South Africa during the time of apartheid, under the governing law at the time, this would be a null union. However, if the couple's marriage had broken down at some point later could either party rely on its nullity, and therefore, re-marry? The English court has, potentially, a wide discretion not to recognise decrees, and in this case, policy would be overtly used.

[122] (1886) L.R. 11 PD 128.

VIII. Non-recognition of a Capacity

Another category in which policy may operate is in relation to the non-recognition of a foreign capacity to marry. Essentially, this is where foreign marriages that are validly contracted encounter recognition difficulties in English private international law. In fact, this is the most insular and imperialistic form of non-recognition simply because the foreign marriage had been validly contracted, and at first, should be entitled to recognition. More recently, the type of foreign capacity that has been the most contentious is in relation to same-sex unions, and different forms of cohabitation.[123] For now, we shall discuss the non-recognition of a capacity in relation to foreign heterosexual marriages between prohibited degrees of relationship. In English domestic family law, there exist two bars to marriage between certain relationships. These 'relationships' can be broken into two categories – consanguinity and affinity.[124] With respect to consanguinity, it is envisaged that relationships between closely genetically related people are contrary to public policy and medically inadvisable. Therefore, sexual intercourse between brother and sister or father and daughter constitutes the crime of incest.[125] The other bar to marriage in

[123] See Chapter 3 generally in relation to same-sex marriages and new forms of cohabitation.
[124] See G. Douglas and N. Lowe *Bromley's Family Law* 10th Ed. (Oxford Oxford University Press 2007) which lists the First Schedule to the Marriage Act, as amended by the Civil Partnership Act 2004 Sch para 17.) 49, 50 and 51-52.
[125] *Ibid.* 50, 51 provides a full list.

English family law is one of affinity.[126] It is believed that are some relationships that are created through marriage (i.e. marriage to a stepchild) could create tension within the family or lead to sexual exploitation.[127]

A stepfather may sexually exploit his stepdaughter.[128] Prohibiting any possible marriage was seen as a disincentive to an inappropriate relationship. Douglas and Lowe provide the example [129] that a man may not marry his son's wife unless both his son and the son's mother are dead, and similarly a woman may not marry her daughter's husband unless both the daughter and the daughter's father are dead. In either case, both parties must be over the age of 21. However, the European Court of Human Rights has held that this restriction is a breach of the right to marry under Article 12 of the European Convention on Human Rights. Both parties could obtain a private Act of Parliament to marry. Therefore, Douglas and Lowe note that domestic law is currently under review. [130] Current policy suggests minimal interference with private choices.

The question for English private international law is thus; how far should the courts recognise foreign marriages that breach our domestic laws relating to consanguinity and affinity? Murphy has outlined three categories in which conflicts of law problems could occur in relation to prohibited

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[126] See Archbishop of Canterbury's Group *No Just Cause, The Law of Affinity in England and Wales* (1984) 30-32.
[127] And the rules have been liberalised recently in the Draft Marriage Remedial Act 1949 (Remedial Order) 2006.
[128] Marriage Act 1949 s (1) (1).
[129] G. Douglas and N. Lowe *Bromley's Family Law* (Oxford Oxford University Press 2008) 50 – 52.
[130] *B and L v United Kingdom* (Application No 36546/02 [2006] 1 FLR 35 and also the Draft Marriage Act (Remedial) Order 2006.

degrees. He illustrates [131]these scenarios. Firstly, there may be two foreign domiciliaries that attempt to marry in England in breach of English prohibited degrees. Murphy notes that there is no direct authority on this situation, but it is probable that the English court would apply the law of the forum refusing to allow the marriage. Or, as Murphy supposes, the court may also apply the law of the parties' ante-nuptial domicile. This author believes that this supposition is correct. Where the parties set up the ante-nuptial home would be indicative of what would be socially applicable to the marriage. Murphy notes that an even more difficult task would be when one of the parties has an English domicile, and the other, a foreign domicile. Murphy suggests that English law as to the law of the forum may be applicable, though "xenophobic."[132]

What I would suggest is to look to the 'seat of the marriage' and *not* automatically revert to English law. If the couple intends to set up home in England, then English law should apply (i.e. the intended matrimonial home). Long term residence in this country should confer acceptance of England's laws. In this manner, the concerns of English policy(both legal and non-legal) would be applicable to the most suitably connected parties to England.

Murphy's final example is when one or both parties to an overseas marriage have an English domicile at the time of the marriage. Murphy states that such a marriage will be treated as void if it was not in compliance

[131] See J . Murphy *International Dimensions in Family Law* (Manchester Manchester University Press) 62-64.
[132] *Ibid.* at 62, 63 and 64.

with English prohibited degrees. Murphy suggests that English private international law will refuse to recognise a person's circumvention of English marriage law by travelling to another jurisdiction to marry.[133]

The case law in this area is yet to be developed. In particular, it is questionable as to whether English private international law would recognise a foreign relationship that is considered incestuous by English law.[134] I would call for English law to take a very liberal approach, or at least articulate much-needed reasons before jumping to non-recognition. This author proposes that what the judiciary, as well as academic lawyers could do, is decide in advance what relationships would be considered repugnant, and provide a list of foreign relationships that would not be acceptable for recognition. This 'list' of foreign relationships that would not be eligible for recognition in private international law would presumably follow the list of relationships encompassed in Section 1(1) of the Marriage Act 1949, which is congruent with the list relating to relatives between whom sexual intercourse is a criminal offence in Section 64 of the Sexual Offences Act 2003. In this manner, the court would be combining flexibility with certainty by examining what existing relationships of consanguinity and affinity English law allows, and then, if any case comes forth that falls outside the domestic law, it would be hypothetical as to what relationships other countries may allow that would be in contrast to England's. In certain

[133] *Ibid.* at pp 63 where Murphy mentions that English law will not recognise circumvention and cites *Mette v Mette* (1859) 1 SW and TR and *Re Paine* [1940] Ch 46 as examples where German marriages with only one English domiciliary was ruled void.

[134] See *Cheni v Cheni* [1965] P 85 where a marriage between an aunt and uncle was recognised.

circumstances, a list of factors that may necessitate recognition may be needed. In this manner, policy considerations would play an indirect role in recognition. For example, if the case in question (and therefore recognition) of the marriage involves a succession issue or child custody issue or legitimacy issue, the need for English law to recognise the union may outweigh any notions of repugnancy.

Two factors may force change in existing English marriage law with respect to relationships of affinity and consanguinity. Recent case law that stems from the European Court of Human Rights may also change national policies (and therefore, English law) on relationships of affinity.[135] Secondly, there is change (liberalisation) in other European countries, therefore, this will undoubtedly affect English private international law.[136]

An argument in favour of recognition for any different foreign marriage that breaches English prohibited degrees of relationships is that though it may differ from English law, the court should realise that the relationship is still a recognised status under the foreign law. Particularly with the advancements made in relation to the recognition in English law of same-sex partnerships, one could argue that this trend 'opens the door' for the recognition of a foreign relationship that breaches the prohibited degrees of relationships in England.

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[135] *B and L v United Kingdom* (Application No 36546/02) [2006] 1 FLR 35.

[136] See Murphy who notes that the present day laws relating to prohibited degrees is in fact, far more liberal than 100 years ago. J. Murphy *International Dimensions in Family Law* (Manchester Manchester University Press 2005) 62.

Beyond the categories of operation, it should be noted that public policy is still available as a residual veto, at any time in English private international law. Therefore, this author suggests that the English court should take the time to adjudicate properly, and through careful reasoning, arrive at a decision without immediately resorting to non-recognition of a foreign marriage [137] that may breach English laws on prohibited degrees of marriage or for that matter, may breach any aspect of English domestic law.

This brings us again to *KC, NNC v. City of Westminster Social and Community Services Department, IC (a protected party, by his litigation friend the Official Solicitor)*[138] which was considered by the English court in 2008. A Bangladeshi parents and their mentally disabled child were domiciled in England. Their child was 26 years old, but was so severely disabled that he required home care 5 days a week and could not be left alone. He contracted a telephone marriage, while in England, with a lady in Bangladesh because his parents wanted him to enter into marriage.

The local authority was alerted and there were several questions for the court to consider. Did the mentally disabled man have the capacity to enter into such a marriage? Which rule could apply when determining the capacity of the disabled? Could public policy be used in an area where it has not been used before? Furthermore, did the inherent jurisdiction of the English court extend to orders where IC should live? Interestingly, the parents had a novel argument in favour of recognition because they believed

[137] By this I mean non-recognition through the non-recognition of a capacity as well as non-recognition by residual policy.
[138] *Supra.* note 4.

he needed to be married so someone could be responsible for him in case of their demise. The case was heard by Roderic Wood J who handed down judgement on 21st of December 2007. However, on 11th January 2008 an Appellant's Notice was filed, which attacked the judge's declaration that the marriage conducted on 3 September 2006 was not valid under English law and challenged the court's jurisdiction to prevent removal of the disabled man to Bangladesh.[139]

The court noted that if the dual domicile rule was used, the marriage would fail because the law of the ante – nuptial domicile (which was English law) would not validate the marriage because of a lack of capacity. Additionally, if the intended matrimonial home test was utilised, the marriage would also fail for lack of capacity. Thorpe LJ acknowledged the fact that the many different rules governing essential validity existed because of a policy to uphold the concept of marriage, and the courts look for alternative methods of recognition. [140] Also, if the real and substantial test was used, the marriage would again fail for lack of capacity. The marriage of this disabled man would be considered so offensive to English public policy that English law would not recognise the marriage.

The possibility of sex between the disabled man and the Bangladeshi lady could breach English criminal law. If the parents were to permit sexual intercourse between IC and NC, this would constitute rape under the provisions of the Sexual Offences Act 2003. Therefore, it is inconceivable

[139] *Supra.* note 4. pp 2.
[140] *Supra.* note 4. pp 12.

that the disabled man could be married in this jurisdiction because such a marriage would be so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. [141] The court deemed that the marriage and the arrival of his bride, NK, could be potentially injurious to the man and is likely to "destroy his equilibrium or his emotional state."[142]

Wall LJ stated that in light of the relationships prohibited in the Sexual Offences Act 2003, the uncle and niece in the case of *Cheni v Cheni*[143] would also be a criminal offence. If we can recall the facts of the case, *Cheni* was a potentially polygamous marriage between a man and niece in Cairo in accordance with Jewish rites. The husband and wife later became domiciled in England. The wife later took proceedings in England to annul the marriage on the grounds of consanguinity and the judge, Sir Jocelyn Simon P had to decide whether or not the court had jurisdiction to adjudicate upon a marriage which was potentially polygamous at its inception. It is notable that the marriage, though polygamous at the inception, became monogamous upon the birth of the child. Sir Jocelyn P decided that the court had the power to do adjudicate on the marriage and that the true test of non – recognition of the marriage is whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the foreign law. Sir Jocelyn P decided that given the length of the marriage between the uncle and the niece which was valid by the religious

[141] *Supra.* note 4. pp 17.
[142] *Supra.* note 4. pp 17 – 18.
[143] *Cheni (orse Rodriguez) v Cheni* [1965] P 85

law of their common faith and by the municipal law of their common domicile, as well as the fact that they have had a child of the relationship, the marriage should be recognised. Additionally, the marriage had been unquestioned for 35 years.

Wall LJ stated that the decisions regarding recognition of the marriage in *Cheni* and non - recognition of the marriage in *IC* were based upon different considerations. It may seem that *both* marriages involve prohibited relationships under the Sexual Offences Act 2003 but there is a difference in the two. In *Cheni*, both adults were consenting and both lacked capacity to the marriage. Whereas in *IC*, there was an absence of any capacity to consent to the marriage as well as a lack of capacity to consent to sexual intercourse. [144]

Therefore in Wall L J's opinion, Sir Jocelyn Simon's words apply and he would hold in the instant appeal that the marriage is 'sufficiently offensive to the conscience of the English court that it should refuse to recognise it, and should refuse to give effect to the law of Bangladesh and Shariah law.' [145] By doing so, the court would be 'exercising common sense, good manners and a reasonable tolerance' and would be properly be applying the law of England.

The judges believed that the marriage would not only be exploitative and abusive to the disabled man but also exploitative to the bride. The case is of significance for those with mental disabilities who may enter into marriage in England. There has to be a balance for those who have a need for marriage and

[144] *Supra.* note 4. at 17.
[145] *Supra.* note 4. at 17.

therefore, a caring legal relationship and also for those who lack the capacity to understand the nature of marriage and sexual intercourse. Furthermore, it was held that the court has the power to prevent the removal of the mentally disabled man to Bangladesh. Finally, this case proves policy can be used for any aspect of non-recognition of private international law, and that non-recognition is available for the court in despite lack of precedent in this area. [146]

IX. Early/Child Marriage in General

There are several general policies[147] underpinning the non-recognition of foreign child marriages in English law. The first policy is that, the minimum age for marriage in English law is set at 16 with parental consent and 18 without parental consent. However, there are many societies that allow males and females to enter marriage at a younger age. [148] The issue of whether a girl or a boy has consented to marriage is contentious because some of these early marriages are brokered by the parents without the child being involved. The assumption, in these foreign countries, is that once a girl is married, she is a woman.[149] Because of these problems, there will be many 'underage' marriages seeking recognition under English private international law.

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[146] *Supra.* note 4. at 6. See also R. Probert 'Hanging on the Telephone: City of Westminster v IC' [2008] *Child and Family Law Quarterly* 395.
[147] And therefore policy issues/policy considerations.
[148] B. Stark *International Family Law; An Introduction* (USA Aldershot Ashgate Publishing 2005) 22-24.
[149] *Ibid.*

The second policy underpinning English law's dislike of underage marriages stems from the fact that there are many international law conventions that expound the need for full and free consent of the spouses. So, the concept of marriage as an internationally recognised human rights norm is well – established. [150] Therefore, it is up to the judiciary when dealing with underage marriages in private international law to be aware of the international legislation and the need for commitment to these conventions. The third policy in English law against underage/child marriages is the issue of sex with minors. In English law, sexual activity with a minor is a criminal offence. [151]Whereas, in certain foreign countries,[152] sexual activity with a minor would not constitute a criminal offence under the foreign law.

The fourth policy that underlies the judiciary's decisions in underage marriage recognition is whether there are English interests/English policies involved in the instant case. In English private international law, the recognition of an early marriage could come forth in several ways. Firstly, a valid foreign marriage with one or two underage parties may be contracted in a foreign country. Secondly, one party to a foreign marriage may have an English domicile , whereas the other party to the same marriage may possess a foreign domicile. The question that would be foremost in the English court's mind is

[150] Convention on Celebration and Recognition of the Validity of Marriages; The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, The International Covenant on the Elimination of All Forms of Discrimination Against Women, The Convention on the Elimination of all Forms of Discrimination Against Women, The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.
[151]Section 5 and Section 9 of the Sexual Offences Act 2003.
[152] *Ibid.*

whether to recognise the fully foreign marriage, since there are no English interests[153] threatened. The other question for the English court would be to recognise the underage marriage with one party having an English domicile. Arguably, the second scenario illustrates an instance where English interests are threatened. The following will now relate several cases in point in English private international law.

A. Underage foreign marriage cases in English private international law

The main decision in relation to underage marriage in English private international law is *Pugh v Pugh*.[154] The husband and the wife were married in Austria in 1946. At the time of the marriage, the wife, then aged 15, was domiciled in Hungary. The husband was a British army officer who had an English domicile. At the time, the husband was serving in Austria. The couple moved home several times and lived in various countries, but came to England to settle down. Some years later, the wife petitioned the English court for a decree of nullity on the grounds that she was under-age at the time of her marriage.

The case, and more specifically, the choice of law, was difficult to decide because three different laws could have been used by the English court to determine the validity of marriage. In Hungarian law, the marriage was considered to be voidable if the wife was under the age of 16, but because she had not chosen to make the marriage void before she was 17, it

[153] The interests of English domiciled parties.
[154] [1951] P 482.

then became valid. The other law that the court may have used is Austrian law, since it was the law of the place of the celebration.[155]

If either Austrian or Hungarian law was used, the wife had capacity under both laws. Therefore, both countries would have held the marriage valid. The English statute that was in question was the Age of Marriage Act 1929 which provided that 'a marriage between two persons either of whom is under the age of 16 shall be void.' Therefore, if English law was the choice of law, was the 1929 Act applicable? Did the 1929 Act apply extra-territorially to the marriage which was celebrated in Austria? Furthermore, if English law did apply, what would be the effect on capacity? As we have seen previously, the wife possessed capacity under Austrian and Hungarian law, so all that needs to be decided is the issue of capacity under English law, the law of the husband's domicile.

At first glance, the husband would appear to have capacity by English law, as he was well above the age of 16 at the time of the marriage. The court construed the law to apply extraterritorially to English domiciliaries who were residing outside the United Kingdom, and therefore, applying to all marriages of English domiciliaries whether they were resident in the United Kingdom or abroad. And the statute prevented either spouse of the marriage from marrying, where one party was under 16, as long as one of the parties had an English domicile. Using this interpretation, a nullity decree was granted to the wife.

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[155] See P.M. North's comments in *Essays in Private International Law* (Oxford Oxford University Press 1993) 138 – 143 where he discusses using the law of the *lex loci* as a possible route for determining capacity questions in *Pugh v Pugh*.

The broader implication of *Pugh v Pugh* for foreign marriage recognition in English private international law is that domestic policies, and therefore, public policy is reflected in the choice of law rule. Clearly the decision does not affect the domestic policies of Austrian or Hungarian law. English marriage law policy, and therefore, public policy, was considered by the judge in *Pugh v Pugh* who stated:

> "According to modern thought it is considered socially and morally wrong that persons of an age, at which we now believe them to be immature and provide for their education, should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth. Child marriages are by common consent believed to be bad for the participants and bad for the institution of marriage. Acts making carnal knowledge of young girls an offence are an indication of modern views on this subject. The remedy that Parliament has resolved for this mischief and defect is to make marriages void where either of the parties is under sixteen years of age." [156]

This is an articulate, and more interestingly, rare exposition of policies (or the policy considerations)[157] that underlie the decision in *Pugh v Pugh.* Therefore, if a foreign marriage were to come forth to the English court, the judge must decide two questions. What is the policy underlying the non-recognition of a foreign capacity or foreign marriage? Similarly to the articulation we have seen above in *Pugh v Pugh,* we must ask ourselves who or what is the policy motive designed to protect?

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[156] [1951] P 482 at 492.
[157] And with this, we would be engaging in the tradition of interest analysis.

Is it for the protection of the parties themselves, or to protect marriages that are inherently unstable and unfamiliar to English law?[158] A further question to consider is how far, geographically, to apply this exposition of policy. Should the courts apply non-recognition, such as in *Pugh v Pugh,* to all fifteen year olds who possessed an English domicile regardless of where they were living outside England? Or should consideration be taken into account as to where the intentions of a couple are planning to reside? For example, if there is a strong connection with England, or the couple plan on returning to England after their marriage, then would English law be applicable? It could be argued that English requirements as to age and capacity should be applied in those cases with a strong connection. It is in this manner that policy plays an implicit role in the decisions of a judge. By manoeuvering the various laws and balancing the many factors for the connection to the parties, legitimate concerns(policies) are being factored in by the judiciary.

In *Mohamed v Knott* [159] both parties in the case were Nigerian and domiciled in Nigeria. The marriage took place in Nigeria, and was valid according to Nigerian law. The wife was thirteen years of age and the husband was twenty six. The couple came to England for the husband's studies after the marriage in Nigeria. The husband married her at the age of nine, slept with her, and then brought her to England. Parker LJ, when considering this case, said that the court had to consider what is repugnant to our culture would be considered

[158] Beckett 'The Question of Classification 'Qualification' in Private International Law' (1934) 15 *British Yearbook of Private International Law* 46 and also Morris (1946) *Law Quarterly Review* 170.
[159] [1969] 1 QB 1.

normal, and therefore natural in Nigerian culture. Lord Parker LJ also considered that it was not until the Age of Marriage Act 1929 that an age requirement was set for marriage in English law.

He stated

> "Granted that this man may be said to be a bad lot, that he has done things in the past which perhaps nobody would approve of, it does not follow from that that this girl, happily married to this man, is under any moral danger by associating and living with him. It could only be said that she was in moral danger if one was considering somebody brought up and living in our way of life, and to hold that she is in moral danger in the circumstances of the case can only be arrived at, as it seems to me, by ignoring the way of life in which she was brought up."[160]

Therefore, recognition of the marriage in *Mohammed v Knott* would not offend public policy. Unlike *Pugh v Pugh,* the only argument advanced against the recognition of the marriage was that it was potentially polygamous.

Following the reasoning in *Pugh v Pugh*, the court could have gone through the same rationalisation before arriving at the final decision. [161] Judges should ask the following questions. What is the policy motive designed to protect? Are the parties themselves in need of protection? Or does non-recognition of the foreign marriage protect the English ideal of what is considered

[160] [1969] 1 QB 1 at 16.
[161] P.M.North *Essays in Private International Law* (Oxford Oxford University Press 1993) 138-140.

to be a stable marriage. Finally, how far, geographically, is the applicability of English statutory law?[162]

As we can see, there was less debate over the recognition of this child marriage as opposed to *Pugh v Pugh*. There are several explanations for this. One explanation could be because the husband was merely a medical student studying in the United Kingdom, and therefore, not residing in England on a long-term basis. [163] Therefore, since the marriage was valid by the domicile of both parties, it should be recognised in English law without resort to public policy.

Another argument in favour of recognition was that the age of marriage of the wife was considered culturally acceptable in Nigeria. There was nothing that offended notions of injustice or immorality to England or English policies when recognising this marriage – the marriage was valid in Nigeria. Since the girl had attained the age of thirteen at the time of the marriage, it is plausible that she had attained puberty, and therefore, womanhood, thereby justifying recognition. A further consideration needs to be highlighted. If a party to a foreign marriage comes forth for recognition in the English court today whose age is below thirteen, would the marriage still be recognised? Or should the age for minimum marriage recognition be fixed at thirteen as in *Mohammed v Knott*? Where should a policy borderline be set?

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[162] In relation to statutes or relativity, the broader question to ask is does this statute apply? The question should not be if English law should apply but should the particular statute apply? Courts may need to construe an implied choice of law to cases involving foreign elements. See JHC Morris in 'The Choice of Law Clause in Statutes' (1946) *Law Quarterly Review* 62 170. Again, public policy rears its head because the courts are not always conscious of applying or shaping conflicts laws when purporting to give effect to the rules against extra-territorial application. See *Saxby v. Fulton* [1909] 2 K.B. 384 (C.A.) in relation to gambling contracts.

[163] See P. North *Essays in Private International Law* (Oxford *Oxford University Press* 1993) 143-146. See Karsten 'Child Marriages' (1969) 33 *Modern Law Review* 212 and R. Deech 'Immigrants and Family Law' (1973*) New Law Journal* 110, 111.

In this author's opinion, it is highly likely that a fully foreign marriage [164] with a female who is twelve years of age would still be recognised. A year's difference from the decision taken in *Mohammed v Knott* would be negligible. On the other hand, if the situation in *Mohammed v Knott* had been a 12 year old boy and a 26 year old woman, the decision may have taken a different turn of events. The question seems to turn on evidence as to whether this would be the norm in the foreign country. Therefore, in the case of a 12 year old boy and a 26 year old woman, if evidence is taken that that is the cultural norm, then the marriage would be recognised such as it was in *Mohammed v Knott.*

One could argue that since the age of criminal responsibility is now set at the age of 10 in England, [165] if a child is considered mature enough to take responsibility for a crime, it is also possible that a child is able to understand the obligation and nature of marriage. Particularly if the child is from a society that emphasises early marriage, then, the English court would be enforcing what is the norm overseas. This is the reasoning that we have seen in Lord Parker's statements in *Mohammed v Knott.* [166]

How should an English court address the recognition of a foreign marriage when a party to the marriage [167] is under the age of twelve? Would it still be recognised at either the age of ten or eleven?[168] There have not been any such cases as of yet. I would propose that a valid foreign marriage would still be

[164] Both parties have a foreign domicile.
[165] Children and Young Persons Act 1933 (1933 c 12) Part III Protection of Children and Young Persons in relation to Criminal and Summary Proceedings.
[166] [1969] 1 QB at 16.
[167] Either a man or a woman.
[168] Adrian Briggs poses the question as to whether a marriage to a party at the age of 5 would be against public policy in Chapter One of A. Briggs *The Conflict of Laws* (Oxford Oxford University Press 2002). Briggs does not provide an answer to the question.

recognised by the English court, provided that there are no other reasons in favour of non-recognition. As in *Mohammed v Knott*, the indicative factor would be the ante-nuptial domicile of both parties. If the couple was living in England after the marriage, then perhaps a very immature marriage at age nine or ten would not be recognised.

On the other hand, if the parties here in England were to stay for a long time, then the marriage may not be recognised. Another factor inherent in child marriages would be the respective ages of the parties. If there was a significant age difference, then the possibility of coercion or violation of the younger party's rights may exist. In *Mohammed v Knott* and *Pugh v Pugh* the age difference was around twelve years between the male and the female. For the sake of postulation, how would the English court recognise a marriage if the age difference was twenty or thirty years as opposed to ten or fifteen years. For example, if a child of 12 was married to a man aged 60, would this marriage be recognised? This has yet to be tested. Again, it is the author's proposition that if the age difference is very significant, and one of the parties is under the age of 16, then the foreign marriage should not be recognised. The amount of control that an older man[169] can have over someone young can be enormous, so much so that the younger party may be at the significantly weaker end of the relationship.[170] If such a case were to come forth for recognition to the English court, this type of marriage would be contentious because there is very little

[169] Or, even an older woman. See www.cnn.com 9 April 2010 M. Jamjoon 'Yemeni child brides.' (Website last visited April 2010).
[170] And, as we shall see in Chapter 5, public policy may also be used in non-recognition where a party may be in a weaker bargaining situation.

existing case law to rely on for a prediction. Consequently, it is difficult to say if and when such cases would be recognised. As we can see, the major cases of *Mohammed v Knott* and *Pugh v Pugh* were decided over forty years ago, and so we do not have any modern dicta to rely on in this area.

There are several principles that can be gleaned from the past cases on child marriages for the future. Firstly, this author submits that setting an absolute age for foreign marriage recognition would be too inflexible. Because of the diversity of marriage requirements in other jurisdictions, what the judiciary needs is flexibility and carefully reasoned adjudication. All the circumstances of the parties in question need to be considered – the respective age of the parties, the circumstances of the parties, the connection with England. Evidence of the foreign law and cultural understanding of the foreign law needs to be gleaned by the adjudicator. It is only in this manner that a reasoned decision can be taken in relation to the recognition of child marriages in English private international law. It is also in this manner that policy considerations creep in and shape the eventual decision in the case.

X. Forced Marriages in English Private International Law

A final matter to consider is the question of forced marriages. The issue of forced marriage has gained prominence only recently in English law.[171] Forced

[171]Most notably, in the Home Office Paper 'A Choice by Right' *Home Office Communications Directorate* June 2000. www.homeoffice.gov.uk (Website last visited March 2010.)(See forced marriage archives at www.homeoffice.gov.uk).

marriage is not a problem limited to foreign domiciliaries, but also to people who reside in the United Kingdom. But, in these cases, if both parties are domiciled here, then no private international law issue arises. To recognise a forced marriage, however, is akin to recognising a wildebeest or rhinocerous – it is difficult to describe in the abstract, but few people have difficulty describing it when it comes charging. [172] What is more problematic for the English court are the 'grey areas' of forced marriage that people have entered into with their acquiescence, but do not actually want to be in.

The issue of whether a party validly consented [173]to a marriage is a requirement in English law. Section 12 (c) of the Matrimonial Causes Act 1973 in English domestic family law provides that a marriage should be voidable if either party did not validly consent to the marriage due to duress, mistake, unsoundness of mind, drunkenness and the effect of drugs, fraud or misrepresentation.[174] Therefore, an English domiciliary must exercise full capacity to consent when entering a marriage. However, the requirement of consent to marriage is a matter for the law of the domicile, and so there may be problems if the law of the domicile does not require consent (such as in forced marriages or marriages in countries that happen under duress or circumstances that do not require consent).[175]

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[172] See P. Singer 'When is an Arranged Marriage a Forced Marriage?' April 2001 *International Family Law Journal* pp 30.
[173] Consent in discussion here relates to the individual's consent to a marriage and not the parental consent needed in English law for marriages where the party is over 16 but under the age of 18. See Douglas and Lowe (Eds.) 10th Ed. *Family Law* (Oxford Oxford University Press 2007) pp 55.
[174] *Ibid.* at 82-85. Also Section 12(c) can apply to a fully foreign marriage – normally a court only needs to decide the validity.
[175] See *Szechter v Szechter* [1971] P 286.

One policy that underpins English law's dislike of forced marriage is that there is now legislation criminalising forced marriages that take place in the United Kingdom. [176] This policy would be prevalent in all forced marriages heard in an English court. Another policy that would prevail in the mind of the adjudicator is the concept of autonomy. There must be autonomy in the contract of marriage in England. If the parties to a foreign marriage have been forced to enter into the ceremony, English law would find the marriage offensive and diametrically opposite to English law's need for autonomy. Forced marriage has been labelled as an "abuse of human dignity and human rights" and the United Kingdom should not ignore this culturally sensitive area anymore.[177] The other legitimate concern that influences adjudicators is the need to protect English interests, and therefore, English domiciliaries and others who have a strong connection to the English forum, from forced marriage.

Although the issues of forced marriage in this thesis are confined to private international law scenarios, it is appropriate to relate the recent domestic governmental development, which will affect adjudication of private international law cases being heard in England. Recently, the Government has taken an overt policy stand in order to combat forced marriages. The possibility of enacting legislation criminalising forced marriage had been debated over the last 2 years, and in 2008, this became a reality. In November 2006, a bill on forced

[176] Forced Marriage (Civil Protection) Act 2007.
[177] Forced Marriage; Guidance from the Law Society – Speech given by the Law Society and the representatives from the Foreign and Commonwealth Office at Russell Square in October 2002. In May 2007, Baroness Scotland and Lord Templeman launched a 2 year project to combat forced marriages. This review, since the passage of the Forced Marriage (Civil Protection) Act 2007 is now being reviewed continuously.

marriages introduced by Lord Lester of Herne Hill was debated in Parliament, and the Forced Marriage (Civil Protection) Act was passed and received the Royal Assent in 2007.[178]

It would be useful to set out some of the relevant provisions of the Act here. English and Northern Irish courts now have the power to make an order for the purposes of protecting individuals who have been forced into marriage in two circumstances.

Section 63 A (of the Forced Marriage Civil Protection Act 2007) states:

(1) (a) a person from being forced into marriage or from any attempt to be forced into marriage; or

(b) a person who has been forced into marriage.

(2) In deciding whether to exercise its powers under the section and, if so, in what manner, the court must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected.

(3) In ascertaining that person's well-being, the court, must in particular, have regard to the person's wishes and feeling (so far as they are reasonably ascertainable) as the court considers appropriate in light of the person's age and understanding

(4) For the purposes of this Part a person "A" is forced into marriage if another marriage "B" forces A into enter into marriage (whether with B or another person) without A's full and free consent.

(5) For the purposes of subsection (4) it does not matter whether the conduct of B which forced A to enter into marriage is directed against A, B or another person.

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[178] Forced Marriage (Civil Protection) Bill (HL) as introduced by Lord Lester of Herne Hill. See HL Debs Cols. Jan. 26, 2007. IR [687] (16.11.06) 19 2R [688] (26.1.07) 1319-67. It received the Royal Assent on 26 July 2007. The Act came into force on November 25, 2008. This Act also amends the Family Law Act 1996. See also *Re SK* (An Adult)(Forced Marriage: Appropriate Relief) [2004] EWHC (3202) , *Ws v MI* [2006] EWHC 1646 (Fam), *P v R* (Forced Marriage Annulment; Procedure) [2003] 1 FLR 661 Fam Div. See also Forced Marriage Research [2009] *International Family Law* 1 September 2009 at 143.

(6) In this part, "force" includes coerce by threats or other psychological means (and related expressions are to be read accordingly); and "forced marriage protection''order means an order under this section.

It is notable, that a protection order under the Act can be made in a variety of ways – by the court on an application being made to it, or even if there has not been an application.[179] The person who is to be protected by an order is also able to make an application for an order.[180] The court may also make forced marriage protection orders on an *ex parte* basis. [181] Understandably, this Act has important ramifications for the ethnic communities of Britain.

A. Private international law issues of forced marriages

What are the ramifications of forced marriage for private international law? Problems for private international law in relation to forced marriages may arise in several ways. The scenarios, as we shall see, are similar in reasoning to the question of recognising a valid foreign capacity in the marriage cases. The first scenario is when the English court may be asked to recognise a forced marriage when both parties have a foreign domicile. The English court will then have to decide whether the alleged forced marriage was valid by some foreign jurisdiction. If not valid, the court will consider if there was duress or some vitiating factor that may invalidate the marriage. However, even if the court

[179] See section 63(C) (6) Forced Marriage Civil Protection Act 2007.
[180] See Section 63(C) (2) Forced Marriage Civil Protection Act 2007.
[181] See Section 63(D) Forced Marriage Civil Protection 2007.

finds the marriage valid by the law of the foreign country, public policy may still be used for non- recognition of the marriage. The parties would have to adduce evidence as to the nature and extent of lack of consent that would invalidate the alleged forced marriage. Forced marriages may be repugnant in most cases to English judges, but this author argues that the level of connection with England as the forum needs to be strong before the English court refuses recognition.

In the case of a fully foreign forced marriage, the argument for recognition is the strongest because the level of connection which the parties have with England as the forum, is low. The same arguments the court used for the recognition of *Mohammed v Knott* [182]and child marriages[183] in favour of recognition might also be levelled at a fully foreign forced marriage. If the parties' stay in England is transient, then some may argue English interests are not threatened. Again, one could argue that culturally, the parties consider such marriages to be the norm in their own country.

Another factor that may be relevant in the recognition (or non-recognition) of a fully foreign forced marriage is the length of the marriage. For the sake of hypothesis, take two different hypothetical situations involving fully forced marriages. If a couple A and B got married (and the marriage was a forced marriage) in a foreign country in 2009, and came to England in 2010, and B petitions the English court for annulment or non-recognition would the English court not recognise the forced marriage? Another situation may arise if A and B were married (and the marriage was a forced marriage) in a foreign country in

[182] [1969] 1 QB 1.
[183] *Pugh v Pugh* [1951] P 482.

1995, and then came to England in 2010, and B tries to invalidate the marriage, it is questionable as to whether the English court would invalidate the marriage. This author would argue that in the first situation, the forced marriage may be recognised if the parties were staying in the United Kingdom on a *temporary* basis. The English judiciary may not want to concern themselves with transient visitors to the United Kingdom. However, if the parties in the first situation were to settle (or intend to settle) in the United Kingdom then the forced marriage would not be recognised. The argument in favour of non-recognition would be stronger if B were to argue that this was B's first chance at invalidating the marriage.

In the second situation, this author suggests that all facts of the case must be examined before the English court jumps to non-recognition. The marriage may have been a lengthy one and there may be children or other interests involved that may be affected by non-recognition of the forced marriage. The court should also examine why B decided to petition for invalidation of the marriage after such a long period of time. B may claim that this was the first chance to vindicate B's human rights. This author suggests that the court look again, to whether B is planning to settle in the United Kingdom, or whether B has picked up habitual residence in the United Kingdom before invalidating the forced marriage. This author argues that while forced marriage is in itself intrinsically repugnant, English judges should consider the level of connection before the party has with the United Kingdom before jumping to non-recognition. This author would argue that English law and therefore, English marriage policies should

apply to those individuals with English interests. It is up to the judge in each individual case to determine whether the connection is sufficient enough to apply English law. [184]

Of greater relevance to this country's interests would be the scenario in which one party was domiciled here, with the other party foreign domiciled, and the forced marriage takes place in the United Kingdom. It is not uncommon for British citizens to bring in foreign spouses, or "potential spouses" who seek leave to remain, and the ceremony takes place in England.[185] So, if the marriage takes place in England[186] and the marriage is alleged to be of a forced nature, the English court would have to treat the case as a domestic marriage with English family law rules and not private international law rules. If the Registrar is aware that the marriage could be a forced one, then the Registrar should be compelled not to perform the ceremony if the parties seem suspicious or vulnerable.

The third manner in which a forced marriage may occur is if an English domiciliary is taken to a foreign country and forced to go through a marriage ceremony there.[187] In this case, the foreign marriage will undoubtedly come into question if England, as the forum, is asked to recognise it. It should be noted that the English party would not have capacity to enter into such a marriage. The

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[184] See the cases of *RB v FB* [2008] EWHC 1436 (Fam) [2008] 2 FLR 1624. See also A. Gill and S. Anitha 'The illusion of protection? An analysis of forced marriage legislation and policy in the United Kingdom' September 2009 Vol 31 *Journal of Social Work Law and Family Law* pp 757 – 769.

[185] 'New Visa Rules' *The Times Online* March 29, 2007 in which there were proposals to raise the visa age to 21 at www.TheTimesonline.co.uk (Website last visited April 2010. See archives of www.TheTimesonline.co.uk).

[186] Raising awareness issues surrounding forced marriage 19 April 2007 at www.forcedmarriage.nhs.uk (Website last visited April 2010. See archives at www.forcedmarriage.nhs.uk). See also Forced Marriage Act 2007 at www.bbc.co.uk/ethics/forcedmarriage/criminal_1.html.com(Website last visited May 2010).

[187] See *Pugh v Pugh* [1951] P 382.

English court would not need to exercise cultural relativism to recognise such a marriage. In this situation, the court will have to resort to public policy for non-recognition. Similarly to the arguments presented earlier in relation to underage marriages, if an English domiciliary was in need of protection, then English law is applicable regardless of geographical boundaries.

This is a rare instance in which the United Kingdom has taken an overt stand against such marriages with legislation, and the added support of the criminal law. Such a direct stand indicates that the policies propelling the recognition and non-recognition of foreign marriages of a country can change quickly over a short time. Therefore, the goals of English private international law (implicitly as well as a trumping discretion) are constantly evolving.

XI. Conclusion

As we have seen throughout this chapter, policy considerations still operate expressly in its residual form in the private international law rules relating to heterosexual marriage as well as implicitly in the manipulation of the choice of law rules. Additionally, the elucidation of policy considerations in relation to the formalities of marriage has been rare, as well as the dicta arising from such cases. Although some initial forays have been taken in recent case law, what is truly needed is a greater awareness of the way in which judges utilise these policy objectives/ policy considerations. In this manner, both the judiciary as well as the parties to the litigation will be better informed as to the policy

objectives underlying this area. This author has suggested that since every decision in marriage recognition is ultimately a balancing exercise, what the court should do is to fully reason and adjudicate all policy considerations in each case *before* arriving at a decision. This author has concluded that this balancing exercise should be done even in relation to the non – recognition of fully foreign forced marriages.

National laws need to be subject to evaluation in order for the judiciary and litigants to understand the rules more fully. The last time the rules relating to foreign marriage recognition and choice of law in marriage was examined by the Law Commission was a little over two decades ago. [188] With the recent proliferation of same – sex partnerships, new forms of cohabitation, the problems in relation to forced marriages and the prospect of an EU family law, there will be an even greater need for the awareness of the rules (and underlying policies) relating to relationship recognition in English private international law. [189] Consequently, this author suggests that the time is ripe for a review of the marriage recognition rules.

[188] Law Commission Working Paper No. 89 'Private International Law Choice of Law Rules of Marriage' (London HMSO 1985) and also Law Commission Report No. 165 'Choice of Law Rules of Marriage (London HMSO 1987).
[189] See Chapters 3 and 6 generally. See also J.Meesun, M.Pertegas, G.Straetmans, F.Swennen *International Family Law in the European Union* (Antwerp Oxford 2007).

Chapter Three

Policy and the Recognition of Same – Sex Marriages, Partnerships and New Forms of Cohabitation in English Private International Law

I. Introduction

The traditional definition of marriage in English law was to be found in *Hyde v Hyde* [1] when Lord Penzance stated " I conceive that marriage, as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others." This definition denied recognition to any relationship falling short of conventional marriage. However, in a span of one hundred years, English law has demonstrated a commitment to ethnic and cultural pluralism by gradually recognising valid polygamous marriages under English law. [2] Since *Hyde v Hyde* it has taken a number of cases and legislation to establish that valid polygamous marriages are to be treated similarly to monogamous English marriages for most purposes.

Social evolution and the emergence of new family forms present new challenges for English private international law. The traditional concept of marriage [3] and therefore, Lord Penzance's dictum is no longer universally endorsed. The requirement that the parties to the marriage should be 'a man and

[1] (1866) LR 1 P & D 130 at 133.
[2] See Cheshire, North and Fawcett (Eds. J.Fawcett, J. Carruthers and P. North) 14th Ed. *Private International Law* (Oxford Oxford University Press 2008) 942 – 943 for the history behind matrimonial relief and polygamous marriages.
[3] For an incisive essay on trends in marriage and divorce, refer to S. Bridge's essay in J. Herring (Ed) *Family Law; Issues, Debates and Policy* (Collompton United Kingdom Willan Publishing 2001).

a woman' must be questioned. The passage of the Gender Recognition Act 2004 and the Civil Partnership Act 2004 heralded an epic change in English law. Certain transsexuals and homosexuals are now allowed to enter into a legally recognised relationship in England. Additionally, in 2006, the first case for the recognition of a same – sex marriage has come forth to the English court. In *Wilkinson v Kitzinger*,[4] two English domiciliaries contracted a same – sex marriage in Canada and petitioned the English court for recognition. Similarly, there has also been a rise in alternative family forms worldwide. There has been an increase in heterosexual cohabitation, with many jurisdictions enacting a status and or rights and responsibilities for heterosexual cohabitants. Additionally, some other jurisdictions have a status for individuals in non – romantic relationship who share a household and finances together. These forms of status often exist alongside marriage in many foreign jurisdictions.

With the proliferation of the many different forms of relationships, heterosexual marriage is no longer the focus of family rights and obligations. Similarly to a married couple, the parties to one of these new partnership forms will seek to have their relationship recognised for many purposes such as: succession, maintenance rights or obligations, parental orders with respect to children, mental incapacity, social security benefits and pension rights. How would the English court recognise such new relationship forms?

Not long ago, it was thought that policy would be used in a negative manner to justify non – recognition to one of these new relationship forms in

[4] *Wilkinson v Kitzinger* [2006] EWHC 2022; [2006] 2 FLR 537.

English private international law. [5] This author predicts that with the spate of recent developments such the Gender Recognition Act 2004, the Civil Partnership Act 2004 as well as new cases such as *Wilkinson v Kitzinger* it is unlikely that the English court would use policy to justify non – recognition of a new form of status outright. As we shall see in this chapter, the notion of policy has changed from being a negative 'trumping" one of non – recognition to a positive one of recognition (and therefore satisfying the legitimate expectations of individuals) in many instances because of Parliamentary intervention and case law stemming from England and Europe.

In the aftermath of the Gender Recognition Act 2004, the Civil Partnership Act 2004 and *Wilkinson v Kitzinger,* this author contends that difficulties still exist for English private international law. There are still recognition problems for a foreign same – sex marriage as well as new cohabitation forms. Recent developments have not completely purged the need for the use of policy in its residual, negative trumping form in this area. However, this author will argue that policy in this form is still needed in certain circumstances. We shall see, however, that with the implementation of much legislation, policy in its negative trumping role has grown narrower and narrower (and in some instances nearly vanished) as opposed to its previously feared 'unruly' basis in the common law.

[5] See K. McNorrie's predictions in 'Reproductive Technology, Transsexualism and Homosexuality; New Problems for International Private Law' (1994) Vol 43 (4) *International and Comparative Law Quarterly* 752 at pp 8 of Westlaw document. In 1994, he predicted that English PIL may resort to public policy and therefore, non-recognition. See also Y. Tan's contribution in 'New Forms of Cohabitation in Europe; Challenges for English Private International Law in Europe' in K. Boele – Woelki (Ed.) *Perspectives on the Harmonisation or Unification of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 437 – 461 where she also hypothetically predicts non - recognition of family forms when writing in 2003.

We shall now examine the remaining private international law problems and policy implications in the rest of this chapter.

II. The Impact of the Civil Partnership Act 2004 in Recognising Foreign Homosexual Relationships

Before the passage of the Civil Partnership Act 2004, the prospect of recognition for a same – sex marriage in English private international law was likely but the situation never arose. It was postulated in academic commentary [6] in 2003 that English policy would dictate against recognition of any form of same– sex relationship. However, within a decade English law has seen drastic change in policy towards same – sex partnerships. As long as the requirements have been fulfilled, recognition of a same–sex partnership by the English court has changed from a negative (non-recognition) to a positive (recognition) one.

Therefore, at first glance, it would seem that the implementation of the Civil Partnership Act 2004 has eradicated the many recognition problems that existed before the Act was passed. The effect of Sections 212 to 218 is that the parties to certain relationships outside the United Kingdom are to be treated as having formed a civil partnership with the effects given to such a partnership by the Act. This author contends that it is still important to discuss the issue of registered partnerships, and whether any recognition difficulties exist.

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[6] See Y. Tan's contribution in 'New Forms of Cohabitation in Europe; Challenges for English Private International Law' in K. Boele – Woelki *Perspectives for the Unification and Harmonisation of Family Law In Europe* (Antwerp Oxford Intersentia 2003) 437 – 461.

A civil partnership is defined in English law as a relationship between two people of the same sex, which is formed when they register as civil partners with each other and in accordance with the Civil Partnership Act 2004.[7] A civil partnership ends only on death, dissolution, or annulment.[8] The Act contains elaborate provisions which mirror those in marriage. [9] In several European countries, England and in the United States, a special status has been implemented for same - sex couples that is akin to, but separate from the institution of marriage. This is often known as a registered partnership or in the case of England, a civil partnership. [10] The implementation of a partnership institution is normally the culmination of many years lobbying and litigation. For instance, in the United States, the fight for equality for homosexuals and the right to marry has been raging for a number of years. 'Rights' in the United States are subject to state and federal levels. Where the institution of marriage is concerned, the fifty states are the gatekeepers. Therefore, the federal government normally recognises that the states are in charge of issuing marriage licenses. In some states in the USA,[11] as well as England, there are two different types of institutions for heterosexuals and homosexuals. [12] In most circumstances, the

[7] Civil Partnership Act 2004, s. 1(1)(a).
[8] Civil Partnership Act 2004 s. 1(3).
[9] *Ibid.* s.2(1).
[10] *Ibid.* The registration for the Civil Partnership Act 2004 ss.2 – 3P6 as amended by the CPA (Amendments to Registration Provisions) Order 2005, SI 2005/2000 and also Civil Partnership Act ss. 3. The prohibited degrees of relationship are prescribed in Sch.1, Pt. 1. Section 4 which set out provisions in relation to parental consent. Also, circumstances in which a civil partnership registered in Scotland or Northern Ireland will be regarded in England as void or voidable. See Section 54(1) of the CPA 2004.
[11] See generally the many contributions in R. Wintemute and M. Andenaes *The Legal Registration of Same – Sex Partnerships; A Study of National, European and International Law* (Oxford Portland Oregon Hart Publishing 2001).
[12] *Infra.* note 13.

registered partnership has been enacted for most homosexual couples, while marriage has been left for heterosexuals. [13]

Before 2004, the difficulty for the English court was *how* to recognise a foreign registered partnership. Now that England has an equivalent in the form of a civil partnership, the path for recognition in English private international law is an easier one. This discretion of public policy will not be used to trump the status accorded to the couple in the foreign jurisdiction.[14] The clause(s) that effect recognition are in Sections 212 – 218 of the Civil Partnership Act 2004. [15] They provide that the parties to an overseas relationship are to be treated as having formed a civil overseas partnership is defined as 'a relationship which is registered (whether before or after the passing of the Act) with a responsible authority or a territory outside the United Kingdom and which must meet certain conditions.'

These conditions are;

(a) the parties must be at the time of registration of the same sex under the law of the country of registration (including its rules of private international law).[16]

(b)Neither party may already be a civil partner or lawfully married[17]

[13] See Paul Axel Lute's continuing weblog of jurisdictions around the world and states in the USA that have enacted same – sex partnerships and marriages. 'Same –Sex Marriage ; A Selective Bibliography of the Legal Literature' at www.law-library.rutgers.edu/ss.html. (Website last visited April 2010).
[14] See G. Douglas and N. Lowe Bromley's *Family Law* 10th Ed (Oxford Oxford University Press 2007) pp. 41 – 45 where the requirements of a civil partnership are given, as well on pp. 95 – 99.
[15] See M. Harper(et al) account and explanation of all the provisions in *Civil Partnership; The New Law* (Bristol Jordan Publishing 2005).
[16] Civil Partnership Act 2004, Section 212(1)(b)i.
[17] Civil Partnership Act 2004 Section 212 (1)(b)ii.

(c) that the relationship is either a relationship specified in Schedule 20 the Act, which meets the general conditions set out in Section 214 of the Act.

As academics previously hypothesised, the question of how England would cope with the applicable law in relation to registered partnerships has been solved simply by having a list of foreign relationships that have been deemed, in advance, as equivalent to England's civil partnership. This list is known as Schedule 20[18] of the Civil Partnership Act 2004. Schedule 20 comprises a list of overseas relationships that would be recognised as "equivalent" to a civil partnership in English law. The general conditions prescribed in Section 214 provides that the relationship, under the law of the country of registration (and including its rules of private international law)[19] should be registered, as the relationship may not be lawfully married, and the relationship is of indeterminate duration, and the effect of entering into is that the parties are treated as a couple either generally or for specified purposes, or treated as married.[20] As long as the respective country's requirements have been followed, and the status is listed in Schedule 20, English law will recognise the relationship as equivalent to a civil partnership.

Similarly to the recognition of a foreign marriage[21] in English private international law, the recognition of an overseas relationship is also subject to

[18] SI 2005/3129, Art 3. Amendments are being made, continuously to keep pace with the many different forms of partnerships/similar partnerships worldwide.
[19] Civil Partnership Act 2004, Section 212(2). In the usual case, the parties to a civil partnership will be treated as having formed the civil partnership at a time when the overseas partnership is registered under the law of the country of registration(including its rules of private international law) as having been entered into.
[20] Civil Partnership 2004, Section 215(3). But if the partnership has been entered into before December 5, 2005, then they are being treated as having formed a civil partnership on that date.
[21] As we have seen in Chapter 2.

rules of formal validity and capacity to enter into a relationship.[22] There are, however, additional provisions that the relationship has to fulfill.[23] First of all, there is the requirement that the parties must at the time of registration be of the same sex under the law of the United Kingdom.[24] This is now subject to a special rule regarding gender change and registration.[25] This rule only applies [26] where at the time of the registration[27] one of the parties was regarded as having changed gender but not having changed gender in the United Kingdom as having done so; and the other party was(under the law of the United Kingdom) of the gender to which the first party had changed under the law of the registration.[28] If, however, a full gender recognition certificate is issued under the Gender Recognition Act 2004 to a party to the relationship, the relationship is thereafter no longer prevented from being treated as a civil partnership. This rule is disapplied if after the registration of the civil partnership in question, either of the parties has formed a civil partnership or a lawful marriage. Another additional requirement is imposed when one party to the foreign relationship is domiciled in England.

If there is an overseas relationship that is registered by a person who was at the time of registration, an English domiciliary, the court will not treat it as an overseas relationship if either of them are within the prohibited degrees of

[22] Sections 217(1) and Sections 217(b) of the Civil Partnership Act 2004.
[23] Sections 212(2) of the Civil PartnershipAct 2004.
[24] And so the provisions of Sections 215(2) and 216(4) and of the Gender Recognition Act 2004 which also provides that two people are not to be treated as having formed a civil partnership as a result of having registered overseas if at the 'critical time' they were not of the same – sex under English law,
[25] Sections 216(1) Civil Partnership Act 2004.
[26] Section 214(1). Civil Partnership Act 2004.
[27] Section 214(1). Civil Partnership Act 2004.
[28] Section 212(1).Civil Partnership Act 2004.

relationship, or if they would have been if registering as civil partners in the United Kingdom. Two people are not to be treated as having formed a civil partnership (under the rules of the United Kingdom) as a result of having entered into an overseas relationship if it would be contrary to public policy to recognise the capacity under the law of the registration (including the particular country's rules of private international law) if one or both of them enter into the relationship.

Therefore, barring the issue of a repugnant capacity[29] or incapacity under the foreign law, most foreign same – sex registered partnerships and foreign same –sex civil partnerships would now be recognised in English private international law. One problem that remains is if the foreign same - sex registered partnership does not confer the same number of rights and obligations as the English civil partnership. Particularly if the number of rights and obligations increase under the law of the United Kingdom as opposed to the foreign status, then the parties may not want their relationship recognised here, because there may be *more* obligations stemming from the relationship. Each case involving a purported foreign partnership needs to be examined thoroughly before conferring the equivalent status of civil partnership.

As we can see, there has been a dramatic change in policy in just a couple of years. With parliamentary intervention, same – sex partnerships or civil partnerships are now acceptable for recognition in English law. The notion of a same – sex partnership being repugnant to English law and English sensibilities has been eliminated save in cases where it is contrary to public policy to recognise

[29] Civil Partnership Act ss 212 and 218.

the capacity under the law of the registration if one or both of them enter into the relationship. The difficulty regarding recognition of a same - sex partnership in English private international law has been solved.

A) Same-Sex Marriages

The principal question that loomed for English private international law following the Civil Partnership Act 2004 is whether or not a foreign same-sex marriage would be recognised. In 2006, the English court was presented with the opportunity to consider this query. In the landmark case of *Wilkinson v Kitzinger*[30] the English court was faced with the decision as to whether a foreign-registered same-sex marriage would be recognised in English law. In this case, two British university professors had been living together as a couple for thirteen years. They were also both domiciled, and remained domiciled in England. They went through a ceremony of marriage on 26 August 2003 that was lawful and valid by the law of British Columbia, which permitted marriages between persons of the same sex. Upon their return to the United Kingdom, and in advance of the coming into force of the Civil Partnership Act 2004, the petitioner, instituted these proceedings, and sought a declaration that the marriage was a valid marriage at its inception.

[30] The parties in *Wilkinson v Kitzinger* [2006] EWHC (Fam) had been the subject of three cases brought forth by Professor Wilkinson and Professor Kitzinger in 2006, just a few weeks after same-sex partners were allowed to register their partnerships in December 2005. The first case was heard in early 2006, but was thrown out by the Attorney General. The second case was to recover costs and was heard on 12 April 2006. [2006] 2 FLR 537. The third case [2006] EWHC 2022 (Fam) is elaborated above.

This author proposes that the decision in the case was ultimately propelled by the unarticulated workings of English policy by the judiciary.[31] As we can recall from Chapter 1 of this thesis, policy is often elusive and unstated by the judiciary when deciding cases. In *Wilkinson v Kitzinger*, this author submits that there are several unarticulated (and inter- related policies) which were at stake in the case. One was a policy against evasion of the law of the domicile (and therefore the law which governed capacity)[32] by the parties in question. The policy against evasion was not *overtly* stated anywhere in the case, but quite possibly weighed heavily in the minds of the judge when deciding the outcome. The other policy, which was discussed, was that the parties simply lacked capacity to contract a foreign same – sex marriage. What is notable for private international lawyers is that the English court also refused to consider any other theory than the dual domicile theory to validate the same - sex marriage. [33] Therefore the parties lacked capacity to marry specifically under English law, as the law of the domicile.

Additionally, another policy that was highlighted in this case was that same – sex civil partnerships in the United Kingdom are not the same as same – sex marriages. The two terms 'marriage' and 'civil partnership' cannot be used interchangeably – civil partners in the United Kingdom are not married to each other. [34] This author submits that these are the unarticulated policies that can be

[31] See Chapter One generally for policies that are articulated and unarticulated.
[32] It was held , dismissing the petition that the parties did not have capacity to enter into the Canadian marriage. [2006] EWHC (Fam).
[33] See Chapter 2 for the various theories the courts and English private international law employs to validate a marriage with regards to essential validity.
[34]See Y.Tan's discussion of what is in a name in K. Boele – Woelki (Ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Oxford Intersentia 2003) pp 457 – 468.

distilled from the case. It is with this in mind that we can now analyse extracts from the case.

The petitioner believed that their Canadian marriage had been downgraded to the status of civil partnership under its laws. She stated;

> "...I do not wish my relationship to Celia to be recognised in this way because we are legally married and it is simply not acceptable to be asked to pretend that this marriage is a civil partnership. While marriage remains open to heterosexual couples only, offering the 'consolation prize' of a civil partnership to lesbians and gay men is offensive and demeaning. Marriage is our society's fundamental social institution for recognising the couple's relationship and access to this institution is an equal rights issue. To deny some people access to marriage on the basis of their sexual orientation is fundamentally unjust, just as it would be to do so on the basis of their race, ethnicity and nationality, religion or political beliefs.[35]

She went on to argue that

> "The argument of separate but equal is unacceptable because (a) there should not be separate sets of laws for recognising different-sex and same-sex relationships and(b) marriages and civil partnerships are clearly not equal. They are not equal symbolically, when it is marriage that is the key social institution, celebrated and recognised around the world, or even across Europe. Even if the rights and benefits conferred by civil partnership are identical (at least in practical terms) to those conferred by marriage within Britain itself, this is not so beyond the boundaries..."[36]

Thus, hardly a few months after the first same-sex couples in this country had registered their partnerships, the English court had some very weighty issues

[35] See [2006] EWHC 2022(Fam) para 18.
[36] See [2006] EWHC 2022(Fam) at para 8.

to decide. The petitioner had several submissions. Firstly, she submitted that the provisions of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, which on their face preclude recognition of a marriage between persons of a same-sex amount to a violation of Convention rights of the petitioner under Articles 12, 8 and 14 of the Convention. She also asked the Court to read and give effect to section 11 of the Matrimonial Causes Act 1973 and ss 212 – 218 of the Civil Partnership Act 2004 in such a manner as to recognise same-sex marriages, lawfully effected in other jurisdictions, as valid in English law. Alternatively, the petitioner asked the court to develop the common law so as to recognise her Canadian marriage as a marriage in English law. In this respect, the petitioner asked the court to ignore or modify the requirement of private international law (administered as part of the common law) that the legal capacity to marry be judged according to the law of the parties' domicile on the grounds that the application of the ordinary rules of private international law would violate the Convention rights. Finally, another alternative ground the petitioner used is that a declaration was sought under s.4(2) of the Human Rights Act that statutory provisions of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 were incompatible with her(and the first Respondent's) Convention rights under Articles 8,12 and 14 of the Convention.

Before going on to examine the specific alleged breaches to each Article, the intervener noted that this was an area in which there was significant social,

political and religious controversy in respect of which there 'was no consensus across Europe.'[37] The intervener went on to note that

> "The European Court of Human Rights (ECtHR) of the Convention has consistently declared itself to be slow to trespass on areas of social, political and religious controversy, where a wide variety of national and cultural traditions are in play and different political and legal choices have been made by the members of the Council of Europe: see for instance *Frette v Frette* [2003] 2 F.L.R. 9; *F v Switzerland* (1987) 10 E.H.R.R. 411, especially at [33]; *Botta v Italy* (1998) 26 E.H.R.R. at [35] and *Estevez v Spain*, unreported, May 10, 2001) ECtHR."

The intervener was keen to stress that during the passage of the Civil Partnership Act 2004, Parliament had already examined the problem of same – sex marriage.

> "The solution which it reached was that there should be statutory recognition of a status and relationship closely modelled upon that of marriage which made available to civil partners essentially every material right and responsibility presently arising from marriage, with the exception of the form of ceremony and the actual name and status of marriage. Parliament ostensibly passed the Act, not because it was obliged to in order to comply with the norms of European law or the rulings of the ECtHR, but because it elected to do so as a policy choice."

Mrs Monaghan proposed that the decision in *Goodwin v the United Kingdom*[38] severed the traditional approach to marriage, which was "rooted in

[37] [2006] EWHC 2022 (Fam) at para 44 -45.
[38] *Ibid.* at paras 59 – 60.

biological determinism." The court in *Goodwin* found that the post-operative transsexual had the 'very essence of her right to marry infringed' and so there had been a breach of the post-operative transsexual's right to marry under Article 12. [39] Therefore it would be appropriate to extend this reasoning to the 'unqualified right of a man or woman to marry a person of the same, as well as the opposite sex.'[40]

Sir Mark Potter P. disagreed with Mrs Monaghan's interpretation and submitted that in *Goodwin,* the decision was based on the court's finding that gender can be determined by factors other than biological factors. Sir Mark Potter P. emphasised that the *Goodwin* case was important in recognising a gender reassignment. [41] Potter concluded that it was the effect to the national law that failed to recognise her gender reassignment that led the court in *Goodwin* to hold that there was a breach of her Article 12 rights.

The court further discussed whether there had been a breach of Article 12 by referring to other cases. [42] Sir Mark Potter P. was of the opinion that there were limitations to the scope of the "living instrument" doctrine in the Convention and that there were interpretations that could be outside its reach. [43] Again, relying on Lord Bingham's judgement in *R v (Ullah) Special Adjudicator*[44] who stated

> "The Convention as an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court...it is, of course open to Member States to provide for rights more generous than those guaranteed by the

[39] *Ibid.* at paras 59 - 61.
[40] *Ibid.*
[41] *Ibid.* para 61.
[42] [2006] EWHC 2022 (Fam) at p 12-14 of Westlaw document.
[43] *Ibid.*
[44] [2004] 2 AC 323 at para 20.

> Convention, but such a provision should not be the product of interpretation of the Convention since the meaning of the Convention should be uniform throughout the States party to it. The duty of the national courts evolves over time; no more but certainly no less (emphasis added)."

Furthermore, Sir Mark Potter P. referred to the decision in *N v Secretary of State for the Home Department* [45] where Lord Nicholls passed judgement on whether Article 8 applied equally to Article 12. Sir Mark Potter P. noted that Lord Nicholls emphasised that there was one proper interpretation of Article 8 which has the same meaning in all contracting states but according to Strasbourg jurisprudence, that meaning does not encompass same – sex partners. Consequently, contracting states are not required by the Convention to give the relationship between same – sex couples the respect for family life under Article 8. This is a matter for each contracting state to decide under the wide margin of appreciation. As a result, Sir Mark Potter P. concluded that there had not any breach of Article 12 with respect to Susan Wilkinson and Jane Kitzinger.

With respect to the petitioner's submission that Article 8 itself had been breached, Sir Mark Potter P. reviewed several cases before deciding whether there had been a breach.[46] Sir Mark Potter P. concluded that in

> "declining to recognise a same – sex partnership as a marriage in legislation the purpose and thrust of which is to enhance their rights, the state cannot be said improperly to intrude on or interfere with the private life, of a same – sex couple who are living in a

[45] [2005] 2 A.C. 296.
[46] *Supra*. note 37 at paras 68 – 81.

close, loving and monogamous relationship as is the position in this case. Nor has the state acted improperly within the sphere of any duty to afford respect to it." [47]

So, Sir Mark Potter P. was of the opinion that there any necessity to protect the private or family life of childless same – sex couples does not extend to recognising them as married. Because of this reasoning, Potter thought that there was no breach of Article 8.[48]

The petitioner had also argued that when Articles 8 and 12 were read in conjunction with Article 14, the fact that English does not recognise foreign same – sex marriages and only foreign civil partnerships under the Civil Partnership Act 2004 constitutes a breach of the non – discrimination guarantee encompassed in Article 14. This would be sufficient to have a declaration of incompatibility. The petitioner also argued Article 14 could apply even if there was no violation of a substantive Convention Article, if it can nonetheless be shown that there has been discrimination on any of the grounds (i.e. differences of status) which are set out in Article 14. Further, if the facts of the case were to fall within the ambit of one or more of the substantive Convention rights. The petitioner reasoned that besides 'the express requirement of Article 14 to secure the rights and freedoms set out in the Convention without discrimination on the grounds of sex, the words

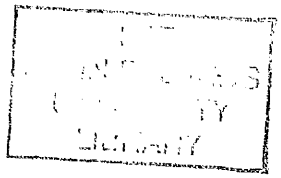
[47] [2006] EWHC 2022(Fam) paras 89-155 and see also [2003] 1 WLR 617 *Wandsworth London Borough Council v Michalak.*
[48] *Ibid.* at para. 88.

"or other status " which appear at the end of the Article include sexual orientation.'[49]

Sir Mark Potter P. surveyed relevant case law before reaching his decision as to the petitioner's claims with respect to a breach of Article 14 . Sir Mark Potter P. also referred to *Wandsworth London Borough Council v Michalak* [50]where the Court of Appeal handled four questions with regards to a breach of Article 14.

> "(i) Do the facts fall within the ambit of one or more of the Convention rights?
>
> (ii) Was there a difference in treatment in respect of that right between the complainant and others put forth for comparison?
>
> (iii) Were those others in an analogous situation?
>
> (iv) Was the difference in treatment objectively justifiable?
>
> For instance, did it have a legitimate aim and bear reasonable relationship of proportionality to that aim?
>
> (v) Was the difference in treatment based on one or more of the grounds proscribed – whether expressly or by inference – in Article 14?"[51]

[49] *Supra.* note 48 at para 89.
[50] [2003] 1 W.L.R. 617.
[51] *Ibid.*



While Sir Mark Potter P. surveyed each of the arguments put forth by Mrs Monaghan with respect to each of the above questions, he maintained the opinion that the difference in treatment between same – sex couples and opposite sex couples was still justifiable within the framework of the Convention. Sir Mark Potter P. stated "the institution of marriage is afforded a particular status within the framework of the Convention, namely as a union between parties of the opposite sex."[52] And so, Sir Mark Potter P. did not agree with Mrs Monaghan's arguments that the differential treatment between opposite sex couples and same sex couples was one of lack of capacity in English law. Sir Mark Potter P. insisted that that differential treatment was due to sexual orientation and remarked 'the question is whether it can withstand scrutiny and this depends on whether it has a legitimate aim and whether the means chosen to achieve that aim are proportionate and not disproportionate in their adverse impact.'[53]

Sir Mark Potter P. emphasised that [54]

> "If marriage is by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it, and if that is the institution contemplated and safeguarded by Article 12, then to accord a same – sex relationship the title and status of marriage would be to fly in the face of the Convention as well to fail to recognise physical activity.
>
> Abiding single-sex relationships are by no means inferior, nor does English law suggest that they are inferior by according them recognition under the name of civil partnership. By the passage of the Civil Partnership Act 2004, the United Kingdom has recognised the

[52] *Supra.* note 42. at para 113 – 114.
[53] *Supra.* note 42 at para 114 – 115.
[54] *Supra.* note 42 at paras 120 – 122.

rights of individuals who wish to make a same-sex commitment. Parliament has called partnerships of the same-sex not because they are considered inferior to the institution of marriage but because of the same matter of objective fact and common understanding, they are indeed different.[55]

The position is as follows. With a view (1) to according formal recognition to relationships between same – sex couples which have all the features and characteristics of marriage save for the ability to procreate children, and (2) preserving and supporting the concept of marriage as a union between persons of opposite sex or gender, Parliament has taken steps by enacting the Civil Partnership Act 2004 to accord to same – sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homosexuals who wish to join stable long term relationships. To the extent that by reason of that distinction it discriminates against same – sex partners, such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States."

It is notable that the intervener, Mrs Monaghan, relied on South African law and Canadian jurisprudence. [56] However, the English court refused to apply the reasoning to *Wilkinson v. Kitzinger.* The court also refused to develop the common law so as to recognise the petitioner's Canadian marriage. Sir Mark Potter P. stated 'I reject that as an appropriate or effective exercise given the unambiguous statutory wording of Section 11 (c) of the Matrimonial Causes Act 1973 reflects, and no doubt has its statutory origin in, the common law rules and

[55] [2006] EWHC 2022(Fam) para 121 and the judges further concluded that it falls within the margin of appreciation accorded to the Convention States Para 122.
[56] *Ibid.* paras 124 – 126.

to do as Mrs Monaghan suggests would not only be inconsistent with statute; it would not advance her cause.' [57]

Mrs. Monaghan had additionally requested that the court should ignore or modify private international law(as part of the common law) that legal capacity to marry be judged according to the law of the parties' domicile on the grounds that the application of the ordinary rules would lead to non – recognition of the same – sex partnership as a valid marriage. Sir Mark Potter P. refused to modify the requirements of private international law, and reiterated that the provisions of English law are not incompatible with the Convention or out of line with European jurisprudence. [58] The court concluded that accepting Mrs. Monaghan's submission to treat civil partnership as marriage would run counter to public policy, as expressed in the provisions of the Civil Partnership Act which would require the Canadian marriage to be treated as a civil partnership. [59] Finally, the court took note of the public policy discretion in the common law[60] as well as well as the public policy discretion in s.11 (c) of the Matrimonial Causes Act 1973 and also the public policy discretion in the Civil Partnership Act.[61] Ultimately, the petitioner's submissions were dismissed. [62] The ground breaking case of *Wilkinson v. Kitzinger* did *not* equate foreign same sex marriages as civil partnerships and the parties did not have their overseas same-sex marriage recognised by the English court.

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[57] *Ibid.* at para. 128.
[58] *Ibid.* at para 129.
[59] *Ibid.* at para 129.
[60] See *Vervaeke v Smith* [1983] AC 145.
[61] *Supra.* note 56 at paras 124, 125, 126 and 127.
[62] *Ibid.* para 131.

B) Beyond Wilkinson v Kitzinger

The difficulty with the decision of *Wilkinson v Kitzinger* [63] is that the judiciary considered only the possibility of two English domiciliaries contracting a foreign overseas same – sex marriage, and then rebutting the human rights contentions put forth by the petitioners. The decision in *Wilkinson v Kitzinger* has been criticised and described as 'law in transition.' [64] This author notes that the judiciary did not postulate two other scenarios that could come before the English court. Firstly, a same – sex marriage could be contracted overseas with one party being an English domiciliary and the other a foreign domiciliary. Secondly, another form of marriage could be that both parties are foreign domiciled but are seeking recognition in an English court. A declaration of marriage is important for many issues ancillary to marriage (succession, legitimacy, adoption). Therefore, it is envisaged that with the globalisation of people, it is only a matter of time that recognition may be challenged for a same-sex marriage in one of the above scenarios involving an ancillary issue.

This author contends that the *real* policy underpinning the decision in *Wilkinson v Kitzinger* is contentious. As we have seen from our discussion in Chapter 1 of this thesis, there can be many policies (articulated and unarticulated)

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[63] [2006] EWHC 2022 (Fam). See also the viewpoints of S.Wilkinson and C. Kitzinger, 'Guest Editorial' (2007) Vol 8 No 1 *Gay and Lesbian Psychology Review* pp 1 -5. And, also the view from other academics that the 'law is in transition' post *Wilkinson v Kitzinger*. See R. Auchmuty 'What's so special about marriage? The impact of *Wilkinson v Kitzinger*' (2008) Vol. 20 (4) *Child and Family Law Quarterly* 475. See also R. Probert 'Hanging on the Telephone – City of Westminster v IC'(2008) Vol 3 *Child and Family Law Quarterly* 395.

[64] *Ibid.*

that may be used by the judiciary in adjudication. Once again, this author suggests that the judge (as we have seen in our earlier treatment of the case) concentrated purely upon the lack of capacity of the parties to contract a Canadian same – sex marriage. Therefore, this is an overt policy *against* same–sex marriage for English domiciliaries. However, the judge did not state that the decision was based upon the evasion of the parties. This author contends that although evasion was not explicitly discussed by the judges in *Wilkinson v Kitzinger* it was *ultimately* weighed in silently as a factor in favour of non – recognition of the Canadian same – sex marriage.

This author proposes that if a case involving two foreign domiciliaries or one English domiciled and one foreign domiciled were to come forth for recognition, these scenarios have a greater chance of recognition than the parties in *Wilkinson v Kitzinger*. Similarly to our discussion in Chapter 2 in relation to the recognition of different types of underage marriages and forced marriages, this author argues that recognition is contingent upon the level of connection with the forum. Therefore, if the level of connection with England as the forum is low, the chances of recognition of the relationship is higher because of the lesser connection with English law (and therefore, English policy). And with this reasoning, it follows that if the connection with English law (and English policy) is high, then the court would be inclined not to recognise a relationship such as in *Wilkinson v Kitzinger* where both parties were English domiciliaries who were subject to English law. This approach, based on the level of connection with England, would give a greater chance of recognition of a same - sex marriage for

foreign domiciliaries and also a same – sex marriage with an English domiciliary (who has picked up residence in a foreign country) with a foreign domiciled spouse.[65]

If we can recall the case of *Mohammed v Knott* [66] from Chapter 2, an underage Nigerian marriage between a girl of thirteen and a husband of twenty - six was recognised by the English court despite the fact that such a marriage would not be valid if contracted in England. One of the academics[67] discussing the basis behind the decision of recognition for *Mohammed v Knott* suggested that the husband was not a long – term resident of England, since he was merely here for his medical studies. This author agrees with Karsten's reasoning. If a couple is in England on a short term stay, the laws of England should *not* apply because English interests, and therefore, English policy is not threatened.

This author suggests that the judiciary in *Wilkinson v Kitzinger* perhaps cast policy, and therefore, the non-recognition of same-sex marriages too widely. If the judiciary had expressly limited English domiciliaries and only English domiciliaries, to lack capacity to contract foreign same - sex marriages, this would be a stand that would still give effect to the legitimate expectations of those who have a foreign non – English domicile. This limitation of policy would provide a balance and still retain English policy for those who have a connection with England, as opposed to those who have a limited connection to England as the forum.

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[65] See Chapter 2's discussion of forced marriage and the level of connection with England at footnotes 178 - 186.
[66] [1969] 1 QB 1.
[67] L. Karsten 'Child Marriages' (1969) 32 *Modern Law Review* 212.

We can already find this limited form of recognition with English law's treatment of foreign contracted polygamous marriages. Polygamous marriages cannot be contracted in England, but case law and statute has developed to encompass foreign polygamous spouses to financial relief in England,[68] to succession upon intestacy,[69] succession to property and entailed interests, titles of honour as well as social security. [70] Children of a polygamous marriage are legitimate children, [71] and wives to a polygamous marriage can claim protection with respect to the family home and domestic violence under the Family Law Act 1996. [72]

Furthermore, if the judiciary were to adopt recognition of same – sex marriages in this limited manner, English policy would not fall foul of the dual domicile rule for English domiciliaries or the intended matrimonial home rule for English domiciliaries. Additionally, the judiciary should expressly give instances in which same – sex marriages will not be recognised - such as lack of capacity by the domiciliary law, or in instances of evasion of a domiciliary law. With the multiplicity of jurisdictions enacting same - sex marriage as a status for couples, it is only a matter of time before the possibility of recognising a same – sex marriage may arise again in English private international law. [73]

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[68] Section 47 of the Matrimonial Causes Act 1973.
[69] *Coleman v Shang* [1961] AC 481, PC. See also Inheritance (Provision for Family and Dependants) Act 1975, s 1 A. As added by the Law Reform (Succession) Act 1995, s 2(3).
[70] *The Sinha Peerage Claim* [1946] 1 ALL ER 348,
[71] Legitimacy Act 1976, Sched 1, para 4.
[72] Family Law Act 1996, s 63 (5).
[73] See R. Probert 'Hanging on the Telephone – City of Westminster v IC' Vol 3 [2008] *CFLQ* 395, where she outlined the need for the judiciary to reason more. See again J. Murphy's incantation in 'The Recognition of Overseas Marriages and Divorces – Some Opportunities Missed?' 47 (1)(1995) *NILQ* 35.

In the future, this author submits that it may be simpler to have just one category of partnership for all same sex marriages, civil partnerships and heterosexual marriages in England's private international law rules, without any distinction. With the variety of relationships/living arrangements abound, there is a faint possibility that there may be a general category of relationship in private international law that would encompass all. [74]

Presently, the notion of procreation and sex is relegated only to the institution of marriage for English law, and distinguishes marriage from civil partnerships. However, the recognition of same-sex couples as a family form is still rising in prominence. [75] The recent passage of the Equality Act 2010 *may* signal a change towards same-sex marriage in domestic law in the future. [76] In the meantime, civil partnerships and marriages will continue to co-exist in English law.

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[74] See S. Henneron 'New Forms of Cohabitation; Private International Law Aspects of Registered Partnerships' at 462 – 469 and M. Jantare-Jarebourg 'Unification of International Family Law in Europe – A Critical Perspective' at 192 - 214 in K. Boele – Woelki (Ed.) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003).

[75] In addition to the Civil Partnership Act 2004, *Ghaidan v Godin – Mendoza* [2004] 2 AC 557 allowed a same-sex partner to succeed to a partner's tenancy. See Adoption and Children Act 2002, which allows same-sex couples to adopt children. See also the Human Fertilisation and Embryology Act 2008 which allows which allows same-sex couples to have access to fertility services and donor insemination.

[76] See R. Deech 'Civil Partnership' [2010] 1 May *Family Law* 468 who raises the question if the passage of the Equality Bill (which received the Royal Assent on 8 April 2010) and now it is the Equality Act 2010, would make it questionable as to whether the provisions of this Act would be inconsistent with Section 11(c) of the Matrimonial Causes Act 1973 which provides that a valid marriage can be entered into only by a male and female. So Deech queries whether same-sex couples can now challenge the concept of marriage in English law, and be able to enter into marriage. She ponders whether it is time for either the judiciary or Parliament to take "that final step for same-sex couples ?" at pp. 469. Consequently, if this comes to fruition, by either judicial or Parliamentary intervention, most of the recognition problems for foreign same-sex marriages in English private international law will be resolved. But this scenario is yet to be seen. The Equality Act 2010 will not be in force until October 2010. It prohibits discrimination in areas of family and private life. The Act brings disability, sex, race and other grounds of discrimination within one piece of legislation, and also makes changes to the existing law. The Act does not apply to Northern Ireland. See Equality Act 2010 at www.opsi.gov.uk.(Website last visited May 2010.)

C) Questions that Remain – Residual Public Policy Still Relevant?

The Civil Partnership Act 2004 encompasses the discretion of public policy. However, the form of public policy that has been enshrined in the Civil Partnership Act is different from its common law discretion which allowed the court to trump any judgement. The public policy discretion in the Civil Partnership Act 2004 operates in a much narrower vein. Section 212(2) of the Civil Partnership Act 2004 provides that 'two people are not to be treated as having formed a civil partnership as a result of having entered into an overseas relationship if it would be manifestly contrary to public policy to recognise the capacity of either of them to enter into the relationship under the relevant law.' This means that the Civil Partnership Act 2004 will *not* recognise an overseas same - sex partnership in English law if the respective foreign jurisdiction does not recognise the capacity of a party (or parties) to enter into the relationship.

It is questionable as to whether this omission of the full trumping residual form of public policy is correct. This author suggests that at first glance, Schedule 20 and Sections 214 and 215 have eliminated the need for public policy in its residual form by fitting any overseas relationship into certain requirements; there still may be situations that may be offensive to English sensibilities or procedural rights in marriage. The Civil Partnership Act 2004 does not state the common law notion of public policy as explicitly as the Brussels II bis Regulation

(EC) 2201/2203.[77] This author contends that since the residual ground of public policy is embedded in the common law, it could be inferred in the Civil Partnership Act 2004. This author believes that, despite the Civil Partnership Act's provisions, the common law notion of the residual ground of public policy is and should be present in the recognition of foreign partnerships and cohabitation forms. With the worldwide trend of enacting legislation for different family forms, there may be very little difference in status among legal systems in the future. Therefore, the role of policy in its residual form would operate in a much narrower vein than it has in the past.

This author argues that there are several areas in which policy should be retained. The decision in *Wilkinson v Kitzinger* found the judge concentrating solely upon the development of European jurisprudence and the extension of European cases and not much else. [78] Even though the parties in *Wilkinson v Kitzinger* did not ask the judiciary to elaborate upon the circumstances where English law would recognise same – sex marriage, the judiciary could have taken the intiative to examine academic commentary in private international law.

D) Retention of policy for evasive, migratory and extraterritorial marriages and retention of policy generally for specific cases

This author suggests that the residual discretion of non – recognition of foreign same-sex marriages such as in *Wilkinson v Kitzinger* should not be

[77] Council Regulation EC 2201/2003 concerning Jurisdiction and Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility.
[78] *Supra.* footnotes 33 – 63 and discussion of *Wilkinson v Kitzinger.*

followed in every case that comes forth for the English court. This author proposes that recognition[79] (and also, non-recognition[80]) of a foreign same-sex marriage should depend upon the intentions and circumstances of the parties in question. For example, Koppelman [81] proposes that in all recognition cases involving same-sex marriages and relationships the use of policy in either its positive or negative form could be classified into several circumstances. The first type of case is known as the evasive marriage. This is where people have travelled out of their home state for the express purpose of evading that state's prohibitions of their marriages, and then, having entered into the same-sex marriage, returned home, as we have seen in the facts of *Wilkinson v Kitzinger*. Koppelman believes this type of marriage should not be recognised particularly if both parties were domiciliaries of the state that prohibited the same – sex marriage.[82] Therefore, the residual discretion of policy should be used in this instance in favour of non – recognition. Koppelman's second category consists of cases in which parties had contracted valid same - sex marriages in the state where they lived, but then decided to move to a state where marriage was prohibited. Koppelman terms these 'migratory' marriages. For instance, if a Massachussetts couple, who had contracted a same - sex marriage in Massachussetts, decided to move from Massachussetts to a conservative state

[79] Thereby using policy in its implicit manner for recognition.
[80] Thereby using policy in its residual trumping form for non – recognition.
[81] A. Koppelman 'Interstate Recognition and Enforcement of Same – Sex Marriage; A Handbook For Judges' (2006) 153 *University of Pennsylvania Law Review* 2143 – 2164 and also Ralph U.Whitten 'Symposium on the Implications of Lawrences and Goodridge for the Recognition of Same – Sex Marriages and the Validity of DOMA' (2005) *Creighton University Law Review* 465.
[82] See Rebecca Bailey – Harris 'Madame Butterfly and the Conflict of Laws' (1991) Vol 39 *American Journal of Comparative Law* 157 – 175.

such as Nebraska. Or, in the context of England, if a same-sex couple (both being non – English domiciliaries) had a same – sex marriage in a foreign jurisdiction but then moved to England, and wanted to have their same – sex marriage recognised without registering their relationship under the Civil Partnership Act 2004. The Civil Partnership Act is silent on such issues. *Wilkinson v Kitzinger* would not apply, as it involved two English domiciliaries that had a valid foreign same – sex marriage, but wanted the marriage to be recognised in England and they wanted to reside in England, as well as a married couple. Therefore, *Wilkinson and Kitzinger* could not be classified as a migratory marriage. So, this author agrees with Koppelman that the pressure to recognise a migratory same - sex marriage in England is strong, as it is a valid foreign marriage. If we were to use Koppelman's argument, the decision to recognise a migratory same – sex marriage in a State (or jurisdiction) which does not allow such marriages under its domestic law requires a balancing act of policy on behalf of the judiciary. Koppelman notes earlier cases in relation to interracial relationships followed a hard line in recognition.[83] Koppelman [84]also quotes Herbert Goodrich writing in 1929, who stated that certain incidents (though he did not elaborate which ones) of the marriage relationship may be refused recognition of they involve a violation of public policy or good morals of the forum. [85]

Koppelman also states that the balancing act by the judiciary has to find a strong public policy in the state legislature against homosexuality in order to

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[83] Joseph Story *Commentaries on the Conflict of Laws* SS 121 at 112 -113 (Boston, Hillard, Gray and Co 1834).
[84] *Handbook on the Conflict of Laws* SS 115 at 266.
[85] See *Yarborough v Yarborough* 290 U.S. 202, 218 n. 10 (1933).

justify non – recognition. However, if there is no overt stand against homosexuality, the same – sex marriage should be recognised if it is a migratory marriage. Therefore, if a Conservative State like Nebraska has a strong public policy in its legislation[86] against same – sex marriages, then the state does not have to recognise the marriage. [87] Or, in the context of England, with the enactment of the Civil Partnership Act 2004, there is no longer any overt stand against homosexuality in English law. Therefore, using Koppelman's reasoning, a migratory same – sex marriage should be recognised by English private international law.

Koppelman urges states to find a way of recognising same – sex marriages if no strong public policy is found in state legislature, or if recognition is available under state contract law or in the state's inheritance law.[88] Moreover, Koppelman reasons that if recognition involves a parental right or the welfare of a child, then, in any instance, the court should recognise a foreign same – sex marriage and forgo the policy considerations that may be anti – homosexual unions.

Though Koppelman utilised American case law and American jurisprudence, the reasoning behind the recognition of a migratory marriage could be applied to cases that come forth for recognition, and therefore, the use of policy in a positive manner for English private international law, as well. In

[86] *Supra.* note 81.

[87] States in the USA have enacted or kept statutes barring same – sex marriage. The largest group of states have laws barring recognition of same – sex marriage called mini – DOMA (legislature called the Defense of Marriage Act) which was passed. See B.E. Graham-Siegenthaler 'Marriage Recognition in Switzerland and Europe' 1998 Vol 32 No 1 *Creighton Law Review* 125 – 148. See also discussion in *Baker v State of Vermont* Slip No. 510009-97 CnC Slip (Chittenden Superior Court 19 December 1997).

[88] Thomas A Atkinson *Handbook on the Law of Wills* 2nd Ed. SS 48 at 218 (1953).

Wilkinson v Kitzinger the court did not consider the possibility of partial or incidental recognition of the Canadian marriage. (This means the possibility of the parties needing marriage recognition as a issue for succession, legitimacy or residence orders in relation to a Canadian same – sex marriage breakdown.) Even though the parties did not raise this query in their petition, the court should have taken the initiative to consider it. Therefore, in the future, same – sex couples who contract marriages abroad would have to re – register in the United Kingdom as civil partners in order to have a legal relationship. In English law, this author proposes that a same – sex marriage may be recognised in relation to parental care and decision making in relation to children. [89]

Another manner in which policy could be used in a positive manner for same – sex marriage recognition is identified by Koppelman in circumstances involving a 'visitor marriage.' [90] In this situation, same – sex couples are temporarily visiting states (or countries) that do not recognise their marriage. The visitor situation happens frequently because of the rate of travel across state lines, as well as international borders that may not recognise same – sex marriages. Take the situation in which a lesbian parent and her child go on a weekend trip to a neighbouring jurisdiction that does not recognise a same – sex marriage. While in the different jurisdiction, both the mother and child are seriously injured in an automobile accident. When the other spouse hears of the news, she goes to the hospital in the next state where her partner and her child are,

[89] See Seth Kreimer's article 'Territoriality and Moral Dissensus; Thoughts on Abortion, Slavery, Gay Marriage and Family Values' (2003) 16 *Quinnipac Law Review* 161, 182 – 189.
[90] *Supra.* note 81.

and is told that she is not a family member of either of these people in any respect which the state recognises. As a same – sex partner, she is told that she may not participate in any medical decisions for either of them. If the mother dies, there may not be anyone else with parental rights for the child if the same – sex union is not recognised by the state. If there is no surviving biological relative, the child may be regarded as an orphan and a ward of state.[91]

Koppelman believes that in such a dire situation a state (or jurisdiction) should not use the trumping discretion of policy for non - recognition and should bend and recognise another state's laws with respect to same – sex marriages in relation to those visiting the state. Koppelman noted that there is little US case law to support the visitor category of marriage.[92] In the context of English law, this author proposes that a same- sex marriage may be recognised as a 'marriage' (as opposed to a partnership) if the parties are *only* visiting England and dire circumstances such as a medical emergency and the need to have 'next of kin' necessitate recognition. In this manner, a same – sex marriage (as opposed to a civil partnership) could be recognised in England.

The final category of marriage proposed by Koppelman is the 'extraterritorial marriage'. This means that the parties have never lived in the state, but the parties have litigation which is relevant to their marriage there. For example, if one spouse dies intestate, the other same – sex spouse should have the right to inherit property that is located within the forum state. Koppelman noted

[91] *Supra.* note 81. Koppelman at pp 2162.
[92] *Ibid.* See also C. Nuckols article 'Two Women, Two States, One Child' *The Virgina Pilot* December 13, 2004 at A1.

that American case law on extraterritorial marriage is nearly unanimous. [93] As long as the state recognises the marriage after its dissolution in relation to succession rights, there should be no harm done to the state's policy, or to the policy of the territory where the litigation is being conducted. Therefore, the trumping discretion of policy should not be used and the same –sex marriage should be recognised. This author suggests that this approach should also be taken in England. The English court should not use policy in its residual form for non – recognition of a foreign same – sex marriage,[94] but instead use policy considerations in a positive manner to recognise, for example, a right of succession.

As we have discussed earlier in relation to the issues that the judiciary in *Wilkinson v Kitzinger* failed to acknowledge, English law can retain a certain policy for its own domiciliaries but do not have to impose the same policy for non – English domiciliaries who may not have a strong connection with England. Of all the categories of marriage discussed (evasive, migratory, visitor and extraterritorial) the visitor marriage has the greatest case in favour of recognition because of the problem of national and international mobility for individuals. This author predicts that jurisdictions that have a strong religious tradition (such as Islamic countries or highly religious states in the USA) would be most likely

[93] Chester G. Vernier *American Family Laws* (1931) 204 – 219 (compiling statutes) and Varnier notes a survey of statutes in relation to interracial marriages in 36 *Yale Law Journal* (1927) 858, 863. See also M. Friedmann *A History of American Law* (New York Simon Schuster Publishing 1973).

[94] If we can recall the trumping discretion of public policy in relation to the recognition of foreign same – sex partnerships has been eliminated save in situations where it would be manifestly contrary to public policy to recognise the capacity, under the law of the country of registration (including its private international law rules) of one or both of them to enter into the relationship.

not to recognise same – sex marriages. [95] Since visitor marriages would have a strong case in favour of recognition [96] it is hoped that the United Kingdom would recognise a same – sex marriage for its visitors and transient people within the jurisdiction. Therefore, despite the narrowing of policy in its residual trumping form as we have seen in the Civil Partnership Act 2004, we may still see it operating *indirectly* in the veins described above in order to accord recognition of a same – sex marriage in certain circumstances. Again, we can see that the recent decision in *Wilkinson v Kitzinger* has not shut the door for questions relating to policy and its usage in its implicit form for same – sex marriage in the future for English private international law. [97]

III. Transsexual Marriages in English Private International Law

Previously, it was thought that if a foreign transsexual marriage were to come forth to an English court, policy would be used in a negative manner for non-recognition because English law did not allow transsexuals to marry in their

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[95] It is notable that worldwide legal developments with regards to enacting same – sex marriage, and also small changes such as the decriminalisation of homosexual sex is fast moving. See www.cnn.com news archives from 2 July 2009 'Indian Court Rules – Gay Sex Legal.'(Website last visited April 2010). See also N. Bruillard 'South Africa debates same – sex marriage' 16 October 2009 at www.globalpost.com. (Website last visited April 2010). More and more states in the USA such as New Hampshire and Iowa have legalised same – sex marriage. See Paul Axel Lute's helpful running weekly updated blog of worldwide same – sex marriage developments at www.rci.rutgers.edu/axellute/. (Website last visited April 2010).

[96] It is anticipated that Islamic jurisdictions would not recognise visitor marriage as envisaged by Koppelman in his article at *Supra.* note 81. pp 107 where he cites *Genesis* from *The Bible* 19: 1 – 8 Judges 19: 16 – 30.

[97] And with David Cameron's recent pledge to allow same - sex couples to have marriage, or say legally that they are married, this potential scenario would eliminate any English private international law problems. See article www.yahoo.co.uk. Press Association 11 April 2010.(Website last visited April 2010).

chosen gender (either by choice, or by surgery). [98] As we shall see in this section, recent policy developments have changed dramatically and the problem of the recognition of foreign transsexual marriages in English private international law has been solved.

Before 2004, the law was regarding the capacity of transsexuals to marry was as such. The nature of a person's sex (normally determined at birth) was the test of sex for marriage. [99] However, an individual could undergo psychological or surgical changes to have another gender during their lifetime but could not marry in their acquired sex. Before the passage of the Gender Recognition Act 2004, English law refused to allow transsexuals to marry in their new gender. This caused hardship to the growing numbers of transsexuals in the United Kingdom who wished to marry in their acquired gender. [100]

Finally, the grip of the reliance of the law upon birth sex was broken through a series of cases domestically[101] and at the European level. The year 2002 heralded epoch making change in policy and provided impetus for the right of transsexuals to marry in their post – operative sex. This change came through a series of European Court of Human Rights ruled in the historic conjoined cases *I. v. the United Kingdom* [102] and *Christine Goodwin v the United Kingdom* [103] that there had been a violation of Article 8 (the right for respect of family life) and

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[98] *Supra*. note 5.
[99] *Corbett v Corbett* [1970] 2 ALL ER 33; [1971] P 33. See also S. Whittle 'An Association for as Noble a Purpose as Any' March 16 1996 *New Law Journal*.
[100] See P.L.Chau and J.Herring 'Defining, Assigning and Designing Sex' 16 (2002) *International Journal of Law Policy and the Family* 327 – 367. See also Mason and McCall Smith (Eds) *Law and Medical Ethics* 5th Ed. (London Butterworths 1999).
[101] *W v W*(Nullity: Gender) [2001] 1 FLR 324 and also *Bellinger v Bellinger* [2001] 1 FLR 389.
[102] [2002] FLR 518.
[103] [2002] FLR 487.

Article 12 (the right to marry and found a family). This ruling forced English law to reconsider their position.

After these cases, Parliament enacted the Gender Recognition Act 2004.[104] The provisions of the Act clarifies and extends rights under English law to those who have had a gender change in many areas of life such as in sport,[105] parenthood,[106] social security benefits, [107]pensions and peerages [108] as well as the situations that involve trustees and personal representatives. [109] Under the Act, a transsexual can apply for a Gender Recognition Certificate. The case for the Gender Recognition Certificate is heard by a Gender Recognition Panel, who decide whether a certificate should be issued.[110] The transsexual does not need to have surgery in order to obtain a Gender Recognition Certificate.[111] Where a full gender recognition certificate is issued, the person's gender, for all purposes,

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[104] Which received the Royal Assent in 2004. This Act was passed following the decision of *Bellinger v Bellinger* [2003] UKHL 21 where the House of Lords dismissed Mrs. Bellinger's final appeal to declare that the marriage that she entered into in 1981 was valid. However, the House of Lords notably decided that Section 11(c) of the Matrimonial Causes Act 1973 referred to a person's gender at the time of birth. It was potentially open to read the provision as referring to gender as opposed to biological sex but the Lords preferred to keep it to biological sex and noted that it was for Parliament to change the law, and instead made a declaration of incompatibility. Therefore, the "effect" of this interpretation was that English law, in not recognising a marriage between two individuals who were of the same gender at birth but one of whom later went gender re-assignment would be incompatible with the right to her private life under Article 8 of the ECHR and her right to marry under Article 12 of the ECHR. *Christine Goodwin v UK* (2002) 35 EHRR 18. For a critique of the Act, see A. Sharpe 'Endless Sex – The Persistence of a Legal Category' 2007 15(1) *Feminist Legal Studies* 57 – 89 and also *Grant v the United Kingdom* [2006] ECHR 32570/0 where rights had to be extended fairly quickly to transsexual individuals because of the rapid change in the law.

[105] See Section 19 of the Gender Recognition Act 2004.

[106] *Ibid.* Section 12

[107] *Ibid.* Section 17.

[108] *Ibid.* Section 16.

[109] *Ibid.* Section 17.

[110] See www.grp.gov.ac.uk which is the website of the Gender Recognition Panel.(Website last visited April 2010).

[111] *Ibid.* note 110. Section 3.

becomes the acquired gender.[112] The Secretary of State will send a copy to the Registrar General and a gender recognition register will be kept.

There are two alternative grounds upon which a person may apply to the Gender Recognition Panel for a certificate.[113] The first ground is that they have changed their gender under the law of another country. The second manner in which a certificate can be obtained is when they are living in the gender which is not on their birth certificate.[114] Most importantly, in the context of this chapter, English law has been amended to allow transsexuals to marry in their new gender.[115] However, if an individual who is already married applies to the Gender Recognition Panel for a certificate, an interim certificate shall be issued.[116] The interim certificate will become a full certificate if the spouse dies or the marriage comes to a legal end. For transsexuals who do not apply for a Gender Recognition Certificate, the test of sex for marriage is still determined by *Corbett*. [117]

The Act provides that a person's gender is not to be regarded as having changed by reason only that it has changed under the law of the country or territory outside the United Kingdom. For the purposes of recognition under English law, and therefore, under English private international law, this means that a foreign transsexual who has entered into a post – recognition marriage

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[112] *Ibid.* Section 9.
[113] *Ibid.*
[114] *Ibid.* Section 2(1).
[115] See Schedule 4, amendments of marriage law 2004. The Matrimonial Causes Act 1973 has been amended to allow transsexuals to marry in their new gender as long as they have obtained a Gender Recognition Certificate.
[116] *Supra.* note 114. Section 4.
[117] See *Corbett v Corbett* [1970] 2 ALL ER 33; [1971] P 33. See also J. Herring (3rd Ed) *Family Law* (Essex Pearson Education Press 2007) pp. 49, and S.M. Edwards *Sex and Gender in the Legal Process* (London Blackstone Press Limited 1996).

abroad will not be allowed automatic recognition of the marriage in England.[118] The foreign transsexual will still have to apply for a gender recognition certificate.[119] The issue is taken out of the court's hands and is regulated now in a procedural manner by the Gender Recognition Act 2004.

There is a list of "approved" countries outside[120] the United Kingdom. But, a foreign transsexual still needs to obtain a gender recognition certificate from the United Kingdom even if the country is on the approved list. If someone has obtained a gender change in a foreign country that is not on the approved list, it would not be recognised. The transsexual would have to apply for a Gender Recognition Certificate in the United Kingdom.[121]

The problem of non-recognition of foreign transsexual marriages has vanished with Parliamentary intervention. This author contends that the only problems that will exist for private international law post the Gender Recognition Act 2004 stem from not policy or repugnance issues but from the lack of registration and the need to obtain a Gender Change Certificate in English law. Recognition of a foreign transsexual marriage in English private international law would be refused because the required mandatory formalities for recognition have not been followed.

The first example is when A, born as a man, changes gender in a foreign country and enters into marriage with another male, B, in a foreign country. Both A and B have since moved to England to make their matrimonial home, and a

[118] *Supra.*note 113. Section 21(2).
[119] *Supra.* note 113. Section 21(3).
[120] See SI 2005/974.
[121] *Ibid.*

Gender Recognition Certificate has not been obtained. The marriage would then be considered void according to the law of the ante - nuptial domicile (which is English law) because of a lack of Gender Change Certificate.

In a second hypothetical scenario, A, who is an English domiciliary, changes gender in a foreign country and enters into a marriage in a foreign country with B. B is a foreign domiciliary. If A and B move to the United Kingdom, the marriage would not be recognised if A does not obtain an English Gender Recognition Certificate. The question for English private international law that still looms in the future is as follows. If a Gender Recognition Certificate had not been obtained, but if the parties to the foreign transsexual marriage needed recognition of the relationship to determine succession rights, would the English court still retain the requirement of registration? There are no authorities on this scenario, but this author suggests that recognition from an English court would be compelling if the couple had been resident here a long time, had connections to England as the forum, and had a valid overseas transsexual marriage, and then the English court should overlook the fact that a Gender Recognition Certificate had not been obtained. There are no examples that can be offered on this point of any judge doing this yet, but this author submits that the problem is a foreseeable one given the number of jurisdictions worldwide that have allowed transsexuals to marry in their new gender. [122] Many foreign transsexuals may have moved to the United Kingdom without registering

[122] See www.guardian.co.uk Robert Tait 'Iran set to clear first transsexual marriage' *The Guardian* 11 September 2009.(Website last visited April 2010.)

their transsexual status. [123] Therefore, there is no longer a policy issue for the residual trumping discretion to be employed against English transsexual domiciliaries entering into foreign marriages. [124] The policy issue today lies not in repugnance or offensiveness, but whether or not a Gender Recognition Certificate has been obtained. So, we can see the shift in policy in just a few years from being originally being a negative one, towards a positive use where the court strives to recognise a transsexual marriage.

A more difficult example is when 'A' a domiciliary of a country which does not allow transsexual marriages, and 'A' is a transsexual, goes to another jurisdiction to marry 'B' in a country which allows transsexual marriages. The couple then come to England to have their foreign transsexual marriage recognised here. The possibility will arise that the English court will not recognise a foreign marriage if either party to the marriage contravened the marriage law of the domicile.[125]

In the year 2010, this author predicts that public policy in its residual trumping form would not be used now in relation to the non – recognition of foreign transsexual marriages. The issue has changed to one of registration and not repugnance/contravention of domestic law. The Gender Recognition Act 2004 is a progressive piece of legislation and has eradicated all repugnance towards the notion of transsexual marriages in both domestic and private

[123] See www.tsroadmap.com. This website discusses the problems that transsexuals may have if they move jurisdictions and do not re – register their relationship in the new jurisdiction.(Website last visited April 2010).
[124] K.Mc Norrie 'Reproductive Technology, Transsexualism and Homosexuality – New Problems for International Private Law '(1994) Vol 43 (4) *International and Comparative Law Quarterly* 752.
[125] Section 21(2) of the Gender Recognition Act 2004.

international law issues. It is envisaged that public policy in its residual form would be used now for the non – recognition of transsexual marriages which have procedural injustice or issues of incapacity such as duress or marriage within prohibited degrees, just like in any other marriage. For instance, if a transsexual did not consent to a marriage and was forced into a marriage either overseas or domestically, then the marriage would not be recognised, and policy would operate in a negative manner of non – recognition due to the lack of consent. This author also submits that policy in its residual form should now be confined to these areas only in the recognition of transsexual marriages. [126]

IV. Other Forms of Legally Recognised Cohabitation Unrecognised by the Civil Partnership Act 2004 and the Gender Recognition Act 2004

There are many different forms of cohabitation worldwide other than a same - sex marriage, same – sex partnership or a transsexual marriage. For instance, a brother and sister could live together and have a legally recognised relationship with automatic succession rights and financial rights arising. Therefore, if a foreign status falls outside a registered partnership or a same – sex partnership, it is questionable as to whether it would be recognised in English private international law, as this was not foreseen when drafting the Civil Partnership Act 2004. The difficulty with such legislation is that each could be a

[126] Similar to the recognition of civil partnerships and divorces throughout the EU.

different "bundle of rights" and may not fit under the umbrella of a registered or civil partnership for the purposes of the Civil Partnership Act 2004.

Take, for instance, Article 12 of the Slovenian law on Marital and other Family Relations.[127] This has been in force since 1976 and sought to equalise the rights of cohabitees with married couples. An extract states "A man and a woman who are not married but have been cohabiting for a long period of time are subject to the same legal effects between them provided that there are no grounds that would render a marriage between them invalid."[128] Petar Sarcevic was of the opinion that when the legislation was drafted, it did not specify what kind of families were entitled to protection. Sarcevic reasoned that interpretation should be given to all families 'without distinction.' By this, Sarcevic included living arrangements such as a brother and sister living together, or a mother and son living together.[129]

Another example of legislation conferring a status that extends to cohabitants who are not in a 'romantic' relationship, but are dependants of each other, or in a 'living relationship' with each other. For example, the Norwegian Joint Household Act[130] provides limited relief to cohabitants in the event of the breakdown of a household. It gives the right to occupy the joint household in some circumstances, and also provides for the division of joint household goods upon relationship breakdown or death. It applies to everyone (husband and wife,

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[127] Published in the *Official Gazette of the Socialist Republic of Slovenia* (1999).
[128] *Ibid.*
[129] In P. Sarcevic (Ed.) 'Private International Law Aspects of Legally Regulated Forms of Non-Marital Cohabitation and Registered Partnerships' *Yearbook of Private International Law* (Netherlands Kluwer Law International 1999) 40.
[130] *Ibid.*

brother and sister) who has lived together for two years. Similarly, the Catalan Mutual Assistance Act [131] provides for maintenance and inheritance rights if people living together have cohabited for the purposes of mutual assistance.

Another status that would be considered unusual in English law is a foreign registered heterosexual partnership. The United Kingdom does not have a legally recognised status for cohabiting heterosexual couples because the Civil Partnership Act 2004 only applies to homosexual couples. [132] In the Netherlands, the registered partnership is open to heterosexual couples as well as homosexual couples. [133] Therefore, it is also questionable as to how an English court would cope with the recognition of a foreign heterosexual registered partnership. Now we shall go on to discuss how English private international law would cope with recognition of each status.

A) Methodology for recognition of a foreign status

[131] See S.E. Lombardo's report on *The Civil Aspects of the Emerging Forms of Registered Partnerships Ministry of Justice of the Netherlands* The Hague Fifth European Conference on Family Law 1999.

[132] It is notable that the fact that a Civil Partnership is only available to homosexuals is now under challenge. See www.guardian.co.uk November 24, 2009. 'Heterosexual legal fight after being refused Civil Partnership License' T. Kerrigan and K. Doyle applied for civil partnership license in London only to be refused on the basis that they were opposite sex partners. T. Kerrigan stated that " they will not collude with the segregation that exists in matrimonial law between gay civil partnerships and marriage." Following this license refusal, they will take their case through the British courts first, and if it is refused, then they will take their case to Strasbourg. (See Guardian website archives)(Website last visited April 2010).

[133] See C. Forder's contribution 'An UnDutchable Family Law; Partnership, Parenthood, Social Parenthood, Names, and Some Article 8 ECHR Case Law' in A. Bainham (ed) *International Survey of Family Law* (Bristol Jordan Publishing 1999) 259 – 307. Other jurisdictions include Seattle and California. See again www.same-sexconflicts.com(Website last visited April 2010) and also www.rci.rutgers.edu/axellute/.(Website last visited April 2010).

The first method for English private international law when recognising *any* form of foreign status is to look to Schedule 20, to see whether it is a relationship that is listed.[134] If the relationship is not listed, the English court can then consider whether it is similar to a civil partnership under Sections 212 to 218. However, as we have seen, the English civil partnership has numerous rights and obligations. Therefore, the parties may not want to have the status of a civil partnership. So, recognition in this manner may not be used. Another manner in which the status could be conferred is to treat the foreign legislation as solely a succession or legitimacy problem, and then recognise the relationship in English private international law as such. This author proposes that the English court should forego the notion that they are recognising an 'unknown status' and instead, decide the problem, which is to award succession rights. There are no examples of this being done in practice, but a few academics have discussed this possibility in theory. For instance, Clarkson and Hill, in the 1998 edition of their Conflicts of Law textbook proposed this method [135]as a way to recognise foreign same-sex unions before Parliament changed the law in 2004. Clarkson and Hill suggested that English succession law should be used to recognise the rights arising foreign same-sex partnership, as they were of the opinion that English marriage law would not recognise the foreign relationship as a status in 1998. Additionally, in my article in 2003, I proposed that it was not the name of the status that the courts should take offense with but the number of rights that are

[134] SI 2005/3129 Art. 3.
[135] For English private international law.

conferred on the couple. [136] Furthermore, other academics such as Ehrenzweig have advocated this approach identifying it as "re- characterization" or "transposition" or "substitution" or "provisional or tentative" characterization. [137] Since many of these relationships have been decided retrospectively, this author suggests that in the interests of the parties legitimate expectations, the unknown status should be recognised by English private international law.

What poses another recognition problem is a foreign status that does not have an equivalent status. As we have seen earlier, other countries have enacted a status for unmarried cohabitants or dependants who are living together for mutual assistance. English law not provide a status for unmarried cohabitants. Moreover, the Civil Partnership Act 2004 provides requires both parties must be of the same-sex under the law of the country of registration.[138] Again, resorting to the method of Ehrenzhweig's re-characterization,[139] this author suggests that the English court should seek recognition of the unmarried cohabitants and dependants status under certain sections of law such as succession law, insurance benefits and tax consequences.

In the recent case of *Burden v the United Kingdom* [140] two sisters took their case to the European Court of Human Rights because they were of the opinion that they were being discriminated against because unlike a spouse or

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[136] See Y. Tan's subheading 'What is in a name' in K. Boele – Woelki (Ed). *Perspectives on the Unification or Harmonisation of Family Law in Europe* (Antwerp Intersentia 2003). pp 457.
[137] A. Ehrenzhweig *Private International Law- A Comparative Treatise on American Conflicts Law Including the Law of Admiralty* (Oxford Leyden A.W. Siijthoff Oceana Publications 1974) pp 117.
[138] Civil Partnership Act 2004, S. 212(1)(b)(ii).
[139] *Supra.* note 137.
[140] (Application No 13378/05) [2008] 2 FLR 787.

civil partner, siblings are unable to pass their property to each exempt from the inheritance tax charge. They brought their case to the European Court of Human Rights that they were being discriminated against, by comparison with spouses or civil partners in their right to peaceful enjoyment of their possessions in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1990 taken in conjunction with Article 14. The European Court held that there was no breach of human rights.

The European Court found that there was a real risk that in the near future that one of them would be required to pay substantial inheritance tax on the property inherited from her sister. Additionally, cohabiting sisters could not be compared for the purposes under Article 14 to a married or civil partnership couple. The court held that a relationship between siblings was "qualitatively of a different nature to that between married couples and homosexual civil partners."[141] The court held that relationship between the sisters was one of consanguinity. And so, one of the characteristics of a union under the Civil Partnership Act 2004 or marriage is that it is forbidden to close family members.[142] Therefore, the fact that the sisters in this case had chosen to live together all their adult lives did not alter this essential difference between the two types of relationship. The court was of the opinion that marriage conferred a special status on those who entered into it.

The judges were of the opinion that [143]

[141] *Ibid.* at 807.
[142] *Ibid.* at 807.
[143] *Ibid.* at 807. per Judge Bratza and Judge David Thor Bjorvinsson.

"the exercise of the right to marry, protected by Article 12, and the exercise by homosexual partners of the choice to enter into a legal relationship, both gave rise to social, personal and legal consequences that set them apart from other forms of cohabitation. They believed that rather than the length or the supportive nature of the relationship, what was determinative was the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual and homosexual couples who choose to live together but not to become husband and wife and civil partners, on the other hand (see *Shackell*[144] cited above) the absence of a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. The view is unaffected by the fact that, as noted in para [26] above, Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted policies as regards the grant of inheritance tax exemptions to the various categories of survivor; states in principle, remaining free to devise different rules in the field of taxation. In conclusion, therefore, the Grand Chamber considers that the applicants, as cohabiting sisters, cannot be compared for the purposes of Article 14 to a married or Civil Partnership Act couple. It follows that there has been no discrimination, and therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No 1."[145]

Given that the recent European Court decision held that there was no discrimination against sibling relationships in relation to inheritance tax law, it may be fair to hypothesise that if a full foreign 'sibling status' came forth for

[144] *Shackell v the United Kingdom* Application No. 45851/99 27 April 2000. (Unreported).
[145] *Ibid.* at 807. paras 62, 63, 64 and 65.

recognition under English private international law it would not be capable of recognition because there is no domestic equivalent. So, if the English court were to recognise a status under only certain sections of the law, the English court would be striving to confer 'partial recognition' to an unknown foreign status. This author submits that this is a fair method for recognition because it balances the different interests of the jurisdictions involved. It takes into account the legitimate expectation(s) of the people involved, and yet does not recognise the 'title' of the unknown relationship in English law. To deny a right or obligation that is valid in a foreign relationship/marriage demonstrates a lack of international comity, and intolerance for foreign laws in English private international law. Again, we can see that my opinion, as well as Clarkson and Hill's suggestion, was to simply ignore the title of a relationship and confer the rights and obligations stemming therefrom under a different section of the law would be a plausible, if academic, postulation for private international law. [146]

B) Foreign Registered Heterosexual Partnerships (as opposed to the Homosexual Partnership)

The recognition of a foreign heterosexual registered partnership poses a problem. Since the foreign heterosexual partnership is an overseas relationship which is valid in the foreign jurisdiction, it is *prima facie* capable of recognition under English common law. However, this author predicts that since there is no equivalent to a heterosexual partnership yet in English domestic law, the chance

[146] *Supra*. note 137 and *Supra*.note 138.

of recognition of a foreign one may be slim. No test cases have come forth to English court for the recognition of a foreign heterosexual partnership, so there is no conclusive case law as of yet that can support this prediction. This author contends that the trend set by the Civil Partnership 2004 and the Gender Recognition Act 2004 appears to be that if there is no domestic "equivalent" status then the foreign status will not be recognised. Before the passage of these pieces of legislation in domestic law, a foreign transsexual marriage and a foreign civil partnership were not recognised in England. [147] However, with the increasing numbers of foreign jurisdictions that are gradually recognising heterosexual cohabitation with a legal status as well as domestic trends in case law and the Law Commission recommendations[148] this author predicts that the recognition of a foreign heterosexual partnership (or the possibility of recognition for one) may take place in the near future by an English court.

With the many forms of new relationships worldwide, it is unlikely that policy would be used immediately as an outright trumping card for non-recognition. The method courts may employ in future recognition cases may be similar to the judicial reasoning in *Wilkinson v Kitzinger.* [149] If we can recall the facts of the case, after much consideration, the court decided that a same-sex marriage contracted by English domiciliaries in Canada was not entitled to recognition in England. As we have seen in our treatment of the specific case,

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[147] See again K. McNorrie 'Reproductive Technology, Transsexualism and Homosexuality – New Problems for International Private Law' (1994) Vol 43 (4) *ICLQ* 42.

[148] See www.wikipedia.com 'Domestic partnerships' for a list of jurisdictions worldwide that have a status for heterosexual partners such as Portugal, Hungary, Croatia as well as Australia, New Zealand. It is notable that in the United States, Oregon, Washington and California have also enacted a status for heterosexual partners. See also further pages of this chapter on other forms of heterosexual cohabitation other than heterosexual partnerships. (Website last visited April 2010).

[149] [2006] EWHC 2022.

this decision was partially prompted by English domiciliaries escaping English law, as well as the judiciary's assertion [150]of English policy that same-sex marriages are not civil partnerships. Therefore, this author suggests that if a form of status/relationship has been contracted validly in a foreign country with non-English domiciliaries, the chances of recognition would be greater by the English court.

As we have seen from our earlier discussion, there are many forms of relationships worldwide that an English court has yet to consider. This author suggests that the international lawyers should consider a foreign status carefully before jumping to non - recognition, and examine the facts of the case, as well as the parties' intentions (for evasion of the domiciliary law). Additionally, this author proposes that dicta would be forthcoming in the near future regarding forms of cohabitation and marriage that the Civil Partnership Act 2004 did not include.

How would the English court recognise other types of legal relationships that exist in jurisdictions outside Europe? Perhaps England's recognition of the homosexual pacte, with inclusion on the list in the Civil Partnership Act 2004, was due to (geographical) proximity. [151] With Europe becoming an ever closer union, English private international law has had to recognise the French homosexual pacte.

[150] Or it can be said re-assertion because the Civil Partnership Act 2004 did not provide for same-sex marriages.
[151] It should be noted that the French pacte is open to heterosexual couples as well as homosexual couples in France, but Schedule 20 of the Civil Partnership Act 2004 did not include the heterosexual pacte.

C) Recognition of Foreign Heterosexual Relationships Outside Marriage and Registered Heterosexual Partnerships

Many foreign jurisdictions now have a formal legal status for heterosexual cohabitants that operates independently from heterosexual marriage. [152] Previously we discussed the recognition of a foreign heterosexual registered partnership, but now we will consider the possibility of other forms of heterosexual cohabitation outside of a formal (foreign) legal status. Presently, English domestic law does not have such a status for heterosexual cohabitants, but the terminology in other jurisdictions with reference to cohabitants can be confusing because the exact level of rights and responsibilities may differ and varies from jurisdiction to jurisdiction. [153]

Therefore, this author predicts there may be recognition problems in English private international law if a foreign status other than a registered heterosexual partnership for heterosexual cohabitants comes forth for recognition. However, as we have seen in relation to the Law Commission Report in July 2007 [154] *Cohabitation; The Financial Consequences of Relationship Breakdown*, and in case law, a change in attitude towards the needs of heterosexual cohabitants upon relationship breakdown has occurred domestically in recent years. The original

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[152] See Chapter 2 of Hoggett, Pearl and Bates (Eds.) *The Family, Law and Society* (London Butterworths 1999). See also the Family Law (Scotland) Act 2006 which introduced a set of rules recognising de facto cohabitants as defined in Section 25 of the Act as either member of a couple consisting of a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners. Thus the provisions in the Act apply both to heterosexual and homosexual couples.

[153] *Supra.* note 144.

[154] Law Com 179 (2006) and also *Report on Cohabitation; The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

stand taken by England's domestic law offered very little financial protection upon relationship breakdown to cohabitants. In *Kimber v Kimber*[155] an ex-husband was required to pay maintenance until she re-married or cohabited, but claimed that his wife was cohabiting with her fiancé, so he stopped payments. The court, in this case, developed criteria to determine whether the cohabiting couple were 'living together as husband and wife."[156] In recent case law in 2005[157] it would be seen that the court will focus upon the degree upon which the parties were connected to each other, and the level of commitment to the relationship. Furthermore, the 2007 case of *Stack v Dowden* [158] was the first time that the House of Lords held that if a property was conveyed or registered into joint names, the presumption would be that equity would follow the law and in the context of the family home this presumption was so strong that it could not be rebutted.[159] Baroness Hale of Richmond famously stated that 'cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."[160] Thus, *Stack v Dowden* was the first case in English legal history to bring forth the presumption of ownership in relation to unmarried couples.[161] Therefore, this

[155] [2000] 1 FLR 383.
[156] [2000] 1 FLR 383 at 391 -393.
[157] *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 where the court debated what is meant as to 'living together as husband and wife.'
[158] [2007] UKHL 17.
[159] Per Baroness Hale in [2007] UKHL at para 69.
[160] *Ibid.*
[161] R. Probert 'Cohabitants and Joint Ownership; The Implications of Stack v Dowden' October [2007] *Fam Law* pp 924 – 929. See also H. Wood, D. Lush, D. Bishop and A. Murray *Cohabitation Law, Practice and Precedents* (Bristol Jordan Publishing 2009) for the position in English law in relation to cohabitees. See also J. Bray 'The Financial Rights of Cohabiting Couples' [2009] *Fam Law* 1151.

signals a trend in domestic law towards greater protection for unmarried heterosexual couples.

The difficulty for cohabitants in England is that there is still no formal legal status (and no statutory remedies like their married and same-sex counterparts) for heterosexual cohabitants.)[162] The Law Commission's central recommendations would introduce a statutory scheme of financial remedies for couples who have cohabited for a minimum period of cohabitation, and who have had children together. It would be open to cohabiting couples, subject to certain requirements, to opt out of the scheme and make their own financial agreements.[163]

This author predicts that a foreign heterosexual status whether it be a registered partnership (such as we have examined earlier in this chapter) or as some other form would presently not be capable of recognition under the current English private international law rules. Again, we will note that the trend seems to be that there will not be recognition of a foreign status *unless* England has implemented the equivalent domestic statutory legislation. It also seems unlikely, at this point, that the English courts would develop case-law in private international law to 'jump' ahead of legislation.[164]

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[162] It should be noted that this author will not go into depth discussing case law relating to cohabitants and the Law Commission Report, the purpose of this section is to give a general understanding of the current trends in domestic law in order to recognise foreign laws and a foreign status in English private international law. It is also noteworthy that in 2010 the Law Commission released the Law Commission Consultation Paper No. 191 *Intestacy and Family Provision Claims Upon Death* (London HMSO 2010) pp 73 - 92. The open consultation period lasted from Oct 2009 to February 2010 and had provisions for intestacy rights for cohabitants.

[163] See S. Bridge 'Cohabitation; Why Legislative Reform is Necessary' [Oct 2007] *Fam Law* 911 – 915.

[164] G. Douglas and N. Lowe have predicted that 'a workable general definition of cohabitation' would not be forthcoming in domestic law at this point and " it is not one which neither the

What is noteworthy is that the Law Commission in its consultation paper in 2006 highlighted the possibility that cohabitation cases could have a substantial foreign element.[165] Part 11 of the Law Commission Consultation Paper focussed upon the procedural rules relating to the cohabitation reform proposals and put forth suggestions for jurisdiction and applicable law for such cases. While the Law Commission for England and Wales have been congratulated on proposing 'initial forays' in conflicts of law cohabitation cases that have a foreign element, it is clear that these cautious ventures need to be developed more. [166]

Therefore, this author contends that policy at this time in England will not force or entertain recognition of a foreign heterosexual status. There are no cases that have arisen in English private international law for recognition as of yet. So, this is an area that can quite possibly be resolved only after parliamentary intervention. But with the recent Law Commission Paper and its proposals, and the recognition of the French homosexual pacte (through the Civil Partnership Act 2004) it is likely that recognition of heterosexual cohabitants will be coming forth in a few years time in English private international law. This author predicts this change in policy because as we have seen in this thesis, [167]it is only when increasing numbers of domiciliaries have the occurrence of a problem (forced marriage legislation, benefits for foreign polygamous marriages, recognition of same-sex partnerships) that Parliament is likely to step in. Or, if any prediction

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Government or Parliament seems keen to tackle in the near future." See G. Douglas and N. Lowe (Eds.) Bromley's *Family Law* 10th Ed. (Oxford Oxford University Press 2007) pp 105.

[165] *Supra.* note 154.

[166] See J. Carruthers 'De facto cohabitation; the international private law dimension' *Edinburgh Law Review* (2008) 12(1) 51 – 76 at 76.

[167] And more generally throughout private international law.

can be garnered from existing case law is that in light of *Wilkinson v Kitzinger* as well as the ECHR decisions relating to transsexuals, policy change by the judiciary in the English courts seem to be incremental, and only with protracted litigation.

Perhaps what can be gleaned from the many recognition difficulties stemming from all new forms of cohabitation[168] is that recognition in English private international law necessitates one 'general category of relationship recognition' for all same – sex marriages, civil partnerships and heterosexual marriages, without any distinction. [169] This author submits that as long as the relationship, which has been established abroad between two partners with proper capacity, should then be recognised in English private international law. In this scenario, public policy could be retained in a manner similarly to what is encompassed in Section 212 of the Civil Partnership Act 2004. This author proposes that this general category would be the ideal situation as it would promote recognition and give effect to the expectations of parties. This would be a very liberal method and had been proposed by a few academics for their national private international law before certain jurisdictions quickly passed legislation to allow same – sex civil partnerships. The implementation of such a category is only hypothetical and represents a simple solution to a growing

[168] This applies to brother/sister relationships, heterosexual partnerships and other forms of heterosexual cohabitation.

[169] See S. Henneron 'New Forms of Cohabitation' in K. Boele – Woelki (Ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Oxford Intersentia 2003) pp 468 – 470. She also finally concluded that perhaps unification of national private international laws throughout Europe is more necessary that harmonisation for a solution to this problem.

recognition problem experienced not only for English private international law but also other EU member states.

V. Conclusion

As we have examined in this chapter, policy in relation to same sex partnerships and new forms of relationships has drastically changed in the minds of the judiciary from being an 'unruly horse' and a trumping discretion. [170] It is now used rarely in its direct form save only in a few situations. Additionally, as we have seen, policy may still be used in its indirect, positive form to recognise new forms of cohabitation that do not fall within the Civil Partnership Act 2004.

What could provide the much needed impetus for change in English private international law? Perhaps the legitimate expectation of individuals, as well as the movements towards the harmonisation of national laws (at least within the EU) would culminate in a European wide general status for all forms of cohabitation/marital relationships thereby eliminating the need for any recognition problems or policy difficulties. Until that time, academics and the judiciary can only postulate on the potential obstacles on the direction of policy and the path for recognition or non – recognition. The recent passage of the Equality Act 2010 *may* prompt domestic change for same-sex couples to enter into marriage by either the judiciary or Parliament. This possible development would ultimately eliminate private international law recognition problems for

[170] See P. Carter 'The Role of Public Policy in English Conflict of Laws' (1993) 42 *ICLQ* 111 – 131.

same-sex marriages, but this would be dependent upon the unpredictable priorities of legislators. [171]

If a solution to the potential recognition problems of new forms of relationships and heterosexual cohabitation is not found, English private international law would fail its duty to demonstrate comity to the laws of other jurisdictions as well as its commitment to the legitimate expectations of foreign individuals who avail the English courts. Without any initiative(s) being undertaken presently to rectify this situation, a lacuna for recognition problems will continue to exist for English private international law.

[171] *Supra.* note 104 which gives a brief account of the developments before the passage of the Gender Recognition Act 2004. As we can recall, the swift passage of the Gender Recognition Act 2004 and the Civil Partnership Act 2004 ultimately solved the private international law problems stemming from such relationships.

Chapter Four

Policy in Jurisdiction and Choice of Law in Matrimonial Dissolutions

I. Introduction

As we have seen in relation to heterosexual and homosexual unions, public policy is present in the common law in its residual form and also implicitly in the rules relating to private international law. However, this chapter will prove that policy is also present in a covert manner in relation to the rules relating to jurisdiction and choice of law in the dissolution of marriage. This author asserts that there are hidden policy considerations in the cases stemming from the rules relating to jurisdiction in the Domicile and Matrimonial Proceedings Act 1973 and the Brussels II bis[1] legislation. Additionally, this author will suggest that the ambiguity in choice of law in nullity and divorce is also motivated by implicit policy considerations that are not always articulated. By not developing legal rules to accommodate classification clearly, the English court is indirectly forcing the classification to be done by English law as the forum and thereby giving importance to English policies, by not giving effect to the foreign law. This is not to say that policy in its residual form is not present in the area of choice of law in nullity decrees. We shall see that the trumping discretion could still be used in

[1] Brussels II bis Regulation (EC) 2201/2203 and also the European Communities (Jurisdiction and Judgements in Matrimonial and Parental Responsibility Matters) Regulations 2005 (SI 2205/265).

non – recognition in certain circumstances in relation to classification of unknown or repugnant defect in nullity cases.

As we have examined earlier in Chapter 1, policy in its residual form and also its implicit form has rarely been expressed by the judiciary. There is a need to uncover the workings of public policy in both its residual and implicit forms because this author suggests there should be a greater awareness of the issues that may motivate the need for policy. As we shall see, this is an area in which the judiciary and academics rarely acknowledge the workings of policy. In doing so, there would be a not only be a greater understanding of policy issues generally, but would promote the expectations of the parties to litigation.

II. Policy Considerations in Staying Proceedings

With the increased availability of the English courts to foreigners, there may be increased litigation worldwide with respect to the same case. There are several reasons for this. For some, the possibility of an English maintenance award may be financially beneficial. For others, the possibility of an English maintenance award may be financially onerous. [2] It has been noted that it is not unusual for a rich English husband to persuade his wife to move to a jurisdiction that will offer a lesser maintenance award upon divorce. Or, perhaps an individual may be unable to obtain a divorce under their domiciliary law, whereas under English law the divorce grounds might be easier to prove. In other

[2] See www.homeoffice.gsi.gov.uk guidelines(Last visited April 2010) and also the case of *Vervaeke v Smith* [1983] 1 A.C. 145 where a Belgian prostitute married an English domiciliary in order to avert deportation.

circumstances, a party may want to escape the financial tie of a pre – marital agreement or a post – marriage contract. Because of the differences worldwide relating to grounds for divorce, jurisdiction and financial consequences, it not uncommon for the parties to shop for the best deal available, globally. [3] Therefore, it is the obligation of the petitioner or the cross petitioner when the proceedings are going on in the English court to inform the court of any proceedings that are happening in relation to that marriage, or of any other proceedings that are going on in a foreign court that may affect the marriage's validity.

In relation to divorce and nullity proceedings, the English court has the power to decline jurisdiction and also, to stop proceedings in England by referring the case to a different jurisdiction. The power to 'stay' proceedings helps to avoid any future conflict between the parties, and helps the court direct the case to the most appropriate forum which has the greatest connection with the parties and the marriage.[4] We shall see in this section that policy often surfaces indirectly outside its residual trumping role in this area. Policy considerations motivate the court's decision making when granting discretionary stays and these considerations are often unarticulated and not usually thought of as policy.

A mandatory stay applies only to simultaneous divorce proceedings in England and the other parts of the British Isles. [5] The mandatory stay does not apply to divorce proceedings between England and a country that is not a member

[3] M.D. Fields and D. Truex 'Foreign Divorce; Risks and Rewards for Americans Abroad' *International Family Law* March 2006.
[4] See R.Shuz in 'Staying Proceedings' (1987) 17 *Family Law Journal* 438
[5] Paragraph 8, Schedule 1.

of the European Union. So, if it appears that proceedings with respect to the marriage are more closely connected to jurisdiction outside the British Isles, [6] the proceedings in the English court will be stayed in favour of the other jurisdiction. The stay of the proceedings can only be implemented by one of the parties applying to the English court. The court cannot halt the proceedings on its own motion in mandatory cases. Under the Domicile and Matrimonial Proceedings Act 1973, the policy was to give priority to the country with the closest connection to the British Isles. However, as we shall see in relation to the Brussels II, the policy of looking for the closest connection has now been replaced by a policy of leaving jurisdiction to the court in which the proceedings first started. The discretionary stay, on the other hand, has a much wider application than the mandatory stay because it can be applied to courts outside the European Community, as well as British courts. [7] Because of the many factors that can be utilised by the court, it is submitted that these considerations are actually an implied form of policy(or policies) operating to control access to the courts. The discretionary test could be generally described as one of 'balance of fairness' and convenience. [8] The law in this area has developed in a flexible manner, as many factors(and therefore, policy considerations) can be taken into account. The balance of fairness test in similar to the *forum non conveniens* test used in

[6] Defined by Sch 1, para 2 to mean Scotland, Northern Ireland, Jersey, Guernsey and the Isle of Man. The parties can apply for a discretionary stay and the court is able to apply for a discretionary stay on its own motion.
[7] See *A v A* (forum conveniens) [1999] 1 FLR 1; *JKN v JCN* [2010] EWHC 843.
[8] See Cheshire and North *Private International Law* (Eds. P. North and J. Fawcett) 13th Ed. (London Butterworths 1999) pp 770 – 771. and also Cheshire and North (Eds. P. North, J. Carruthers and J. Fawcett) *Private International Law* 14th Ed. (Oxford Oxford University Press 2008) pp 960 – 961.

Spiliada Maritime Corporation Law v Cansulex Ltd. [9] In *Spiliada,* Lord Goff set out principles for the courts to follow when determining which jurisdiction is the most appropriate in commercial cases.[10] Firstly, before the *Spiliada* case,[11] the factor that the court had to consider generally whether justice would be obtained in the foreign court. After *Spiliada,* the defendant has the burden of proof that there is another available forum abroad which is *prima facie,* more appropriate. If the defendant succeeds, then the claimant must show that there are special circumstances which justify keeping the case in England. The court would then be concerned with whether or not justice requires that a stay should *not* be granted. [12] However, since the S*piliada* case, many cases have been decided that was no more appropriate forum abroad. What is notable about these cases, is that many considerations have been taken into account because the "general notion is that the ultimate question is what justice demands" [13] so all the factors in favour of and against a stay have to be considered by the court. [14] But when there is a more appropriate forum abroad, the court will weigh in the other circumstances of the case.

Therefore, the number of factors (and therefore policy considerations) that can be weighed into the decision making process post – *Spiliada* are very

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[9] [1987] AC 460 [1986] 3 ALL ER 843.
[10] And see generally the explanation of *forum non conveniens* in Cheshire and North *Private International Law* 13th ed. (London Butterworths 1999) at pp. 340 – 345.
[11] *Aaronson Bros Ltd v Maderera del Tropico SA* [1967] 1 Lloyd's Rep 159 at 162.
[12] *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 at 478 HL. *Connelly v RTZ Corpn PLC* [1998] AC 854, HL
[13] Cheshire and North 13th Ed. *Private International Law* (London Butterworths 1999) pp 340.
[14] See *Charm Maritime Inc v Minas Xenophon Kyriaku and David John Mathias* [1987] 1 Lloyd's Rep 33 at 447. See also *The Po* [1990] 1 Lloyd's Rep 418 at 44; affd by the Court of Appeal [1991] 2 Lloyd's Rep 206; *Arkwright Mutual Insurance Co v Bryanston Insurance Corpn of Ireland Ltd and International Commercial Bank plc* [1989] 1 Lloyd's Rep 181 at 190 affd [1989] 2 Lloyd's Rep 298.

wide. [15] Cheshire and North note that a 'fixed list' of considerations that can be taken into account does not exist.[16] This discretionary formula, though decided in the commercial law context has been carried over to matrimonial proceedings, as well. I shall now illustrate the breadth of the discretion available to the court by some selected examples.

In *Gadd v Gadd* [17] the fact that a wife would not receive any financial support in a foreign country was instrumental in refusing a stay. The wife and husband were British nationals resident in Morocco. Upon relationship breakdown the wife came back to England to seek treatment for her illness, and stay with her mother. The court considered that in Morocco the wife would receive a significantly lower financial settlement as opposed to England. The husband applied for a stay of the wife's English divorce proceedings, but the court considered that, in light of all factors of the case, the English proceedings should be allowed to continue.

It is appropriate now to consider and contrast *Dampierre v Dampierre* [18] with *Gadd v Gadd.*[19] In *Dampierre v Dampierre* [20] the parties were both French. In 1979, they moved to England, where the husband was involved in the cognac business. The wife went to New York, where she remained and informed the husband that she did not want to return to England. The husband applied to the French court to start divorce proceedings. The wife started divorce proceedings

[15] If we can recall, Chapter 1 describes Jean Stapleton's lists for and against the imposition of a duty of care.
[16] *Supra.* note 10. at 342 – 343.
[17] [1985] 1 ALL ER 58, [1984] 1 WLR 1435.
[18] *Dampierre v Dampierre* [1988] A.C. 102.
[19] [1985] 1 ALL ER 58 [1984] 1 WLR 1435.
[20] [1988] A.C. 102 per Lord Templeton's judgement.

in England. The wife argued that her maintenance would be lower if the case was heard in France as opposed to England, but in view of all the factors connecting the case to France, the prospect of a lower maintenance award had to be insignificant.[21] The husband had applied to the Court of Appeal for a stay of his wife's English divorce proceedings, but the stay was refused by Sir John Arnold P. Consequently, the husband appealed to the House of Lords to overturn this judgement (denial of a stay of the wife's proceedings) of the Court of Appeal. The House of Lords considered that in light of all the connections with France, and specifically, the wife's connections with France, it would not be an injustice to have a French maintenance award. [22] Lord Templeman reasoned[23] that

> " it is not unfair to this wife in the present circumstances to deprive her of certain advantages which she might not obtain from a French court. The wife's connections with England were tenuous and she voluntarily severed all her connections with England before instituting English divorce proceedings. The wife is French, she was married in France, she can litigate in France as easily as in England and she can obtain from the French court all the redress to which she is entitled under French law. The wife cannot sever her direct French connections derived from ancestry, birth, nationality, education and marriage laws, or her indirect French connections through her husband and her child."

Thus, it was concluded that a stay of the wife's English divorce proceedings should be granted. One may query why there is a difference between *Dampierre v Dampierre* and *Gadd v Gadd.* As we have seen, in *Dampierre*, the

[21] [1988] A.C. at 102.
[22] *Dampierre v Dampierre* [1988] A.C. 102. per Lord Templeman's judgement.
[23] *Ibid.* at 103.

wife was closely connected to France, and therefore, the English judges felt it was fair that the case should be held in France despite the prospect of a lower maintenance award. Whereas, in *Gadd* the courts reached the opposite conclusion, and directed that the wife be allowed to continue proceedings in order to obtain a higher maintenance award. This author submits that the test is one of balance of fairness. Therefore, after taking into account all the factors, similar cases may then have a different result. Secondly, this author submits the possibility of a lower maintenance award from a developing country such as Morocco in *Gadd* may have swayed the English court's decision to allow the wife to have maintenance determined by the English courts. Whereas, in *Dampierre* the competing forum was France, so the difference in maintenance was not as great as the country of Morocco in *Gadd*.[24]

Another case that illustrates the balance of fairness test well is *Krenge v Krenge*.[25] The facts of the case are as follows. The wife was English and the husband was German. There were numerous errors in relation to the petition and timing of documents. The English court sent the husband and the wife a decree of certificate of entitlement.[26] They were married in England, but then moved to Germany. Upon relationship breakdown, the wife first issued maintenance

[24] Some jurisdictions have maintenance awards that are highly biased in favour of one party. See R. Mohammed Hussaain- Patel's views in *Woman versus Man; Socio-Legal Gender Inequality in Pakistan* (New York USA 2004) and also www.roleofwomen ineconomiclife.net/Biblio_media.html.(Website last visited April 2010).

[25] [1999] 1 FLR 969.

[26] This is a certificate issued to Commonwealth citizens so they can enter England and be free from immigration control. See www.britishhighcommission.gov.uk(Website last visited April 2010) and also www.indhomeoffice.gov.ac.uk/documents/nisec2gensec/rightofabode.(Website last visited April 2010. See archives.) In this case the husband did not get the proceedings stayed in England. One cannot get a certificate of entitlement if the proceedings are defective or living arrangements for the children are not settled. A certificate of entitlement would also be served upon both parties in English law.

proceedings in Germany, and then divorce proceedings in England.[27] The husband's German solicitors then sought a stay of the English proceedings. The solicitors also wanted to set aside the decree absolute because of the irregularities. The main reason for seeking a stay was because under German law, inheritances would not be treated as matrimonial assets. The court allowed the stay of the proceedings. There was a burden of the husband to establish that there was also another forum that was more appropriate. The court considered whether Germany was clearly and more distinctly the more appropriate forum for the case. There are certain factors which pulled evenly in each direction. The husband remained German and the wife retained her English identity by "attending an English church in Berlin and had a circle of English friends." [28] While the marriage was celebrated in England, the court found that the connecting factors pointed more to German law over English law. The matrimonial assets were in Germany, the maintenance claim which the wife had was against German income in Germany, their pensions were payable in Germany, they had planned their married life to live in Germany and had lived in Germany during the duration of the marriage so there were few factors that tied the case to England. [29]

As we can see from these cases, there are a number of factors that can influence a court's decision as to which country can be most closely connected with the case. Public policy (and therefore, policy considerations) surfaces here in an indirect manner by allowing the parties to prove that they have had a

[27] Domicile and Matrimonial Proceedings Act 1973 Schedule 1 para 7. See also the Family Proceedings Rules 1991, rr.2.3, 2.15(4), 2.27(4), App.2 para 1(j).
[28] [1999] 1 FLR 969 at 981.
[29] [1999] 1 FLR 969 at 981, 982.

connection with a country. It is in this manner that the English court equates justice to the parties by allowing the parties to prove their connection to a particular forum by allowing a variety of considerations to be taken into account. The wide discretion granted to the English courts allows policy considerations to be used in the jurisdictional rules of the Domicile and Matrimonial Proceedings Act 1973. Now we can turn to the particular sections of the Brussels II bis Regulation that relate to jurisdiction and have an impact upon public policy.

III. Jurisdictional Policy Changes - The Brussels II bis versus the Domicile and Matrimonial Proceedings Act 1973

The biggest change in the Europeanisation of private international law rules in relation to matrimonial proceedings is that the English court cannot elect to decline jurisdiction in favour of a more appropriate forum. The rule, which is encompassed in Article 19 of the Brussels II bis[30] is that the 'court first seised' enjoys jurisdiction. The Regulation does not take into account the rules discussed earlier in relation to non – EU divorces in the Domicile and Matrimonial Proceedings Act 1973, unless jurisdiction falls under the residual rules of jurisdiction. This means that *forum non conveniens* does not apply to

[30] European Communities (Jurisdiction and Judgements in Matrimonial Parental Responsibility Matters) Regulations 2005 (SI 2005/265). It was drafted with the best interests of the child in mind see also A. Tsauossis-Hatzis 'Strengthening the Ties that Bind: Proposals for a Child Centred European Divorce Law' in K. Boele – Woelki (Ed.) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003). See generally N. Lowe, M. Everall, M. Nicholls *The International Movement of Children* (Law Practice and Procedure) (Bristol Jordans Publishing 2004.)

cases under the Brussels II *bis*. Unlike the rules set out in the DMPA 1973,[31] the court under the Brussels II *bis* has no power to order discretionary stays. [32] Therefore, the court cannot consider the breadth of factors and policy considerations that we have previously analysed anymore in cases involving a matrimonial dissolution from within the European Union.

This is largely due to the fact that the emphasis on connecting factors changed from the DMPA 1973. The Brussels II bis utilises habitual residence over domicile as a connecting factor. [33] According to the Borras Report, the implementation of a connecting factor such as habitual residence was intended to help the respective parties avail of their chosen jurisdiction easily. [34] Compounded with the court first seised rule within the European Union, the Convention had hoped to bring about the possibility of multiple divorce proceedings throughout the European Union to a closure, thereby speeding up what might be a traumatic and emotional process for all involved.

It is questionable as to how this change has fared. From a technical standpoint, it has been argued that a great paradox of the new regulation is that

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[31] Which is still in force for non – European Union divorces.

[32] *Supra.* notes 7 – 18.

[33] Article 3(1)(a)(vi), 3(1)(b) and 3(2). See also 3(1)(a)(ii), and 3(2)(a)(iii). *Sulaiman v Julaffi* [2002] 1 FLR 479. See also *Ikimi v Ikimi* (2001) EWCA Civ 873 and *Mark v Mark* [2005] UKHL 42.

[34] See A. Borras *Explanatory Report on the Convention Drawn up on the Basis of Article K.3 of Treaty on the European Union, on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters* OJ 1998 C221/27. Para 33 of the Borras Report gives recommendations as to what happens when there is a dual nationality. And if a court has been properly seised, Articles 4 and 5 enable it to entertain a matrimonial counterclaim, or to convert a legal separation which has been granted into a divorce, even if the connection which was granted by Article 3 disappeared. Note Articles 6 and 7 which are the residual grounds of jurisdiction and throw jurisdiction back to the DMPA 1973. Note as well Articles 16 – 20 of the Brussels II bis - has provisions relating to the court's obligation to decline jurisdiction of its own motion, on notification of the respondent, on concurrent proceedings in Member States, and on provisional and protective measures. See also the case of *Wermuth v Wermuth* [2003] 1 WLR 942.

although it was intended to avoid parallel proceedings, the multiplicity of connecting factors available has actually increased the possibility of parallel proceedings.

From a policy standpoint, since considerations *cannot* be factored into the decision to stay matrimonial dissolutions stemming from the European Union anymore this may simply be less confusing for the parties and the court. The lack of policy in this area may be disadvantageous for those parties who would like to shop for the best available forum for whatever reason – whether it be personal or financial reason. The implementation of the Brussels II bis emphasises the "court first seised" rule in most cases stemming from within the European Union.

It should be noted, however, that the implementation of Article 19 "buffers" the effect of the court first seised rule[35] by requiring that the court in which the proceedings were first brought acquires jurisdiction to hear the case. All other courts must decline proceedings afterwards. In this case, the English domiciliary could fulfill the residential requirements in a different EU country with a lower maintenance obligation, and then start divorce proceedings there. What would be preferable is to implement a hierarchy of connecting factors in order to resolve forum shopping.

We are left with an incredibly complex piece of legislation which achieves uniformity at a procedural level at the expense of limited forum shopping. It is submitted that the current jurisdictional rules are far too complicated and do not provide a beneficial approach to resolving the problem of jurisdiction in divorce.

[35] Which was encompassed in Article 3 of the Brussels II Bis.

[36] Neither does the legislation resolve the difficulties with the connecting factor of habitual residence, as no uniform definition of habitual residence has been expounded. Therefore, it is up to each member state of the EU to determine their own definition of habitual residence. By leaving the definition to the respective member state, each state therefore promotes (and retains) its own policy agenda by not having a European – wide standard.

IV. Policy and Choice of Law in Divorce

The Matrimonial Causes Act 1973 is silent on choice of law issues in relation to the applicable law for divorce and judicial separation. However, in practice, English law applies to all proceedings for divorce or judicial separation that come before the English courts. [37] English law as the forum dominates this area of choice of law. [38] It does not matter if the foreign jurisdiction's ground for divorce differs from English law.[40] This view was confirmed in 1950, when the eminent private international law scholar Wolff stated that "the dissolution of a marriage is matter which touches fundamental English conceptions of morality,

[36] At www.familylawweek.co.uk/print.asp see D. Hodson's article"Brussels II Encore – A Summary of Brussels II bis.'(Website last visited April 2010, but article taken off .)
[37] *Qourashi v Qourashi* [1985] FLR 780. So once jurisdiction is assumed in England, English law will always be applicable as choice of law.
[38] *Czepek v Czepek* [1962] 3 ALL ER 990 and *Pratt v Pratt* [1939] 3 All ER.
[40] *Pratt v Pratt* [1939] 3 All ER.

religion and public policy." [41] Thus, we can see that this insistence on English law as the law of the forum, is a policy – fuelled consideration.

There are, however, several reasons for this approach. [42] Historically, the English court had jurisdiction only if the parties were domiciled in England. With English law as the law of the forum, and the law of the domicile, then English law was the only law to be applied. Secondly, the application of foreign laws to what is a sensitive national policy issue might be considered abhorrent. Thirdly, the application of foreign law may seem time-consuming for the English court when many domestic divorces are uncontested.

But, it is evident that a need for a choice of law rule exists when the English court possesses jurisdiction on some basis other than domicile. [43] However, the application of English law was confirmed in *Zanelli v Zanelli.* [44] An Italian national, who was domiciled in England, married an Englishwoman in England in 1948. He was deported from England, and then acquired an Italian

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[41] M. Wolff *Private International Law* 2nd Ed. (1950) pp 374. See also *Transactions of the Grotius Society* 1954 Vol 9 (Issue/Annual Lecture on Public and Private International Law) (Oxford Oxford University Press 1954).

[42] Clarkson and Hill *Jaffey on the Conflict of Laws* (London Butterworths 2002) pp 394-395.

[43] Cheshire and North 13th Ed. *Private International Law* (London Butterworths 1999) pp 773 noted *Zanelli v Zanelli* (1948) 64 TLR 556. See also Dicey and Morris on the *Conflict of Laws* 14th Ed.(Eds, L. Collins Et al) (London Sweet and Maxwell 2006) at 877. Before 1938, it was a matter of academic debate whether the English court applied English law as the law of the parties' domicile or as the law of the forum, because they did not exercise divorce jurisdiction unless the parties were domiciled in England. The Matrimonial Causes Act 1937 gave the English court jurisdiction on some basis other than domicile but did not specify which basis. The Matrimonial Causes Act 1937 Section 13 allowed a deserted wife to could petition for divorce in the English courts even though the husband was domiciled abroad so it did put forth the possibility that the law of the domicile of the parties might either be English law or the law of the husband's domicile. .

[44] *Zanelli v Zanelli* (1948) 64 TLR 556. The wife carried the husband's domicile (Italian) because he reverted back to his Italian domicile in the case.

domicile. The Matrimonial Causes Act 1937[45] gave the English court jurisdiction in cases of divorce and legal separation, but it did not have a rule for choice of law. The court in *Zanelli* applied English domestic law, and granted the wife a decree of divorce despite the fact that Italian law (which was the law of her domicile) did not permit divorce. Despite this, the court did not consider the choice of law problem in the case, and applied English law, nonetheless. And so, in the aftermath of *Zanelli* and the Matrimonial Proceedings Act 1973,[46] English law is still applicable to all proceedings that come before the English court even if the parties are domiciled abroad.

There are jurisdictions which consider the law of other countries other than that of the forum,[47] but the English law has decided to retain the approach of application the law of the forum in relation to the recognition of foreign divorces.[48] This author submits that this is another avenue in which policy has surfaced covertly into English private international law with respect to choice of law.

V. Policy and Choice of Law in Nullity

While the question of choice of law for divorces and legal separations is straightforward, if contestable, the same cannot be said for nullity petitions.

[45] Section 13 of the Matrimonial Causes Act 1937, which was in force at the time. This provision was reenacted in Section 46(1) Matrimonial Causes Act 1973, which was then later repealed by Section 17(2) and Schedule 6 of the Domicile and Matrimonial Proceedings Act 1973.
[46] *Ibid.*
[47] Such as France. See L. Palsson *International Encyclopaedia of Comparative Law* Vol III Chapter 16 pp 16. *Infra.* note 79.
[48] As we shall see, the approach of choice of law of the forum in English private international law has continued in spite of the recent EU choice of law proposals. *Infra.* note 79.

Generally, in the area of domestic law, divorce ends a marriage but an annulment merely declares an existing fact – whether the marriage is void or voidable. Therefore, the court is determining the validity of a marriage, which may be governed by two different foreign laws(formal validity and essential validity) as opposed to a divorce. But more specifically, we see that public policy operates in a *more* covert manner in relation to nullity decrees, as opposed to divorce decrees. Since the question at hand for nullity decrees is what law governs the defect in the marriage, there are various applicable laws that the English court may use. Since there are many different applicable laws that the English court may employ, the judge(s) deciding the case may disguise policy considerations in the choice of applicable law. This author suggests that the uncertainty as to what the applicable law should be is essentially the covert workings of policy so that English law (as the law of the forum) can be applied. Again, we can see the choice of law rules acting as a homing device as an excuse to return to English law and English policy considerations.

A. Method of Application to find the applicable law

The process which the courts have developed to find the applicable law asks the question what law governs the defect in the marriage? Therefore, the court has to analyse whether the defect belongs to formalities(which would then be governed by the place of the celebration) or whether the defect relates to a personal defect (which would then be governed the law of the domicile). A case

that illustrates the difficulties in relation to classification is *Solomon v Walters*.[49] A marriage had been celebrated in Nevada between the husband who was domiciled in British Columbia, and the wife, who was domiciled in Alberta. The wife petitioned in British Columbia for a nullity decree on the ground of absence of parental consent, as required by Nevada law, though by the domestic law of British Columbia the marriage was not affected by the defect; by Nevada law it was voidable. The judge considered the case and classified the defect as to formalities and applied Nevada law. If the defect had been classified as to capacity, then the ante-nuptial domiciliary law should have been applied. Classification is not an easy task.[50] There is no exhaustive list of defects in marriages or nullity decrees. The problem can only be resolved by reference to broad categories of defect. For example, the defect in the marriage could be that either party or both parties did not consent to the marriage. Cheshire and North recognise that there a variety of grounds upon which lack of consent can be founded. For example, there may be duress or coercion, mental illness, mistake as to the legal effects of the ceremony, attributes of the other party, or that one party was mistaken as to the identity of the other party.

This author suggests that the lack of legal certainty in classification is actually the implicit operation of policy considerations in English private international law. It is submitted by this author that this ambiguity is actually the silent workings of policy. By not developing legal rules to accommodate classification clearly, the English court is *indirectly* forcing the classification to be

[49] (1956) 3 DLR (2d) 78.
[50] See Cheshire and North (Eds. P. North and J. Fawcett) *Private International Law* (13th Ed.) (London Butterworths 1999) pp. 777.

done by English law as the forum, and not giving effect to the foreign law. Therefore, the court gets to utilise English law and English policy considerations. As we shall see in the following section, there is still uncertainty as to what law to apply to certain defects. Now we shall analyse the broad categories of defect, and discuss the applicable law that would be appropriate for each defect in turn.

B. Defect with respect to consent

In relation to nullity cases that lack consent, the first proposition for the applicable law is to apply the law of the forum, [51] which is English law. While convenient for the court to apply and non-question begging, this simple solution (with the regression to English law and policy) is not the best way out. Application of the law of the forum does not develop the choice of law conundrum in lack of consent cases. This author suggests that it is more appropriate to argue that reference to other countries' laws should be applied in lieu of forum law. This method would apply the foreign law that is best connection for the parties. However, the practice for the courts that has developed from case law and academic authorities varies.

[51] *Ibid.* pp. 778. Also see Cheshire and North(Eds. P. North, J.Carruthers, J.Fawcett) *Private International Law* 14th Ed. (London Butterworths 2008) at pp. 970 - 975. We shall see in this section that the Editors of Cheshire and North have discussed in depth the many different applicable laws to specific defects. Other authorities such as Dicey and Morris on *The Conflict of Laws* 14 ed. (Eds. L. Collins, Et al.) (London Sweet and Maxwell 2006) as well as Clarkson and Hill *The Conflict of Laws* 3rd Ed. (Oxford Oxford University Press 2006) have discussed the different applicable laws, but have not warranted as much discussion as Cheshire and North have done.

Other than the law of the forum it has been proposed that the court should apply the law of the place of the celebration.[52] Specifically, in *Parojic v Parojic* [53] Davies J referred the question of effect of duress to the law of England, as England was the place of the celebration. This stand, however, cannot be taken to be conclusive because there are as many cases in favour of applying the law of the place of celebration with regards to consent, as against it. [54]

Another way is to apply the law of the domicile of both parties. [55] For example in *Way v Way*[56] Hodson J accepted the lack of consent to be dealt with by referring to the personal law of the parties as opposed to the law of the place of the celebration. The case went to the Court of Appeal[57] where the marriage was held to be void on the ground that Russian formalities had not been observed, and anything that was said about the law of consent was purely *obiter.* [58] However, it was affirmed that Hodson J's [59] previous arguments in favour of referring consent to the personal law of the parties was correct.

Following the law of the domicile in issues of consent was affirmed in *Szechter v Szechter.*[60] The husband and wife and the husband's secretary were all Polish domiciliaries. The secretary was imprisoned for anti-state activities. In order to help the secretary, the husband divorced his wife, and then married his secretary in prison. The secretary was then released and then acquired a domicile

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[52] *Supra.* note 50. at pp 781.
[53] [1958] 1 WLR 1280 at 1283.
[54] *Bell v Graham* (1859) 13 Moo PCC 242; *Silver v Silver* [1955] 2 ALL ER 614 [1955] 1 WLR 728 see also the cases of *Apt v Apt* [1948] P 83 at 88 and also *H v H* [1954] P 258.
[55] *Supra.* note 50 at pp 782.
[56] [1949] 2 ALL ER 959.
[57] [1951] P 124 at 133.
[58] *Ibid.* 133 at 302.
[59] *Ibid.*
[60] [1970] 3 ALL ER 905.

in England, where she petitioned for a nullity decree on the ground of duress. This was done so that the husband could re-marry his first wife now that the secretary was free. This case raised many issues about what law could be applied to the marriage, [61] but Jocelyn Simon P was of the opinion that it was for Polish law, as the law of the domicile of the parties.

The Law Commission considered the problem of what law is to be applied to lack of consent cases in relation to marriage, and thought that issues of consent was related to essential validity as opposed to formal validity. [62] Following this reasoning, the Law Commission concluded that the most appropriate law to be applied to matters of essential validity, and therefore, lack of consent, would be to apply the domiciliary law. The Law Commission also favoured the application of the law of the domicile of the person whose consent is alleged to be defective.

The difficulty of what law to apply in relation to physical defects is even more cumbersome for the English court. [63] In English law, the range of personal defects can encompass many grounds, as illustrated under section 12 of the Matrimonial Causes Act 1973. Such grounds detailed in this section are impotence, wilful refusal to consummate the marriage, mental disorder, venereal disease and that the woman was pregnant by another man. And, in foreign jurisdictions, personal defects may differ greatly. Therefore, the classification process for English law will be a difficult one.

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[61] See the discussion of T. Hartley 'The Policy Basis of the Conflict of Laws in Marriage' (1972) 35 *Modern Law Review* 38 - 40 and P. Carter 'Private International Law Aspects of Capacity to Marry' (1971) 45 *British Yearbook of International Law* 406 of *Szechter v Szechter.*

[62] Law Commission Working Paper No 89(1985) paras 5.25-5.43; Law Com No 165(1987) para 2.9.

[63] Cheshire and North *Private International Law* (London Butterworths 1999) pp 781, and also Dicey and Morris on the *Conflict of Laws* 14th ed. (Eds. L. Collins, Et al) (London Sweet and Maxwell) Butterworths 2006)

In many cases, English law has simply been applied. Again, we can see that this is a fallback on policy. For example, in *Way v Way*[64] English law was applied to a nullity petition based on wilful refusal arising from a marriage that was celebrated in Russia. In *Ponticelli v Ponticelli* [65] English law was applied although the marriage was celebrated in Italy. Confusingly, in the area of physical defects, the law of the domicile has also been applied, too. There are also cases where there is strong support of the forum and also cases in which there is support of the law of the domicile.[66] If the law does not provide a clear guide as to what law should be applied, perhaps there are principles that are discernible that could guide the court in reaching a future decision when confronted with a defect?

Again, let us refer to *Ponticelli v Ponticelli* [67] as authority for reference to the law of the domicile. The judge in the case did not want to classify refusal to consummate as relating to form; therefore he did not allow the law of the place of the celebration to be used. The judge applied English law, as it was the law of the husband's domicile as well as the law of the intended matrimonial home. The possibility of having different choice of law rules for wilful refusal and for impotence was rejected. The judge was of the opinion that reference to the law of the domicile was enough.

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[64] [1950] P 71 at 80.
[65] [1958] P 204 [1958] 1 ALL ER.
[66] *Easterbrook vEasterbrook* [1944] P10; *Hutter v Hutter* [1944] P 95 *Ramsay – Fairfax v Ramsay- Fairfax* [1956] P 115 at 125.
[67] [1958] P 204 [1958] 1 ALL ER 357.

It has been suggested that certain questions remain unresolved post - *Ponticelli.* [68] Reference to the law of the domicile does not solve all problems in relation to the application of choice of law with regards to personal defects. There are three ways in which the English court can apply foreign law. [69] Firstly, the court can look to either party's domiciliary law and if there are grounds under either party's law for annulment, the court can then annul the marriage. The second method would be to apply the law of the petitioner's domicile. A third method would be to apply the law of the domicile of the spouse who is alleged to be defective. For example, in a non-consummation case, the law of the spouse who was unable to consummate the marriage would be used.

Perhaps the[70]third approach would be the most appropriate because it accords with the general choice of law rule which relates matters of invalidity to the law of the domicile. Additionally, the third method pinpoints the spouse who has not fulfilled the requirements of his/her domicile. As we have seen, the courts, the academic authorities, as well as the Law Commission have continuously grappled with the dilemma of what is the appropriate law to apply in relation to the particular defect. As we have seen from the discussion above and case law, there were many instances that referred to English law as the law of the forum, and the rules seem to have developed in a sporadic manner throughout the years.

Although applying the law of the forum is easier and cheaper for the English court, this author proffers the recommendation for judges to be rather

[68] Cheshire and North *Private International Law* 13th ed. (London Butterworths 1999) pp 784.
[69] *Ibid.* pp 784.
[70] *Ibid.* pp 785.

wary of *immediately* reverting to English law, and therefore, English policy motives. Each case should be carefully considered, and the court should in all cases try to apply the relevant foreign law to the defect. By utilising this process, the English court would be administering justice to the parties and giving effect to the expectations of the parties. Additionally, the elucidation of the reasons (policy considerations) underpinning such decisions would provide future case law (and the parties to future litigation) with a greater understanding of the process relating to the applicable law in relation to nullity decrees.

With the 251 decrees of nullity granted by the English court in 2005, as opposed to the 142,393 divorces granted in the same year, it might be assumed that nullity is not important in English family cases today. [71] However, in other jurisdictions, a decree of nullity may be of importance, religiously or socially, because there may be a social stigma attached to a divorce decree. [72] Therefore, English law should be vigilant when deciding what the appropriate law is to be applied to foreign nullity cases, because the validity or invalidity of the nullity decree may have important social, as well as legal ramifications, for the couple involved.

C. Unknown defects ? Annulment on grounds unknown to English law?

Previously we have seen the choice of law possibilities in relation to lack of consent and physical defect cases. But, yet another possibility is that a petition

[71] R. Probert *Cretney's Family Law* (London Sweet and Maxwell) 2006 pp 37-38.
[72] G. Douglas and N. Lowe (Eds.) *Bromley's Family Law* 10th Ed. (Oxford Oxford University Press 2006) pp 67-69.

for nullity could be presented to the English court that does not plead the usual incapacities that are known to English law. It is possible that this is the area which public policy in both its implicit and residual form has the greatest probability of being used by English law because there may be a tendency to either to apply English law to the case, or not recognise the foreign law outright.

Section 14(1) of the Matrimonial Causes Act 1973 qualifies the grounds of annulment as void and voidable. It states that where there is any matter affecting the validity of the marriage, would, in accordance with the rules of private international law, fall to be determined by a foreign law, there is nothing in the nullity provisions of the 1973 Act that should preclude the application of the foreign law, or require the application of the English law of nullity.[73] This provision expressly allows a foreign law to be applied. As Chapter 3 has shown, there now exists a variety of same-sex and heterosexual partnerships worldwide. Therefore, along with these new forms of partnerships, exist new forms of invalidity and incapacity. The English court must be prepared to apply the relevant foreign law in relation to these annulments. In theory, any foreign defect could be recognised by the English court even if the foreign grounds are a variant of English domestic grounds, or a ground which is substantially different from English grounds. It has been argued that the English court still retains public policy as a residual discretion in any nullity recognition case.[74]

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[73] Cheshire and North *Private International Law* 13th Ed. (Eds. P. North and J. Fawcett) (London Butterworths 1999) pp 785. See also Dicey and Morris on The Conflict of Laws (Eds. L. Collins Et. al) (London Sweet and Maxwell 2006) pp 882 - 883.

[74] Cheshire and North *Private International Law* 13th Ed. (Eds. P. North and J. Fawcett) (London Butterworths 1999) pp. 786.

Similarly if the foreign defect in the choice of law is also repugnant or offensive to English policy, the court immediately reserves the right not to recognise the decree, even before the operation of the residual discretion. For example, if a foreign nullity decree is considered defective under the foreign law because of a racist law(mixed race marriages cannot obtain a nullity decree) then English private international law has the residual discretion not to recognise the defect. [75] This is very similar to what we have seen in Chapter 2 in relation to the recognition of foreign marriages. In Chapter 2 we discussed the instances in which public policy should be used in relation to marriages that would be valid under the foreign law but yet would be considered repugnant to the residual discretion of English public policy. This was examined in relation to formal validity and essential validity. Furthermore, Chapter 2 also discussed certain capacities and incapacities that would be deemed repugnant to English law. It is again recommended by this author that, the courts should strive to apply the foreign law in most cases without resorting rapidly to public policy in an effort to give effect to the most appropriate law for the situation. And, on the other hand, if the English courts do choose to use the residual discretion of policy, reasons should be given in cases of non - recognition.

VI. Classifying Void and Voidable in the Recognition of Foreign Nullity Decrees

After deciding the particular defect, as well as what law to apply to nullity decrees, the English court also has to classify the foreign nullity decree as to

[75] Refer to Chapter 2.

whether the foreign decree is void or voidable. There was once some support in favour of English law as the forum to classify the decree as void or voidable. [76]

However, it is now established that it is English law that classifies the defect as to whether it relates to formalities (which is governed by the place of celebration) or substantial validity (which is governed by the law of the domicile). [77] By employing this process, it is always the law of the forum that should determine whether a marriage is void or voidable. It would be entirely wrong to validate a marriage that is void under the governing law. Again, there *was* a tendency to gravitate towards English law for classification. This author suggests that this can be identified as policy in disguise operating as a 'homing device' to revert to forum law. In the future, it is hoped that classification will continue to give effect to the governing law.

VII. Conclusion

Throughout this chapter, we have considered that policy in relation to jurisdictional rules and choice of law in matrimonial dissolutions surfaces in a concealed manner outside of its well known trumping form of non – recognition. In particular, the non – elucidation of such policy maneuvers by the judiciary and private international law academics has had the consequence of unclear applicable law rules so that English law, and therefore, English policy can be

[76] Morris (1970) 19 *ICLQ* 424, 427 – 428, and see also *Ross v Smith v Ross Smith* [1963] AC 280.
[77] *De Renville v De Renville* [1948] P 100 at 114; *Casey v Casey* [1949] P 420 at 429 – 430; *Merker v Merker* [1963] P 283 at 297; *Szechter v Szechter* [1971] P 286 at 294, and also Law Commission Working Paper No. 89 (1985) para 5.5.3.

upheld. It is hoped that this author's exploration of the hidden policy considerations in this area will shed light in an area which is underexplored territory for the judiciary and private international law academics. Moreover, since nullity decrees are of significance to certain sections of society [78] the elucidation of the indirect workings of policy in this area would provide a heightened awareness of the policy considerations the judiciary has used in the past for all those involved in future litigation.

With the recent developments in March 2010 and in June 2010 relating to the harmonisation of choice of law rules matrimonial dissolutions in the European Union it is noteworthy that the United Kingdom has *again* opted out of the scheme. [79] With the lack of debate domestically as well as the refusal to opt into the Draft Proposal, it is foreseeable that this is an area of law that will be left untouched for quite some time by the Law Commission. This author suggests

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[78] *Supra.* note 73.

[79] See history outlined in Draft European Parliament Legislative Resolution on the proposal for a council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation(COM2010)014-C7-xxxxxxx-2010/0066(NLE)). In July 2006, the European Commission adopted a proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable laws in matrimonial matters "Rome III" (COM(2006)399). The United Kingdom opted out of the Regulation in 2006. However, by mid 2008 some Member States had problems with the proposed Regulation and the application of foreign law. On 5 and 6 June 2008 the Council concluded that there was no unanimity to go ahead with the Regulation and so it was scrapped. As part of a movement towards enhanced cooperation within the EU, 12 member EU states indicated their intention in 2009 to establish enhanced cooperation between themselves in the area of applicable law in relation to matrimonial matters. See S. Clements 'Brussels Bulletin; The Future EU Justice Programme' [2009] 1 March 2009 *International Family Law* 67. So in March 2010, a Draft European Parliament Legislative Resolution for a Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010)0104) was passed. By end of May 2010 the countries of Austria, Belgium, Bulgaria, France, Germany, Italy, Latvia, Luxembourg, Hungary, Romania, Spain and Slovenia had joined. The United Kingdom has opted out again. So English law as the law of the forum will still be the applicable law for divorce and nullity petitions brought in the United Kingdom. English lawyers will have to be aware of the new Draft Recommendation/Regulation. See also Europa Press Release 'European Commission goes ahead with 10 countries to bring legal certainty to children and parents in cross – border marriages.' See www.europa.eu. (Website last visited May/June 2010).

that the United Kingdom should look towards their European counterparts who are signatories to the Draft Regulation for the development of their choice of law rules in this area. Furthermore, the United Kingdom could learn from the debates of academic working groups such as the Commission on European Family Law. [80] For now, choice of law in nullity and divorce cases in English private international law will remain as it is so that the law of the forum can be upheld in most cases.

[80] See www.cefl.uu.nl.(Website last visited April 2010).

Chapter Five

Public Policy and the Recognition of Foreign Divorces and Nullity Decrees

I. Introduction

Before 2001, the recognition of foreign divorces and nullity decrees for the United Kingdom was purely subject to domestic legislation under the provisions of the Family Law Act 1986. However, with the Europeanisation[1] of national divorce recognition rules in private international law,[2] the United Kingdom now has effectively to juggle two sets of recognition rules that are relevant – the Family Law Act 1986 for divorces and nullity decrees that involve cases from outside the European Union, and the Brussels II bis Regulation (EC) No. 2201/2203 for all decrees of divorce, nullity and legal separations.[3]

This chapter will argue that public policy is prevalent in much of the Family Law Act 1986 as well as the Brussels II bis expressly as well as implicitly. This chapter's objective is to point out the express strands of public policy in both the Family Law Act 1986 and the Brussels II Bis, as well as the judicial

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[1] See generally N. Lowe 'The Growing Influence of the European Union in International Family Law – A View From the Boundary' (2003) *Current Legal Problems* 439. See G. Douglas and N. Lowe *Bromley's Family Law* 10th Ed. (Oxford Oxford University Press 2006) at pp 29- 35. Since the entry into force of the Treaty of Amsterdam on 1st May 1999, the harmonization of conflict rules at European level has been effected under Title IV (Articles 61 – 65) of the Treaty. For a good historical outline, see generally P.M. North in *The Private International Law of Matrimonial Causes Act in the British Isles and the Republic of Ireland* (Amsterdam North Holland Publishing Company 1977) Chapter 3 and 4 and also J.D. McClean *Recognition of Family Judgements in the Commonwealth* (London Butterworths 1983).

[2] EC Regulation 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and in Matters of Parental Responsibility for the Children of Both Spouses which entered into force for the fourteen pre-2004 Member States other than Denmark and the ten additional States on 1 May 2004. But as from 1 March 2005, the Brussels II Bis Regulation 2201/2203(a.k.a. the Brussels II bis) has repealed and replaced the Brussels II Regulation.

[3] The Family Law Act 1986 regulates divorce, nullity and legal separations with respect to cases outside the European Union and the Brussels II bis.

decisions arising therefrom. We shall analyse policy in its residual, overt form of non – recognition, and also policy considerations that have not been articulated by the court that but have been encompassed in both sets of legislation. Additionally, we shall analyse how policy arises in a covert manner – the court may not have used policy in its fundamental form but utilised a creative interpretation of policy in which the court manipulates the rules or arrives at a decision of recognition or non - recognition by using policy considerations. [4] It is only by analysing the instances in which policy arises that we can understand the operation of public policy in divorce and nullity recognition in English private international law.

For instance, in the Family Law Act 1986, the chapter shall see that there are many provisions which are actually strands of public policy, yet do not overtly state so. Sections 51(1), Section 51(2) and Section 51(3)(a)(i) and Section 51(3)(a)(ii) of the Family Law Act 1986 encompass natural justice and procedural fairness for the parties including the right to a fair trial and the right to be heard or notified. Although the Family Law Act 1986 does not expressly state that these provisions are policy-driven, I shall argue that they are. I shall go on to analyse the natural justice and procedural fairness provisions that are part of the Brussels II bis such as Article 22 (b) and (c). Moving on to further uncover the implicit policy strands in the legislation, I will argue that the distinction between proceedings and non-proceedings divorces in Section 46(1) and Section 46(2) is also policy laden, as is the law relating to transnational divorces. This chapter shall analyse those particular provisions and cases that fall under each category.

[4] See Chapter 1(of this thesis) generally.

The chapter will also analyse public policy in its residual, and overt, form in Section 51(3)(c) of the Family Law Act 1986 as well as Article 22 (a) of the Brussels II bis which is rarely discussed by the judiciary. Cases in which public policy could and should be utilised more in its overt form will be elaborated upon by this author.

Despite the lack of express acknowledgement in much of the legislation and judicial decisions, this author suggests that public policy surfaces to remedy other situations in private international law in divorce and nullity recognition. We will see that in certain judicial decisions, particularly at the common law and the Family Law Act 1986, public policy has been used as a remedial tool for situations that lack justice. In certain cases, policy serves to protect English domiciliaries and therefore, English interests. Policy also surfaces in situations to protect one spouse from the actions of another spouse, or to remedy a financial situation in a divorce case.

This author submits that it is important for the judiciary to appreciate the flexibility of public policy and carefully consider their reasons before exercising the discretion in any situation. The courts should not be discouraged from using public policy in any form (implicit or express) but should expound on the reasons as to *why* it is being used. [5] The chapter will then conclude with some observations about on how public policy will be used in divorce and nullity recognition in the future.

[5] See J. Murphy's call for better elucidation with respect to public policy and foreign marriages in *International Dimensions in Family Law* (Manchester Manchester University Press 2005).

As we have discussed in Chapter 1 of this thesis, judgements (and therefore, the need for fully reasoned judgements) are necessary not only for the parties to the litigation, but for everyone with an interest in the judicial process. Consequently, by providing fully reasoned judgements in this area of private international law, the judge in the instant case provides "a clearer judgement, and gets to shape and restate the developing body of law that is just and coherent." [6]

Certain questions should be asked by the English court before blindly embarking on non-recognition. What is the difference between the foreign law and domestic English law? Is the difference something that is enough to offend English policy or should the English court resort to good manners and comity[7] - which is one of the underpinnings of private international law - and recognise the foreign law? Is there an English domiciliary or an English interest that needs to be protected? What level of connection do the case and the parties have with England? It is only when the court reasons, and provides answers to the above questions that both the judiciary and private international law can begin to discern principles about when and how to use public policy.

II. Public Policy - Implicit and Express [8]

[6] D. Dyzenhaus *Judging the Judges; Judging Ourselves – Truth, Justice and Apartheid* (Oxford Hart Publishing 2003) and also M. Coper, A. Blackshield, G. Williams *Oxford Companion to the High Court of Australia* (Australia New Zealand Oxford University Press 2001) pp 373 – 376.
[7] Cheshire and North (Eds. P. North and J. Fawcett) 13th Ed. *Private International Law* (London Butterworths 1999) pp 5.
[8] The Family Law Act 1986 encompasses rules for recognition for all nullity decrees,divorces and legal separations.

It is important now to delineate the particular strands of public policy in the Family Law Act 1986. Recognition rules for foreign divorces and nullity decrees lie in Part II (ss 44 – 54) of Act. We shall see that Section 51 expressly sets out grounds that displace the normal recognition rules. Therefore, certain provisions of Section 51 encompass policy considerations that are not normally thought of as public policy in its residual form, but are implicit forms of policy that encompass the notion of procedural justice and the right to a fair trial.

A. Implicit policy and procedural justice - Section 51(3)(a)

Section 51(3)(a) is a better known strand of public policy, which encompasses procedural justice. This section provides further discretionary grounds under which a divorce can still be refused recognition.

[If] in the case of divorce...obtained by means of proceedings, it was obtained –

> (i)without such steps having been taken for giving notice of the proceedings to a party to the marriage as having regard to the nature of the proceedings and all the circumstances, should have reasonably been taken; or
> (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given;

The Law Commissioners[9] discussing the Family Law Act 1986 believed that there should be a provision encompassing the notion of a right to a fair hearing, because the right to a fair hearing is predominant in countries who are signatories to the European Convention on Human Rights and Fundamental

[9] Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees and Related Matters* para 6.15 – 6.16.

Freedoms.[10] Therefore, one could argue that with the variety of foreign divorces worldwide, this is a biased provision that discriminates unfairly against certain kinds of foreign divorces based on different cultural understandings of marriage. However, since its application is limited to divorce by proceedings[11] it could be argued that the ground of non-recognition operates only in a limited manner. It does not give an unbridled discretion to the court for non-recognition for all forms of divorces.

In order for Section 51(3)(a)(i) to be used, there has to be some form of injustice shown in the particular case. This ground stems from the procedural notion that a party to a divorce should be given full notice of the proceedings, so that a divorce cannot be obtained in secret. This provision may be applied to either the respondent or the petitioner. *D v D* [12] illustrates the manner in which policy issues influence the exercise of Section 51(3)(a)(i). As we will see, the test for Section 51(3)(a)(i) is not dependent *solely* upon the finding of lack of notice, but on a thorough examination of all the facts before the discretion is exercised. In this manner, there is flexibility for both parties, as well as for the judge, to adduce evidence in favour of non-recognition.

In *D v D*,[13] a Ghanaian national who resided in England, left England to divorce his wife in Ghana. She was not aware that he had taken a trip to Ghana specifically to divorce her. The husband went ahead with the procedures for a

[10] The United Kingdom ratified the Convention in 1951. Since 1966, individuals have been allowed to take their complaints to the European Court of Human Rights in Strasbourg. However, it was only implemented into domestic law(and therefore domestically applicable) since 2000.
[11] *Infra.* notes 48 – 55.
[12] [1994] 1 FLR 38.
13 [1994] 1 FLR 38.

Tribunal divorce, under Ghanaian law. The wife, however, was still in England. The court took evidence as to what the appropriate procedure for a Ghanaian divorce was, and found that there was an irregularity in the divorce proceedings.

There was no submission to the proceedings by either side to the divorce. The mother-in-law was named as a defendant in the proceedings, but the wife had not been notified. Nor was the wife present. The mother-in-law voiced her concerns about the lack of notification and lack of presence of her daughter for the divorce proceedings. The husband argued that the divorce was valid because it was done in accordance with Ghanaian Customary law. The wife and the mother argued that the divorce fell foul of Section 51(3)(a)(i). Therefore the English court had to decide whether or not the valid foreign divorce[14](as a proceedings divorce) was capable of recognition. The court called expert evidence of Ghanaian customary divorces from Professor Read.[15] Upon hearing the expert evidence, the English court considered whether the divorce was capable of being recognised by the English court. The court judged that the husband had the burden of proof to establish on the balance of probabilities that there had been voluntary submission to the tribunal. The court, after listening to the expert evidence, ruled that the Ghanaian tribunal had an obligation under Ghanaian law to arrive at a decision only after hearing both sides. Since the wife was not notified or present, this was an irregularity in the proceedings. Additionally Professor Read testified that the tribunal had a duty to go beyond the facts and

[14] Under Ghanaian law.
[15] [1994] 1 FLR 45.

examine the merits of the case.[16] It was not enough to hear the husband and the mother-in-law. The wife needed to be present. Therefore, the divorce was not entitled to recognition under English private international law because it was not a valid divorce. [17] Miss Gumbel, who gave expert evidence, pondered that if Wall J were to apply Section 51(3)(a)(i), no Ghanaian divorce in the country would be capable of being recognised.[18] Faced with the evidence from Miss Gumbel, the court considered that the terminology of Section 51(3)(a)(i) was sufficiently wide to embrace such proceedings and an extremely wide range of circumstances. [19]

In *D v D,* the court found that the husband did not take reasonable steps to give notice to the wife of the divorce proceedings. [20] Therefore the Ghanaian divorce was not recognised by the English court. In *D v D,* we can see the English court stretching the application of public policy, and the English notion of justice to a valid Ghanaian divorce that normally does not require notice, in order to grant justice to the aggrieved party. This author suggests that the second reason is that policy has taken on a protective role, and was used to extend to individuals *without* an English domicile, but who have a connection with England.

Public policy is reiterated in Section 51(3)(a)(ii) relating to lack of opportunity to take part in the foreign proceedings. This ground is wider than lack of notice and the court is entitled to use a variety of factors in the exercise of

[16] [1994] 1 FLR 51.
[17] [1994] 1 FLR 45 where the court considered that recognition under Section 46(1) is subject to recognition under Section 51(1). The discretion in the English court of non-recognition must be capable of overriding otherwise mandatory recognition to be afforded under Section 46(1).
[18] [1994] 1 FLR 45, 46.
[19] [1994] 1 FLR 45, 46.
[20] [1994] 1 FLR 51 where Balcombe L.J. considered that the husband fell short of Section 51(3)(a)(i) but not Section 51(3)(a)(ii) and also Section 51(3)(c).

its discretion. *Joyce v Joyce and O Hare* [21] illustrates the variety of factors that the court may use and look for when deciding the case in question. The parties to the divorce were British nationals, but the husband started divorce proceedings in Canada, and the wife started proceedings in England. The husband's petition went undefended in Canada, and there was also evidence that the wife had not had the opportunity to present her case fairly. She could not afford to fly into Canada to defend her case.[22] Also, the wife's solicitors had misinformed her. Upon examining the case Lane J. also thought that Canadian procedural laws were too severe, and if the Canadian divorce was recognised, the wife would have to leave the matrimonial home in England. [23] The Canadian court had not been informed of an order in an English magistrates court which was brought by the wife for the custody of the children, as well as financial maintenance. The English court ruled in the wife's favour not to recognise the Canadian decree.

The court judged that non-recognition of the Canadian decree was dependent upon examination of several factors. Firstly, the court had to examine the nature of the proceedings, and when the circumstances commenced. Secondly, the court should have regard to the date of when the proceedings commenced and when the circumstances commenced. Thirdly, the court should see whether financial aid was available, and whether financial aid was used for

[21] [1979] Fam 93 and also interesting commentary by S.B. Dickson 'Foreign Divorces that Jar the Conscience' (1980) *Modern Law Review* Vol 43 at pp 1.
[22] [1979] Fam 93 113A – 114 B.
[23] [1979] Fam 93 at 110.

the case. Fourthly, the court should consider what remedies were available to the wife in the foreign jurisdiction.[24]

It has already been noted that all the pros and cons for the case must be weighed before arriving at the decision in relation to denying recognition to a foreign decree on grounds of procedural justice.[25] The court has to consider whether non-recognition of the foreign decree would damage international comity. [26] This would also be a balancing act. It is clear that the sections 51(3)(a)(i) and (ii) are strands of procedural justice. One criticism that can be levelled against the provisions is that it upholds the concept of justice encompassed in the European Convention of Human Rights over non - Convention jurisdictions. But then again, this section, along with the general notion of human rights violations is something so deeply ingrained in domestic public policy that bias is difficult to escape. Nonetheless, this author suggests the implementation of the above 'biased' provisions are necessary to preserve England's notion of procedural justice,[27] and represent another way in which English justice can prevail without openly resorting to the residual trumping discretion of public policy in Section 51(3)(c) of the Family Law Act 1986, which is the statutory manifestation of the common law notion of public policy.

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[24] *Ibid.* at 112 and 113 where Lane J famously stated that it would 'jar' upon her conscience if she were to recognise the Canadian decree.

[25] D. Gordon *Foreign Divorces English Law and Practice* (Aldershot Gower Publishing Press 1988) pp 84 and see *Newmarch v Newmarch* [1978] Fam 79 at 95G. See also *Law v Gustin* [1976] Fam 155 [1976]. 1 All R 113 it was held that 5 day's notice of foreign nullity proceedings was sufficient. See *A v L* [2010] EWHC 460 (Fam).

[26] Cheshire and North (Eds. P. North and J. Fawcett) 13th Ed *Private International Law* (London Butterworths 1999) pp 5.

[27] Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees* para 6.6.

This author suggests Section 51(3)(a)(i) and Section 51 (3) (a)(ii)) effectively operate as a buffer, so resort to Section 51(3)(c) is rare.

It is submitted that these provisions(Section 51(3)(a)(i) and Section 51(3)(a)(ii)) are necessary for the function of public policy and natural justice in English private international law. This author submits that these provisions specifically provide redress in unfair situations for aggrieved parties, otherwise the court would have to resort to the residual discretion in Section 51(3)(c). We shall now also see that these provisions of natural justice have been replicated in the Brussels II bis.

The basis of the Brussels II bis[28] is to harmonise private international law matters in relation to matrimonial proceedings throughout the European Union. [29] The Brussels II bis legislation provides for the recognition in each Member State of decrees of divorce,[30] separation or annulment granted in the other Member States [31] as well as the recognition and enforcement of such orders relating to the

[28] Brussels II Bis Regulation Council Regulation EC 2201/2003 (OJ 223 L 338/1). Which encompasses rules of jurisdiction (See Chapter 4) and recognition for all nullity decrees, divorce decrees and legal separations throughout Europe. Denmark has opted out of the Regulation. See Cheshire and North (Eds. J. Fawcett, J. Carruthers, P. North) 14th Ed. *Private International Law* (Oxford Oxford University Press 2008).

[29] It should be noted that the area of matrimonial proceedings is one of *several* areas (commercial law, insolvency law, succession) which is being harmonised throughout the European Union. See generally P. Stone *European Union Private International Law* (Cheltenham Edward Elgar Publishing 2006) and also K. Boele – Woelki and C. Gonzalez – Belfuss (Eds.) *The Impact and Application of the Brussels II bis in Member States* (Oxford Antwerp Intersentia 2007) pp 3 – 22 and pp 23 – 42. For a general overview of the repealed legislation before the Brussels II bis, See I. Karsten 'Brussels II – An English Perspective' [1998] *International Family Law* 75. See also P. McEleavy 'The Brussels II Regulation; How the European Community has moved into Family Law' (2002) *International and Comparative Law Quarterly* Vol 51 883. See also A. Borras "Explanatory Report on the Convention on jurisdiction and the recognition and enforcement of judgements in matrimonial matters" OJ 1998 C 221/27.

[30] See generally, the EU country reports regarding divorce and maintenance in member states in K. Boele- Woelki, F. Ferrand, C Gonzalez – Belfuss, M. Jantare – Jarebourg, N. Lowe, D. Martiny and W. Pintens (Eds.) *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Oxford Antwerp Intersentia 2004).

[31] *Supra.* note 28. Articles 1(1) (a) and 2(4).

costs of the proceedings.[32] Chapter III (Article 21 – 52) of the Brussels II bis Regulation provides for automatic regulation, with no special procedures required. [33] Chapter III (Articles 21 -52) provides for the recognition in each Member State of decrees of divorce, separation or annulment granted in the other Member States. Chapter III (Articles 21 – 52) also provides for the recognition and enforcement of orders relating to the costs of the proceedings. Articles 28 – 39 detail the procedure needed to obtain a declaration of enforceability.[34] There are also grounds that are classified as exceptions to the general rule in favour of recognition in Chapter III (Articles 21 – 52). These exceptions are specifically classified in Articles 22 – 27 of the Brussels II bis Regulation. Article 26 states that under no circumstances can a decree be reviewed as to its substance, and Article 24 prevents the court addressed from reviewing the jurisdiction of the court of origin. However, in certain transnational cases, jurisdictional review is allowed.[35]

As we have seen earlier in relation to the Family Law Act 1986, procedural justice provisions are encompassed in Sections 51(1), Section 51(2) and Section 51(3) (a) (i) and Section 51(3)(a)(ii). Article 22 of the Brussels II bis has similar procedural justice provisions. [36] Article 22 (b) encompasses the

[32] It does not apply to negative decisions, refusing to grant a divorce, separation or annulment, or to findings of fault made in divorce proceedings (Recital 10 of the Brussels II Regulation; and the Borras Report) para 64.
[33] *Supra.* note 28. Generally Chapter III Article 21 – 52 combined and also Article 21 specifically outlines automatic recognition.
[34] See P. Stone *European Union Private International Law* (Cheltenham Edward Elgar Publishing 2006). See generally, Part IV of Stone.
[35] *Supra.* note 28.Article 64 and also Article 59 permits situations involving the Nordic Convention 1931, to which Denmark, Sweden, Finland and other Scandinavian countries are also party to.
[36] *Infra.* notes 197 – 202.

provisions of natural justice and the right to a fair trial. Article 22 (b) provides that recognition of a decree must be refused where it was given in default of appearance, and the respondent was not served with the instituting document in sufficient time in a way that would allow the respondent to be able to arrange for his or her defence. [37] Articles 22 (c) and (d) require that a matrimonial decree be refused recognition in certain cases where it was irreconcilable with another judgement given in proceedings between the same parties. Now we can turn to the implicit forms of policy in the classification of divorces in the Family Law Act 1986.

III. Public Policy in the Classification of Divorces

Public policy appears in a more overt manner in the current recognition rules for foreign divorces in English private international law in the form of a distinction in the legislation between two different categories of foreign divorces (divorces which have been obtained by means of judicial or other proceedings and divorces obtained by other than judicial proceedings) in the Family Law Act 1986. A distinction between different types of divorces was also apparent in the Recognition of Divorces and Legal Separations Act 1971.[38] However, before the restrictive provisions[39] it is notable that English private international law had taken a liberal approach to recognition at common law before 1972. A brief

[37] There is a Community standard for both the time and manner of the service. See Council Regulation (EC) No 1393/2007/OJ 2007 L 342/79. Discussed by Cheshire and North (Eds. J. Fawcett, J. Carruthers, P. North) 14th Ed. *Private International Law* (Oxford Oxford University Press 2008). pp 300 – 301.

[38] Recognition of Divorces and Legal Separations Act 1971. Section 1 - Section 6.

[39] See D.Gordon *Foreign Divorces; English Law and Practice* (Aldershot Gower Publishing 1988) in Chapters 3 and 4.

account of the legislative history in this area would help the reader understand the policy implications of today's distinction.

A divorce could be recognised in a number of difficult circumstances, so a foreign divorce was recognised even if it was obtained in a country other than that of the husband's domicile, as long as it was a valid divorce by the law of the husband's domicile. A divorce would also be recognised in England if the factual link existing between the parties to the divorce and the granting state would have been enough to fulfill jurisdiction for the English court to grant a divorce. The case of *Indyka v Indyka*[40] marked the high point of liberal divorce recognition, if a foreign divorce was granted by a country with which the petitioner had a real and substantial connection.

Following the uncertainty of the real and substantial connection test set out by *Indyka,* as well as the court's reluctance[41] to use the residual discretion of public policy, there was pressure domestically and internationally to put the common law rules on a statutory framework. [42] Thus, the Recognition of Divorces and Legal Separations Act 1971 (RODSLA) was enacted to ratify the Hague Convention of the Recognition of Divorces and Legal Separations 1970 and the Law Commission's proposals. [43] RODSLA 1971 referred to two kinds of divorces – overseas divorces that have been obtained by judicial or other proceedings in any country outside the British Isles, and to divorces that were

[40] [1969] 1 AC 33.
[41] D. Gordon in *Foreign Divorces; English Law and Practice* (Aldershot Gower Publishing 1988) p. 61.
[42] After the 11th Session of the Hague Conference on Private International Law, the Hague Convention of the Recognition of Divorces and Legal Separations was published. The UK was a signatory, including 24 other countries. Articles 1 and 2 are the basis 'judicial or other proceedings'.
[43] Law Commission Report No. 34 (1970) *Jactitation of Marriage* para.25.

obtained or recognised in the country (or countries) of the spouses domicile. However, over the next ten years, there was dissatisfaction from the Law Commission that the law relating to nullity decrees was still separate from the recognition of divorces and legal separations. The Law Commission recommended that nullity decrees, divorces and legal separations should be considered in all the same legislation. The Law Commission was disgruntled with Section 6 of RODLSA 1971. Interestingly, the Law Commission did *not* recommend the two – fold distinction with regards to foreign divorces in RODLSA 1971. [44] The Law Commission also recommended a wider interpretation that the phrase 'judicial or other proceedings' which include any acts by which a divorce is obtained in the country concerned, provided that the acts comply with the procedure which is required by the law of the country. The Law Commission wanted the phrase 'judicial or other proceedings' to include recognition of a bare talaq. [45]

In *Armitage v. The Attorney - General* [46] a foreign divorce was recognised even though it was obtained in a country other than that of the husband's domicile as long as it was recognised as a valid divorce by the law of the husband's domicile. Therefore, the English marriage in *Armitage* was validly dissolved by a judicial decree obtained by the wife in the state of South Dakota, which was recognised by New York law, which was the law of the husband's domicile.

[44] See Law Commission Report No. 34 (1970) Jactitation of Marriage which was published before the Recognition of Divorces and Legal Separations Act 1971 (London HMSO) and also Law Commission Report No. 137 (1984) Recognition of Foreign Nullity Decrees and Related Matters para 5.5 (London HMSO) which was published before the Family Law Act 1986.
[45] Law Commission Report No. 137 (1984) *Jactitation of Marriage* (London HMSO) para 6.11.
[46] [1906] P 135.

Section 16 was designed specifically to prevent the operation of the *Armitage* rule in certain circumstances. The Law Commission recommended that the *Armitage* rule should be abolished,[47] and that Section 16 of the Domicile and Matrimonial Proceedings Act 1973 should be repealed. Additionally, the Law Commission recommended that there should be a provision in the new legislation preventing extra – judicial divorces from being obtained in the United Kingdom.[48]

The Law Commission's recommendation, if implemented would have modified divorce recognition into a one – tier system, unlike the Recognition of Divorces and Legal Separations Act 1971. [49] This would mean that divorces such as a bare talaq would be recognised under the phrase 'judicial or other proceedings.' [50] The Family Law Bill, though incorporating some proposals of the Law Commission, nonetheless retained the two category system for foreign divorces. Before the implementation of the Matrimonial and Family Proceedings Act 1984,[51] if a foreign decree was recognised under RODLSA 1971, correspondingly, the English courts could not grant financial relief under the Matrimonial Causes Act 1973. If the marriage had already been dissolved by the parties to a recognised foreign decree, English law could not be granted financial

[47] The *Armitage* rule survived RODSLA 1971 and so the Law Commission Report No. 137 (1937) *Recognition of Foreign Nullity Decrees and Related Matters* resolved not to repeat the *Armitage* rule. Para 6.13 (London HMSO).
[48] See Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees and Related Matters* para 6.30 (London HMSO).
[49] Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees and Related Matters* para 6.11. (London HMSO).
[50] Law Commission Report No. 137 (1984) Recognition of Foreign Nullity Decrees and Related Matters para 6.6. (London HMSO).
[51] Which came into force on 16 September 1985.

and proprietary relief. Additionally, the words 'judicial or other proceedings' add clarity to the availability of financial relief for the parties. [52]

A. Retention of the two – category system in the Family Law Act 1986

The Recognition of Divorces and Legal Separations Act 1971 was repealed and replaced by the Family Law Act 1986. The Family Law Act 1986 continued to distinguish between different categories of divorces with two categories(obtained by means of proceedings and other than by proceedings) now encompassed in Section 46(1) and Section 46(2). It would be useful, at this point, to set both provisions out, in full.

A divorce will be recognised under Section 46(1) if;

(a) the divorce is... effective under the law of the country in which it was obtained;
And
(b)at the relevant date either party to the marriage –
(i)was habitually resident in the country in which the divorce...was obtained or
(ii)was domiciled in that country; or
(iii)was a national of the country.

Whereas, Section 46(2) states that a divorce shall be recognised if;

(a) the divorce... is effective under the law of the country in which it was obtained;
(b) at the relevant date –
(i) each party to the marriage was domiciled in that country; or
(ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce...is recognised as valid; and

[52] *Infra.* Later in chapter pages discussing Part III of the Matrimonial and Family Proceedings Act 1984.

(c) neither party to the marriage was habitually resident in the [UK] throughout the period of one year preceding that date.

As we shall see, Sections 46(1) and 46(2) of the Family Law Act 1986 continues to regulate foreign divorce recognition outside of the European Union member states in 2010. The distinction between different types of divorces relates to the level of formality and procedure in divorces from other jurisdictions. In English domestic law, all divorces are granted by a court. However, in other jurisdictions, not all divorces are given by a court, and a divorce may be obtained extra-judicially (outside a court). For example, a foreign divorce can be attained by a procedure that may be of a customary or tribal nature such as a customary tribal divorce with no role for a state recognised agency. Such divorces would be common in India, Africa and Asia.[53] The differentiation among the kinds of foreign divorces is whether a foreign decree is formal or informal. More specifically, if a divorce is of a formal nature (one given by a court or administrative authority in foreign country) it would be classified as a divorce obtained ' by proceedings' and would fall under Section 46(1) of the Family Law Act 1986. If a divorce is deemed to be of a less formal nature, and therefore 'obtained otherwise than by proceedings' it would fall into Section 46(2).

The distinction in the legislation creates, effectively, a further hurdle to recognition for the judiciary and for practitioners. As we shall see, divorce classification needs careful scrutiny of the nature of the foreign proceedings,

[53] D.C. Buxbaum *Family Law and Contemporary Society in Asia; A Contemporary Legal Perspective* (The Hague Martinus Njihoff 1968) pp 234-241 and see generally D. Gordon in *Foreign Divorces: English Law and Practice* (Aldershot Gower Publishing 1988) at pp 115-116 where he usefully lists a variety of judicial and extra-judicial divorces.

because some divorces that may seem informal may in fact fulfill the requirement of 'judicial or other proceedings' in Section 46(1) because of the formality of the proceedings.[54]

The policy issue of protection against disadvantaged spouses, and therefore, discrimination against foreign informal divorces runs throughout the Family Law Act 1986. [55] Therefore, this differentiation remains important in some cases in order to protect a disadvantaged spouse. In this manner, the distinction among foreign divorces takes on a protective role. This author submits that because of this distinction, the need for the court to resort to public policy in its *overt* form in Section 51(3) (c) has lessened because the discrimination is already present in the legislation. [56]

It is notable, however, that during the second reading of the Family Law Bill 1986, Lord Hailsham L.C. supported the departure from the Law Commission's proposals for one tier divorce recognition and supported the division of divorces into Section 46(1) and Section 46(2). Lord Hailsham L.C. envisaged that Section 46(2) would generally encompass divorces that are less formal. [57] Lord Hailsham L.C. during the debate in the House of Lords, put forward his recommendation as to what kind of divorces would fall under Section

[54] Such as some African and customary tribal divorces that may seem informal, at first glance, but involve a state recognised third party (such as the head of a tribe or tribal elders) or a Hindu customary consensual divorce that again, uses a state recognised third party, a ghet (a Jewish divorce) and Muslim consensual divorces that are obtained under the Muslim Family Law Ordinance or similar legislation of national or international importance. See D. Gordon *Foreign Divorces: English Law and Practice* (Aldershot Gower Publishing 1988) pp 111.

[55] 473 HL Debs col. 1082 (22.4.86) per Hailsham L.C.

[56] See A. Mayss's contribution in 'Recognition of Foreign Divorces; Unacceptable Ethnocentrism' in J. Murphy (ed) *Ethnic Minorities, Their Families and the Law* (Oxford Hart Publishing 2000) pp 51 – 68.

[57] Lord Hailsham L.C. in the HL Debs Cols. 1081 – 1082 (22.4.86).

46(2). He stated that[58] Section 46(2) applied to... 'Overseas divorces granted otherwise than by proceedings...the bare Muslim talaq, certain Hindu and Japanese consensual divorces...many African and Asian countries also have such divorces.' Gordon is also of the opinion that Lord Hailsham L.C.'s use of the word 'certain' includes most consensual and tribal divorces.' [59]

Lord Hailsham L.C. was of the opinion that the two categories were needed, as a protective measure, for wives in the United Kingdom whose husbands had obtained an informal divorce abroad. He stated that it would be 'wrong to deny a wife living here the protection of our own courts.'[60] The protection of UK residents from the possibility of unjust informal divorces obtained abroad was a predominant policy issue for the legislators eclipsing the prospect of recognition and international comity in English private international law. We shall revisit Sections 46(1) and Sections 46(2) later in this chapter and analyse the provisions of each, in turn.

B. Different forms of divorces in foreign jurisdictions – the need for Sections 46(1) and 46(2)

Before we embark on an analysis of the specific provisions of Sections 46(1) and 46(2) , it would be fruitful to give an overview of the different forms of divorces that have been the subject of litigation in the English courts under Recognition Of Divorces and Legal Separations Act 1971 and the Family Law

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[58] *Ibid.*
[59] D. Gordon *Foreign Divorces: English Law and Practice* (Aldershot Gower Publishing 1988) p. 111.
[60] *Ibid.*

Act 1986. Many of them, as we shall see, stem from Israel, Islamic countries, Asian and African nations. A form of divorce recognised in most Muslim countries is the talaq. [61] However, within the different schools of Islam,[62] and the particular Muslim country in question, there can be many different versions of talaq. There are talaqs that have a degree of formality (procedure) to them, and other talaqs that do not have as much formality. An Ordinance talaq is a talaq in Pakistan that has been subject to statutory reform and also judicial decisions. [63] Under the Ordinance, notification of the talaq to the Chairman is necessary for the Ordinance talaq to be valid. However, notice to the Arbitration Council is sometimes done[64] but not necessary for the validity of an Ordinance talaq.[65] The Muslim Family Laws Ordinance (VIII) of 1961 applies to Bangladesh and Pakistan. [66] Other Muslim countries have also implemented a similar form of statutory talaq, as well. It is now established that the recognition of an Ordinance talaq, or any talaq which is on a statutory basis in an Islamic nation is likely to be recognised under Section 46(1) of the Family Law Act 1986, as long as the jurisdictional requirements for Section 46(1) are fulfilled.

A talaq may take the form of a 'bare talaq' in Islamic countries. Unlike the Ordinance talaq, a bare talaq is not subject to as much formality, but is still a

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[61] K.L. Hodkinson *Muslim Family Law A Sourcebook* (London, Croon Helm Publishing 1984) p. 7. See also D. Pearl's account of Islamic law in *Family Law and the Immigrant Communities* (Bristol Jordan and Sons 1986) and also J. Rehman 'The Sharia in Family Laws and International Human Rights Law; Examining the Theory and Practice of Polygamy and Talaq' *International Journal of Law Policy and the Family* (2007) Vol. 21 No 1 at pp118.

[62] The schools of Islam are normally divided into Hanafi, Shafi'i, Malika, and Hanbali, and also Shi'l Islam, Ithna Ashari and Zaydi. See *Supra.* note 58. at Chapter 1 and also D. Pearl *Family Law and the Immigrant Communities* (Bristol Jordan and Sons 1986).

[63] *Supra.*note 59 at pp 14.

[64] See *Quazi v Quazi* [1979] 3 W.L.R. 833 [1980] A.C. 744 p10 of Westlaw document.

[65] *Supra.* note 59. pp 19.

[66] *Supra.* note 59. at pp 16-17.

valid divorce by Muslim law. [67] In Sunni law, the bare talaq may be pronounced before or after the consummation of a marriage, without the need for witnesses. There are three forms of bare talaq under Sunni law. Firstly, there is the talaq al-ahsan which is a pronouncement of a divorce when the wife is not experiencing menstrual flow. After the pronouncement, three months must elapse without intercourse before the divorce is effective. [68] There is also the talaq al-hasan which is pronounced when the wife is not having her menstrual cycle (tuhr) and must be repeated during the wife's next two tuhrs and a period of idda, the talaq al-hasan will be effective upon the third pronouncement. Thirdly, there is also the talaq al-bidah. This could take many forms in different Islamic countries; a triple pronouncement on one occasion, a pronouncement of talaq during a wife's non-menstrual period, or a pronouncement during a wife's period of menstruation. In some cases, the wife may not be able to contest the divorce.

Another type of extra-judicial divorce is the khul. [69] This means 'to put off.' The dissolution is initiated by one party(either the husband or wife) and the other party agrees. In the mubara'a (which is similar to a khul) both parties desire the divorce. [70]The only formality that exists for both divorces is that the proposal for divorce is by one party, and its acceptance by the other should occur at the same meeting. Compared to the procedures required for an Ordinance talaq, the formalities needed for a bare talaq are very few. Since this divorce has less formality(and less procedure) than an Ordinance talaq, it is now established that a

[67] *Supra.* note 59. at pp 14-15.
[68] *Supra.* note 59. at pp 15, 16 and 17.
[69] *Supra.* note 59. at pp 16 and 17.
[70] *Supra.* note 59. at pp 16 and 17.

bare talaq would most likely fall under the category of Section 46(2). Furthermore, the nature of a bare talaq in some Islamic countries may jar against the English concept of justice(with the wife not being able to contest the divorce) thereby necessitating the more onerous requirements of Section 46(2).[71]

In India, there are customary consensual extra-judicial divorces for certain members of the lower castes of the Indian community.[72] Normally there is a procedure, that is set by the elders of the tribe, for the parties to follow in a consensual divorce. For example, the Patidar tribe requires that the parties to the divorce must belong to the tribe, and the divorce must witnessed, in writing. India also has extra- judicial divorces for members of the Sikh, Hindu and Buddhist communities under the Hindu Marriage Act 1933.

Whether or not a customary consensual extra-judicial divorce would fall under Section 46(1) or 46(2) is difficult to determine and careful scrutiny is needed to determine whether or not the foreign proceedings would fulfill the formalities required for a 'proceedings' divorce (and fall under Section 46(1) or whether it would be obtained otherwise than by proceedings(and fall under Section 46(2). The difficulty for legal advisers and individuals is that some divorces that may seem informal at first glance, may in fact fufill the requirement of 'proceedings' for Section 46(1). There are some Indian, Chinese and African customary divorces that have a state –recognised third party involved in the

[71] J.Rehman 'The Sharia in Family Laws and International Human Rights Law; Examining the Theory and Practice of Polygamy and Talaq' *International Journal of Law Policy and the Family* (2007) Vol. 21 No. 1 pp 118 in which he examines the talaq.
[72] S.T. Desai Mulla *Principles of Hindu Law* 15th Edn (Bombay Tripathi 1982) and also S. Poulter's account of Indian law in *English Law and Minority Customs* (London Butterworths 1986).

proceedings that add enough formality to arguably fall under Section 46(1) as opposed to Section 46(2).[73]

In Judaism, there is only one form of divorce – the ghet. The ghet is extra-judicial. [74] It is described as an act that takes place between both parties to the marriage, normally in a Beth Din, in front of rabbis.[75] Since the Beth Din is not a court, it does not grant ghets. However, the Beth Din could be termed a "rabbinical court." [76] The Beth Din's function is to ensure the ghet is written, witnessed and handed over in accordance with Jewish religious requirements. [77] Many of the ghets that have been a source of contention in English private international law are required to be validated by Israeli law.[78] The proceedings for an Israeli ghet are regulated by the Beth Din, therefore the level of formality brings it within 'proceedings' for Section 46(1). [79] Now that we have surveyed the possible kinds of divorces, it is now appropriate to analyse specifically certain issues.

IV. The Problem of Classification of an Ordinance Talaq ? Section 46 (1)

The issue that affected a significant proportion of the UK Muslim population and their advisers was the difficulty in classifying an Ordinance

[73] *Supra.* note 59. at pp 115.
[74] The first ghet was recorded in English law in *Ganer v. Lady Lanesborough* (1790) 1 Peake 25.
[75] M.Lamm *The Jewish Way in Love and Marriage* (New York Jonathan David Publishing 1980).
[76] M. Freeman 'The Jewish Law of Divorce' *International Family Law* May 2000 pp 58.
[77] *Supra.* note 59. See Chapter 3.
[78] But it should be noted that outside Israel, the State of New York and California also have religious requirement for ghets.
[79] *Broit v. Broit* 1972 SC 192; 192 SLT (NOTES) 32.

talaq.[80] In *Quazi v Quazi,* [81] the spouses were Muslims and Indian nationals. [82] They were both born, and married in India. Throughout the case, both spouses retained their Indian nationality. Two years after the marriage, they moved to Thailand where the husband pronounced a khul in 1965. [83] In 1973, the husband went to Karachi, and then on to England. The wife joined him later in England, and lived with him but the marriage was under strain. In 1974, the husband flew back to Karachi where he pronounced a triple talaq in front of witnesses and complied with the Muslim Family Law Ordinance[84] which governed dissolution of marriage. In accordance with the Ordinance, notification of the talaq was given to his wife and to the Chairman of the council in Karachi. The wife then petitioned for a divorce in the England. The husband sought a declaration that the marriage no longer existed because of that dissolution. The Court of Appeal was of the opinion that the Ordinance talaq did not fall under proceedings and stated[85]

> "Given the apposition of the words 'other proceedings' to the word 'judicial' 'proceedings' here means that the efficacy of the divorce depends in some way on the authority of the state expressed in a formal manner, as provided for by the law of the state...the state or some official organisation recognised by the state must play some part

[80] As we have seen in this chapter's earlier discussion.
[81] [1979] 3 WLR 833 [1980] A.C. 744.
[82] The same distinction among formal and informal divorces and is present in both RODSLA 1971 in Section 2 and Section 6, and the FLA 1986 in Section 46(1) and Section 46(2). Therefore *Quazi v Quazi* [1979] 3 WLR 833 [1980] A.C. 744, which was decided under RODSLA is *still* relevant when discussing the classification of an Ordinance talaq under the FLA 1986.
[83] A khul is a form of Islamic divorce which is non-judicial and is not governed by the Muslim Family Law Ordinance or similar legislation(khul or Mubara'a in India). See *Supra.* note 59. at pp 115.
[84] The Muslim Family Laws Ordinance(VIII) was passed in 1961. It applies to Bangladesh, Pakistan but does not extend to India. See D. Pearl *A Textbook on Muslim Personal Law* (London Croon Helm Publishing 1987) at page 17. See also *Supra.* note 59. at pp 17-18 where Gordon has helpfully set out the legislation and procedure for obtaining a valid Ordinance talaq.
[85] [1980] AC 744 and [1979] 3 W.L.R. 833.

in the divorce process at least to the extent that, in proper cases, it can prevent the wishes of the parties or one of them, as the case may be, from dissolving the marriage tie as of right."

However, the Court of Appeal in *Quazi* did not recognise the Ordinance talaq, or any other extra-judicial divorces which were obtained by a procedure which did not permit an official organisation to veto the divorce. The interpretation of the Court of

Appeal would only have allowed recognition to judicial and quasi-judicial divorces.[86] *Quazi* went to the House of Lords and the Court of Appeal's decision was overturned. The House of Lords disagreed with the Court of Appeal's finding that a divorce would be recognised as a 'proceedings' divorce only if the divorce procedure had permitted the exercise by the state of a power of veto. Thereby, recognition of the Ordinance talaq fell under 'judicial or other proceedings.' Lord Diplock, after carefully reviewing the relevant Muslim law in Pakistan, was also of the opinion that the Ordinance talaq was a divorce that was obtained by proceedings.[87]

Lord Diplock [88]stated that

"The pronouncement of the talaq was required by law to be notified to a public authority, the chairman of the union council; he in turn was required by law to constitute an arbitration council for the purposes of conciliation and invite each spouse to nominate a representative. These are 'proceedings'; none the less so because in the event neither spouse elects to take advantage of the opportunity for conciliation...They are..not merely officially recognised but are also enforced by penal sanctions under the...Ordinance."

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[86] *Supra*, note 59 at pp 92.
[87] [1979] 3 WLR 833 [1980] AC 744 at pp 41-43 of Westlaw document.
[88][1980] AC 744 and [1979] 3 W.L.R At 808 H.

Lord Fraser considered whether the talaq divorce would be valid in English law.[89] He disagreed with the Court of Appeal's restricted meaning and agreed with Wood J that the words of Section 2 'cover a divorce or judicial separation which is finally recognised after some form of procedure.'[90] Lord Fraser agreed with Lord Diplock that the talaq was a proceedings divorce and effective by the law of Pakistan.

Quazi v Quazi [91] was important [92] in helping the courts decide what should constitute a 'proceedings' divorce, and therefore, the kinds of divorces that should fall under Section 46(1) of the Family Law Act 1986. Therefore, the judgements of the Court of Appeal and the House of Lords were precedent – setting in the future development of English private international law. The decision of *Quazi* not only clarified the classification of an Ordinance talaq under the provisions of RODSLA 1971 and the FLA 1986 but also shed light on the meaning of what constitutes proceedings for a large number of foreign divorce proceedings other than a talaq. Furthermore, the decision of *Quazi* was also important in the context of recognition of transnational proceedings. [93]

A. Lord Scarman's unique test and proposition for one de facto category of recognition for all divorces

[89] [1979] 3 W.L.R 833 [1980] AC 744 at pp 45-47 of Westlaw document.
[90] [1979] 3 W.L.R. 833 [1980] AC 744 at pp 46 of Westlaw document.
[91] [1979] 3 WLR 833 [1098] A.C. 744
[92] The decision of *Quazi* at both the CA and the HL and the case of *Chaudhary v Chaudhary* [1985] 2 W.L.R. 350 were formative decisions for the classification of an Ordinance talaq in English private international law.
[93] As we shall see later in the chapter, the issue of recognition of transnational divorces also plagues the courts. *Quazi* is authority for the view that an extra – judicial divorce obtained in another state (outside the Ordinance in Pakistan) but in compliance with procedural rules of the state should be recognised under Section 46(1). See D. Pearl's arguments in *A Textbook on Muslim Personal Law* (London Croon Helm Publishing 1987) p 107.

Lord Scarman could not change an Act of Parliament, but, after considering the classification of the Ordinance talaq, he was the only Law Lord who proffered his own, more general interpretation of Section 2 of Recognition of Divorces and Legal Separations Act 1971 as a whole. Despite Parliament's vision for a two category distinction, he stated:

> " ...I construe Section 2 as applying to any divorce which has been obtained by means of proceedings, i.e., any act or acts officially recognised as leading to the divorce in the country where the divorce was obtained, and which itself is 'recognised by the law of the country' as an effective divorce. " [94]

Therefore, Lord Scarman's speech was unique because the Law Lords had the opportunity to consider what constitutes 'proceedings' and what constitutes 'non-proceedings' and *only* Lord Scarman went further to deliberate and provide dicta on what divorces should apply to Section 2 of RODSLA. If Lord Scarman's test were to be applied in practice, this would allow nearly all extra-judicial divorces that would normally be considered only under Section 46(2) to under Section 46(1) in the Family Law Act 1986. Lord Scarman's interpretation proposed a wider recognition policy, and potentially might have the practical effect of affording recognition to a variety of extra-judicial divorces. Lord Scarman's approach would lessen the need for Section 46(2). Gordon also was of the opinion that Lord Scarman's approach would also have the effect of reducing limping marriages.[95] Therefore, being the minority opinion in the House of Lords, English law did not have an obligation to follow Lord Scarman's approach. Lord

[94] [1979] 3 W.L.R. 833 [1980] AC 744 at 824B.
[95] *Supra.* note 59. at pp 75.

Scarman's test has only be examined here, and by others[96] for the sake of academic postulation. Consequently, the English court, and therefore, judges adhered to legislative policy to retain two different categories for foreign divorces.

Rather than following Lord Scarman's interpretation of proceedings divorces, *Chaudhary*[97] limited the effect of *Quazi.* The Court of Appeal applied its own decision. The parties were nationals of Pakistan, and were married in Kashmir in 1954. In 1963, the husband left the wife and children behind in Kashmir and moved to England. The husband settled in England, found employment and became involved with another woman, H. In 1967, the husband and H went through a ceremony of marriage at a register office in London. In 1969, the husband and H went through a ceremony of marriage in Beirut. In 1976, the husband pronounced talaq three times in a London mosque and notified the wife. In 1978, the husband went to Kashmir and pronounced oral talaq three times before witnesses. This was immediately effective as a final divorce in Pakistan. The Muslim Family Laws Ordinance 1961 did not apply to Kashmir. For the purpose of the case, this means that the talaq the husband obtained was an informal talaq, that was not governed by the Muslim Family Laws Ordinance 1961.

In 1980, Balcombe J declared the husband's marriage to H. in the English register office void and bigamous and granted a decree of nullity. The wife petitioned the English court for divorce on the ground of the husband's adultery

[96] *Supra.* note 59. at pp 89 -94
[97] [1985] 2 W.L.R. 350 and also [1985] Fam. 19.

with H. The husband presented a petition for a declaration that the marriage had been lawfully dissolved by either the talaq in 1976 or the talaq in 1978. Wood J held[98] that the talaq of 1976 could not be recognised because by that date the husband was an English domiciliary, and had acquired a domicile of choice in England. Therefore, by Section 16(1) of the Domicile and Matrimonial Proceedings Act 1973 no proceedings in the United Kingdom could validly dissolve a marriage unless instituted in a court of law; the talaq of 1978 which was a bare talaq involving merely the husband's act could not be regarded as "judicial or other proceedings" within the meaning of Section 2(a) of the Recognition and Legal Separations Act 1971 and therefore did not fail to be recognised under Sections 2 – 5 of the Act of 1971.

Wood J stated[99] that even if the talaq was capable of recognition under RODSLA 1971, the court would still not recognise the divorce on the grounds of public policy at common law or under Section 8(2) of RODSLA 1971. The husband appealed and wanted the 1978 talaq to be declared a valid divorce under Section 2 of RODSLA 1971. Thus, the husband's appeal prompted some interesting commentary as to what should constitute a 'proceedings' divorce. Cumming Bruce L.J. considered the Hague Convention on the Recognition of Divorces and Legal Separations[100] which the United Kingdom signed on 1 June 1970. [101] Cumming Bruce L.J. was of the opinion [102]that if the draftsman of 1971

[98] [1985] 2 W.L.R 350 [1985] Fam. 19 upholding Wood J's judgement at the Court of Appeal 1983 Feb. 21, 22; March 3,4 and May 13.
[99] [1985] 2 W.L.R 350 upholding Wood J's judgement at the Court of Appeal 1983 Feb. 21, 22; March 3,4; May 13.
[100] Cmnd. 6248 on 1 June 1970 and entered in force 24 August 1975. See www.hcch.net. (Last visited April 2010).
[101] [1985] Fam. 19 Page 38.

had intended that all divorces granted in any country should be recognised if they were effective under the law of the country it would have been easy to use the appropriate words of unlimited generality. Instead the draftsman followed the more restrictive language of the Convention and made the primary criterion for recognition that the divorce or legal separation had been "*obtained by means* of judicial or other proceedings." The emphasis on 'obtained by means' is Cumming Bruce L.J.'s. And therefore, Cumming Bruce L.J. believed that those words must be intended as a limitation on the scope of the section and therefore the appeal must be dismissed. [103] Cumming Bruce L.J. argued that Lord Scarman's interpretation[104] of proceedings was not to be applied generally, and the Court of Appeal held that the term 'judicial or other proceedings' in s.2 RODSLA 1971 was to be

> "...restricted recognition to a narrower category of divorces than all divorces obtained by any means whatsoever which are effective by the law of the country in which the divorce was obtained. "[105]

Oliver L.J. analysed the nature of the bare talaq as

> "merely the private recital of a verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably that they can see and hear. It may be as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to

[102] [1985] Fam. 19 Page 38.
[103] [1985] Fam. 19 Page 38.
[104] [1979] 3 W.L.R. at 824 B Lord Scarman had suggested a general definition of S.2("Proceedings Divorces") but if Scarman's test would be applied nearly all extra-judicial divorces would have been recognised under Section 46(1). But this test was dismissed as being too wide.
[105] [1985] 2 W.L.R 350 at 365 E and [1985] Fam, 19 at page 38.

insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering and recording what has been done. Thus, though the consequences are very different, the essential procedure differs very little from any other private act such as the execution of a will and is akin to the purely consensual type of divorce recognised in some states of the Far East."[106]

Oliver L.J. stated that the term proceedings amounts to more than simply the doing of an act

"Proceedings' must... at least bear in the statute a meaning in which the word would have in normal speech where, it seems to me, no-one would ordinarily refer to a private act conducted by the parties inter se or by one party alone, as a proceeding, even though the party performing it may give it an additional solemnity or even an efficacy by performing it in the presence of other persons whose only involvement is that they witness its performance. The word would not...ordinarily be used as being synonymous with 'procedure' or 'ritual."[107]

Oliver L. J. went on to clarify the level of involvement in order to qualify as 'proceedings.' [108] He stated that

"In the context... of a solemn change of status [proceedings] must import a degree of formality and at least the involvement of some agency, whether lay or religious, of or recognised by the state having a function that is more than simply probative although *Quazi*...clearly shows that it need have no power of veto."

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[106] *Ratanachai v Ratanachai* The Times 3 June 1960; *Varanand v. Varanand* 108 *Solicitor's Journal* 693 and *Lee v. Lau* [1967] Fam. 173.
[107] [1985] 2 WLR 350 at 368 G and also [1985] Fam 19 at pp 19-21 and also note that Cumming Bruce LJ stated that a divorce would not be within s.2 if 'No institution of the state, legal or administrative, is involved. No religious institution is involved.' At [1985] 2 WLR 350 at A-B.
[108] [1985] 2 WLR 350 at 368 E.

The husband's appeal was dismissed. The Court ruled that although RODSLA had been amended by the DMPA 1973, the provisions of the DMPA 1973 and the lack of formality of the husband's 1978 talaq did not fulfill the requirement of formality that involved a state-recognised agency. [109] Balcombe L.J.[110] also considered the bare talaq, and was not convinced that it should be classified under Section 2 of RODSLA 1971.

Clearly the requirements set by *Chaudhary* above would exclude many extra-judicial divorces,[111] and narrowed the test suggested by Lord Scarman in *Quazi*. The narrow interpretation of *Chaudhary* also seems to be in line with the policy ethos, overall, of the Family Law Act 1986, with the stringent separation of Section 46(1) and Section 46(2) divorces. [112] The combined result of *Quazi* and *Chaudhary* means that formal talaqs can be recognised under Section 2 of RODSLA and Section 46(1) of the Family Law Act 1986 only if an organisation that was recognised by the state was involved in the process. As decided in the House of Lords in *Quazi*, and affirmed by *Chaudhary*, a state recognised body does not have to possess the power to veto the divorce. [113] Legal advisers would have to consider the dicta and requirements set in *Chaudhary* before

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[109] [1985] Fam 19 and also [1985] 2 WLR 350 at 38A-C, 39 D-F, 40G-41C, E-42D, 43A-G, 46C-D, E-G, 48A-B.
[110] [1985] Fam 19 at pp 47-48.
[111] Though there are some extra-judicial divorces that are formal and may qualify under Section 46 (1). The judge deciding the case will have to make the decision as to how formal an extra-judicial divorce is in order to classify it under Section 46(1). See E.Cotran *Restatement of African Law* Vol. 1 (London Sweet and Maxwell 1968) pp 31 and also *H v H* (Queen's Proctor Intervening) (Validity of Japanese Divorce)[2006] EWHC 2989 (Fam) where a Japanese consensual divorce was held to fall under Section 46(1).
[112] 816 HC Debs col. 1551 (5.5.71). See *Varanand v Varanand* (1964) 108 SJ 693 in which it was decided that a consensual divorce was too informal to be capable of being recognised by Section 46(1). See also P. Stone (1985) *Anglo- American Law Review* 363 at 367.
[113] *Supra*. notes. 80 – 84.

placing foreign divorces in Section 46(1) or Section 46 (2). Post *Chaudhary*, and even in 2010, this author postulates that divorces of a formal nature such as an Ordinance talaq would be recognised under Section 46 (1), as well as a ghet, but not informal divorces such as a khul or a bare talaq, which would fall under Section 46 (2).

B. Section 46(2) of the Family Law Act 1986

At this point, it would be useful to re-visit Section 46(2) again, which I have recopied below for ease of reference.

Section 46(2) provides

> The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if –
>
> the divorce, annulment or legal separation is effective under the law of the country [114]in which it was obtained;
>
> (a) at the relevant date –
>
> (i) each party to the marriage was domiciled in that country; or
>
> (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and
>
> (iii) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.

The jurisdictional provisions of Section 46(2) are thus stricter than Section 46(1). While we have seen that Section 46(1) divorces ground jurisdiction on three options - domicile, habitual residence or nationality, Section 46(2) divorces

[114] Country in Section 46(2) means territory within a political state if each territory has different laws on divorce, etc Section 49(1).

can only rely on the jurisdictional ground of domicile. Even though the jurisdictional ground of domicile was used for such divorces under the previous legislation,[115] domicile under the 1986 Act is more narrowly defined. In the Family Law Act 1986, under Section 46(2)(b) an extra-judicial divorce must be obtained and effective[116] in a country in which at least one of the parties is domiciled, and recognised under the law of the domicile of both parties.

In the 1986 Act, one change is that domicile is no longer confined to domicile in the English sense, but also domicile in the foreign sense. Previously, under RODSLA 1971, a divorce could be recognised even though it was ineffective where it was obtained, provided that it was recognised by the parties' domiciles. [117] Furthermore, Section 46(2) divorces are subject to yet another provision that may hinder recognition. In Section 46(2)(c) recognition of an overseas divorce that has been obtained without proceedings will be denied, despite the validity of the divorce in the law of the domicile, if either party had been habitually resident in the United Kingdom for a year before immediately preceding the date on which the divorce was obtained.[118] This particular requirement is a strand of public policy that ousts the recognition of a foreign divorce on the basis that either of the parties were resident here. This inevitably gives the parties the discretion to petition in the English courts for an English divorce.

[115] Recognition of Divorces and Legal Separations Act 1971.
[116] Section 46(2)(a) and also *Wicken v Wicken* [1999] Fam 334.
[117] Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees* para 6.24.
[118] *R v Immigration Appeal Tribunal ex parte Asfar Jan* [1995] Imm AR 440.

C. Back to One Category of Recognition?

While not reverting back to the high water mark of liberal divorce rules of *Indyka*[119] legislators should consider a simpler, one-tier system as recommended by the Law Commission Report in 1984.[120] The creation of the two tier system by RODSLA 1971(which was followed by the FLA 1986) had hoped to reduce the amount of limping marriages. [121] However, this objective has not been fulfilled. [122] Thus, it is questionable as to why this distinction exists, leading one academic to ruminate that "quite why this is a line worth drawing remains a mystery. "[123]

This author suggests that the mystery behind this distinction is easily explainable. A one - tier approach for divorce recognition has certain advantages. If judges altered policy and followed the Law Commission's and Lord Scarman's approach in order to accord more divorces a claim to recognition, this would show more comity [124] when recognising foreign divorces. Therefore, by employing a one tier system of recognition, English private international law would be giving precedence to what is *already* an underpinning tenet of English private international law. Additionally, the notion of legitimate expectation[125] which underlies other areas of adult relationships also affects the area of divorce recognition. Having a one - tier system would also accord with the legitimate expectations of individuals because of its simplicity – more divorces would be

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[119] *Indyka v Indyka* [1969] 1 AC 33.
[120] Law Commission Report No. 137 (1984) *Recognition of Foreign Nullity Decrees and Related Matters* (London HMSO).
[121] *Supra.* note 59. at pp 68.
[122] *Ibid.*
[123] See A. Briggs *The Conflict of Laws* 2nd Ed. (Oxford Oxford University Press 2008) pp 257.
[124] And therefore, international comity.
[125] See other chapters which have also highlighted legitimate expectation.

recognised. A one - tier system would also be clearer and more concise for individuals whose status is contingent upon its provisions, as well as their advisers and officials.

Despite the several apparent advantages, the fact is that a one tier system flies *against* the policy underpinning the Family Law Act 1986. The provisions envisaged by the proponents of the Family Law Bill[126] have been set with a clear purpose which discriminates against different kinds of divorces. The intention of Parliament, and the accepted judicial interpretation of Parliament was to give effect to a one tier system. Therefore, this author proposes it would be impossible for a court to give effect to any other interpretation. We can recall that in *Chaudhary v Chaudhary,* the Court of Appeal discussed the need for a distinction among the different types of divorces, and the weight to be given as to what constitutes 'other proceedings' at length. [127] Wood J in *Chaudhary* surmised [128] that Lord Scarman's speech in the House of Lords did not intend for a bare talaq to fall within the terminology of 'other proceedings' but, expressed 'a general principle which he finds applicable upon his interpretation of the statutory provisions and in the latter passage he repeats and applies those principles to the facts in *Quazi v Quazi* itself. I do not read either passage as indicating that Lord Scarman took the view that a bare talaq fell within the words '' judicial or other proceedings.''

Furthermore, Cumming Bruce L.J. stated [129] that

[126] See Lord Hailsham at 473 HL Debs. cols. 1082 (22.4.86).
[127] *Supra.* the discussion pages 27 – 31 of this chapter.
[128] [1985] Fam. 19 page 38.
[129] [1985] Fam. 19 page 39.

" If then the divorce has to be obtained by means that can fairly be regarded as proceedings, should pronouncement of talaq be so regarded? Such a divorce is not at first sight obtained by means of "any proceeding." It is pronounced. Pronouncement of talaq three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition. Certainly by that tradition the pronouncement is a solemn religious act. It might doubtfully be described as a ceremony, though the absence of any formality of any kind renders the ceremony singularly unceremonious. It can fairly be described as a "procedure" laid down by divine authority in the inspired text of the Koran. But neither respect for the divine origin of the procedure nor respect for the long enduring tradition which over the centuries had rendered the bare talaq effective as terminating marriage by the law of Muslim countries necessarily or sensibly convert the procedure into a "proceeding" within the intent of section 2 of the Act of 1971. So I conclude that at the date of the Royal Assent to the Act of 1971, a divorce obtained by bare talaq would not be construed as not "obtained by means of judicial or other proceedings" within the intendment of Section 2 of the Act."

In the above passage Cumming Bruce L.J. disclosed his aversion of the bare talaq as being treated as a 'proceedings' divorce, and concluded that a bare talaq did not have the requisite formality needed for classification under Section 2 of the Recognition of Divorces and Legal Separations Act 1971.

The necessity to distinguish among informal and formal divorces was followed by Oliver L.J.

Oliver L.J. stated [130]

[130] [1985] Fam. 19 page 41, 42.

" that if it had been the intention of legislature to recognise every divorce obtained abroad, however obtained, it would have been unnecessary to have any reference at all to "judicial or other proceedings" and section 2(a) of the Act 1971 could have been omitted altogether. The starting – point, therefore, as it seems to me – and I do not find anything in their Lordships' reasoning to suggest otherwise – is that the phrase "judicial or other proceedings" is restrictive. It is not every divorce or legal separation recognised as effective by the foreign law which is to be accorded recognition here, but only one which has resulted from "judicial or other proceedings" in the country in which the divorce or separation has been obtained."

Thus Oliver L.J. advocated a restrictive meaning to be given to 'judicial or other proceedings' and in doing so he advocated a two tier system of foreign divorce recognition.

Finally, Balcombe J. commented that [131]

" The preamble to the Act of 1971 states that it was passed with a view to the ratification by the United Kingdom of the Hague Convention on the Recognition of Divorces and Legal Separations, and the preamble to the Convention states that it was concluded pursuant to a desire on the part of the signatory states to facilitate the recognition of divorces and legal separations obtained in their respective territories. So I approach the construction of the Act of 1971 with this aim in mind and in the knowledge that it is socially undesirable for persons to be tied to a 'limping' marriage; a marriage which has been dissolved by a decree of divorce in one country which is not recognised in another. But to carry that approach to its logical conclusion would be to ignore the provisions of section 2(a) of the Act of 1971 and to recognise any overseas divorce which is effective

[131] [1985] Fam. 19 Page 46.

> under the law of the country where it was obtained and, as explained above, that is not what the Act provides. Giving due weight to this approach I am not convinced that it requires me to give to the phrase "other proceedings" the meaning for which the husband contends."

Accordingly, with this opinion of Balcombe J. we can observe a reiteration of the views expressed by the other Lords in favour of treating proceedings divorces quite separately from non – proceedings divorces. As we can recall from the vigorous debate by the Lords in the Court of Appeal in *Chaudhary*, Lord Scarman's call for a one – tier system in *Quazi* has been ignored. The level of involvement needed to qualify as 'proceedings' needs to have the involvement of a state – recognised agency (either lay or religious but there is no need for a power of veto) and the bare talaq obtained by the husband did not fulfill the requirements of Section 2 of RODSLA. [132] Following this, the distinction among foreign divorces has been repeated in Section 46(1) and Section 46(2) of the Family Law Act 1986. Accordingly, no judicial decision, academic or judicial hypothesis can change the current requirements which are encompassed in the Family Law Act 1986. Lord Scarman was unusual in his stand, but his speech cannot be taken to represent any legal authority, particularly as it is a minority view. The majority decision of the Court of Appeal in *Chaudhary* must be upheld and followed in future cases.

Additionally, this author contends that the higher hurdle in Section 6 of the Recognition of Divorces and Legal Separations Act 1970 (and thereby

[132] *Supra.* to pp 27 – 30 of this chapter and footnotes 96 – 111.

followed in Section 46 (2) of the Family Law Act 1986) was set following the Hague Convention on the Recognition of Divorces and Legal Separations 1970 policy against foreign tourist divorces. [133] Therefore, the distinction in the Recognition of Divorces and Legal Separations Act 1970 and the Family Law Act 1986 has a twofold purpose in discriminating against different types of foreign divorces.

There has not been any call for reform stemming from the Law Commission in recent years. [134] The Family Law Act 1986 can only be overturned by another Act of Parliament, and this would seem unlikely in the future. This is an example of policy operating indirectly, particularly with the higher hurdle in relation to extra – judicial and more informal divorces. As we have seen, this discriminatory policy against different kinds of foreign divorces runs *throughout* the Family Law Act 1986.

It is, as always, a balancing act between international comity and domestic policy[135] that is inherent in the legislation and also, judicial decisions when deciding which policy should be given predominance in the current law. [136] As we have seen with the new regime throughout Europe, the recognition of foreign divorces in England is now even more complicated because recognition is now subject to two sets of legislation – the Family Law Act 1986 and the Brussels II bis Regulation (2201/2203).

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[133] Also known as "quickie divorces." See N. Lowe and G. Douglas Families (Eds.) *Families Across Frontiers* (The Hague Boston London Martinus Njihoff Publishers 1996) pp 47.
[134] Refer to Law Commission Papers in other portions of this thesis stemming from 1980's.
[135] As stated by A. Mayss in her contribution 'Recognition of Foreign Divorces; Unwarrantable Ethnocentrism' in J.Murphy *Ethnic Minorities Their Families and the Law* (Oxford Hart Publishing 2000) pp 51-68.
[136] Refer to Chapter 1 for judicial reasoning and policy, and the weighing of competing policies.

V. Section 51(3)(b) – Public policy in no official documentation

In light of our previous analysis of Sections 46(1) and 46(2), it is appropriate to turn our focus to Section 51(3)(b). The objective of public policy in Section 51(3)(b) is to protect individuals from circumstances that may be unfair. For instance, a spouse may go to a foreign country to obtain a divorce and then request the English court to recognise the decree. Particularly with respect to 'less formal' divorces encompassed by Section 46(2), there may be no formal documentation or proof that the divorce has happened. [137] Divorces such as these could lead to fraudulent cases with one party obtaining a divorce against another party without their knowledge. [138]

Section 51(3)(b) is discretionary, and allows a foreign divorce not to be recognised if

(i) there is no formal document certifying that the divorce...is effective under the law of the country in which it was obtained; or
(ii) where either party to the marriage was domiciled in another country at the relevant date, there was no official document certifying that the divorce...is recognised as valid under the law of the country

In this manner, public policy has surfaced to protect an aggrieved party from an unrecorded divorce. It is also submitted that this proviso has been provided by the legislators as a buffer for the possible flood of informal divorces

[137] *Wicken v Wicken* [1999] 2 WLR 166 at 180.
[138] *Supra.* note 59. at pp 115 for a list of extra-judicial divorces and other divorces that are of a more informal nature that have no requirement of record-keeping.

that could fall under Section 46(2). [139] This author submits that although Parliament found it necessary to provide for informal foreign divorces with Section 46(2), Section 51(3)(b) still upholds the English concept of formalities and documentation.

VI. Transnational Divorces and Public Policy

Previously I examined the recognition rules in relation to divorces that have been obtained abroad by judicial or other proceedings and also foreign divorces that have been obtained other than by proceedings. Now, I shall analyse the additional difficulties in relation to recognition of a transnational divorce. I shall show that recognition of a transnational divorce brings a different set of difficulties to English private international law, and therefore, further public policy considerations to Sections 46(1) and Section 46(2).

A transnational divorce happens when steps are taken in relation to a divorce in one country(delivered) and completed(obtained) in another country. We can see the example of transnational divorces with the pronouncement of a talaq or ghet which are divorces under Jewish and Islamic law. The validity of a talaq or a ghet divorce is dependent upon several stages to complete the process. A talaq must be pronounced by the husband, and a ghet must be written in a Beth Din, with notification to the wife. [140] Therefore, first question that a court needs to consider in relation to transnational divorces is where (geographically) the

[139] Cheshire and North have noted that there is no guidance from the Law Commission Law Com No 137(1984) largely because this provision was not recommended by the Law Commission . See Cheshire and North *Private International Law* 13th Ed. (London Butterworths 1999) pp 819.
[140] For further details and the procedure for obtaining a ghet or talaq see *Supra.* note 59. Chapters 2 and 3.

divorce was obtained. The pronouncement of a talaq or the delivery of a ghet may be in country A but received in country B. [141] Normally, this would be a foreign jurisdiction where the divorce proceedings were completed. For example, if a divorce was obtained in Pakistan, it should be effective under Section 2 of the Muslim Family Laws Ordinance (VIII) Act 1961. Since the nature of the divorce could be transnational, [142]the English court must be aware of the specific jurisdiction where the divorce was obtained. Although the reforms encompassed in FLA 1986 do not repeat the wording in RODSLA 1971, the law relating to the recognition of transnational divorces remains the same. [143] Gordon, in his book, *Foreign Divorces; English Law and Practice*[144] compares the wording between the RODSLA 1971 and the Family Law Act 1986, throughout chapters 5 and 6. [145] Gordon takes the reader through the provisions and legislative history of the provisions of the Recognition of Divorces and Legal Separations Act 1971, and does the same with the Family Law Act 1986. Gordon highlights the difficulties with each piece of legislation, and describes how the Family Law Act 1986 resolves some of the previous problems relating to transnational divorces in English private international law.

Section 46(1) of the 1986 Act states that a divorce obtained by means of proceedings which must be effective in the country where it was obtained, without any express requirement that the whole of such proceedings must take

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[141] *Kellman and Kellman* [2000] 1 FLR 785 where postal divorces were considered.
[142] The utterance and/or the proceedings may span several countries.
[143] For a good overview of the law relating to transnational divorces see M. Pilkington 'Transnational Divorces under the Family Law Act 1986' *International and Comparative Law Quarterly* (1988) 37 131-148.
[144] *Supra.* note 59. Chapters 6 and 7.
[145] *Supra.* the first few pages of this chapter.

place in that country.[146] This section flags up two requirements for English private international law. Firstly, that the overseas divorce be effective in the country where it was obtained.[147] The second requirement, that the divorce be obtained outside the British Isles, posed more problems for the English court. If the extra-judicial divorce was obtained within the British Isles, then the divorce will not be recognised by the English court.[148]

R v the Secretary of State ex parte Ghulam Fatima [149] illustrated the difficulties with the recognition of transnational divorces under 1971 legislation. A Pakistani man, who was resident in England, pronounced talaq in England against his wife, who was resident in Pakistan. In compliance with the Pakistan Family Laws Ordinance Act 1961 he sent a written notice that he had pronounced the talaq to the chairman of his local union council in Pakistan and also to his wife. Under the Ordinance, the marriage was dissolved 90 days after the receipt of the notice by the chairman of the local council. The husband then sponsored his fiancée to enter the United Kingdom. Upon arrival in the United Kingdom, the immigration officer refused entry to her because he was not satisfied that the intended marriage could take place within a reasonable time because her sponsor's divorce was not valid in the United Kingdom under the provisions of sections 2 and 3(1) of the Recognition of Divorces and Legal Separations Act 1971.

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[146] This is, viewed in conjunction with Section 44(1) of the Family Law Act 1986 which states that no divorce granted in a court is effective unless granted in a court of civil jurisdiction.
[147] Family Law Act 1986 Section 46.
[148] Family Law Act 1986 Section 44.
[149] [1986] CA 527 and [1986] 2 ALL ER 32 affirming the Court of Appeal's decision [1985] QB 190.

The question for the court was whether the divorce was obtained in Pakistan or England. If the divorce was obtained in England(because the talaq was pronounced in England) it would not be valid. If the divorce was obtained in Pakistan, then the divorce [150]would be valid. [151] The difficulty was that it was a transnational divorce that had some proceedings in England and some proceedings in Pakistan. The Lords considered the importance of the pronouncement of the talaq in England. They considered that the first pronouncement of the talaq was of integral importance to the whole proceedings, which finished in Pakistan under the requirements of the 1961 Family Law Ordinance. Since the pronouncement of the talaq was in England, and the husband's domicile was in England, the divorce could not be recognised by English law. Lord Ackner did consider that non-recognition of this divorce would favour the rich who could fly back to Pakistan to institute proceedings. [152] Lord Ackner agreed with the Court of Appeal, Taylor J. and agreed the policy behind the provisions of the Domicile and Matrimonial Proceedings Act 1973 which made further provision concerning the recognition of divorces and legal separations states in Section16;

> "No proceedings in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of the countries."

[150] [1985] QB 190 at 197, 297.
[151] *Ibid.*
[152] *Ibid.* at 199-200.

Lord Ackner was of the opinion that it is thus the policy of the legislature(in section 16 of the Domicile and Matrimonial Proceedings Act 1973) to deny recognition to divorces obtained by persons within the jurisdiction, and therefore subject to the laws of the United Kingdom, by any proceedings other than an English court. Lord Ackner agreed with the Court of Appeal that he could not be satisfied that the proposed marriage could take place within a reasonable time. The divorce in *Ghulam Fatima* was not recognised.

Ghulam Fatima left open the question as to whether a similar transnational situation would be recognised under section 46(1) of the Family Law Act 1986. The Family Law Act 1986 had different wording from the 1971 Act. Section 46(1) requires an overseas divorce obtained by proceedings to be effective in the country where it was obtained but does not require the proceedings to take place in that particular country. Pilkington suggested [153] that this is authority for cases such as *Ghulam Fatima* where a divorce may be recognised if the particular element of the proceedings which renders the divorce effective took place in an overseas jurisdiction where the individual's jurisdictional links have been fulfilled.[154]

A case which sought to clarify the position was *Berkovits v Grinberg.*[155] The husband and the wife were both Israeli citizens, married in Israel in 1975. The husband subsequently became habitually resident and domiciled in London.

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[153] See M. Pilkington 'Transnational Divorces under the Family Law Act 1986' *International and Comparative Law Quarterly* (1988) 37 at 130, 132-136 and 135.
[154] Pilkington refers to cases that are under the FLA 1986 see M. Pilkington 'Transnational Divorces under the Family Law Act 1986' *International and Comparative Law Quarterly* (1988) 37 130.
[155] [1995] Fam 142.

In 1988, the husband wanted to re-marry so he wrote a ghet in London, which was written in accordance with Jewish rabbinical law, in London, and then the divorce was delivered to the wife in Israel. The dissolution of marriage was effective by the law of Israel. The applicant petitioned the court for a declaration pursuant to section 55 of the Family Law Act 1986 that the ghet be recognised as a valid divorce that had been obtained in Israel.

The difficulty was that the divorce had been written in London and sent to Israel. It was decided that, at the point the divorce was received by a court in Israel, the divorce had been obtained by means of proceedings [156]without any express requirement that all such proceedings must take place in that country. The judge heard that on the true construction of Section 46(1) an overseas divorce would only be recognised [157]if the divorce proceedings had been instituted in the country where the divorce was obtained, and the mere fact that the ghet was obtained in the sense of "finalised" or "pronounced" in one country could not disassociate the process of obtaining it from the proceedings in which it was obtained.

In clarifying the meaning of 'obtained' Wall J stated:

> " In my view, the word 'obtained' connotes a process rather than a single act. To obtain a divorce the party must go through a process, in the same way that a person obtains a university degree of any other qualification. If that process is part of a judicial process(proceedings) and therefore linked to one judicial authority, it seems to me there is logic and sense in saying that proceedings must begin and end in the same place." [158]

[156] [1995] Fam 142 at 157.
[157] *Ibid.* at 145H – 146A, 152E, 155G-156D 157C-E 160 A-B.
[158] *Ibid.*

Accordingly, since the ghet had been pronounced in England but delivered in Israel, the ghet was not capable of recognition under English law although it was effective in Israel. The interpretation of the previous legislation[159] was that the divorce had to start and end in the same country.[160] However, Murphy has contested this interpretation of the Family Law Act 1986. [161] He states that the Family Law Act 1986 only requires the divorce to to be effective in the country, unlike the 1971 Act which required a divorce to be commenced and completed in the same jurisdiction. Murphy contends that since the decision in *Berkovits* only of first instance, it is open to a different interpretation in the future. [162] The first "narrow" interpretation is that the judicial proceedings must begin and end in the same place when the divorce involves only 'judicial process linked to one judicial authority.' [163] This definition covers a Beth Din, such as an Israeli Beth Din. However, whether an Arbitration Council or the involvement of a non judicial authority would fall within that rule is still questionable. Furthermore, transnational divorces may also be obtained otherwise than by proceedings. A marriage may be dissolved that does not have judicial[164] involvement. One example is a khul. [165] The husband has to utter the repudiation, and then the wife has to accept it. The khul can be uttered in person, or through a letter. It is only

[159] RODSLA 1971.
[160] [1995] Fam 142.
[161] J. Murphy *International Dimensions in Family Law* (Manchester Manchester University Press 2005) pp 140.
[162] *Ibid.* pp 141. See also A. Reed 'Extra- Judicial Divorces since Berkovits' [1996] *Family Law* 100, 102.
[163] *Ibid.* Murphy's book at pp 141.
[164] Or quasi-judicial involvement.
[165] D. Pearl and W. Menski *Muslim Family Law* 3rd Edn (London Sweet and Maxwell 1998).

upon the acceptance of the khul that the khul becomes valid. A khul could also be transnational in nature, particularly if the utterance of the divorce is done through the telephone. There are also many other different forms of talaq divorces that are informal in nature. Therefore, these divorces, in theory, could fall under transnational divorces otherwise than by proceedings and would be classified under Section 46(2) as an extra-judicial transnational divorce.

The way the law on transnational divorces has developed is ineffective and unfair for those who cannot afford to fly to the foreign country to obtain the divorce. Mayss has argued that the refusal to recognise such a foreign divorce is permissible in such a situation when part of the transnational proceedings would be instituted in a country such as England, and part of the talaq was pronounced in England, and the rest, say, in Pakistan. There the divorce may rightly be ineffective because such forms of divorces are prohibited in the British Isles. Mayss proposes that it is undesirable and unsatisfactory not to recognise a transnational divorce if the proceedings take place in countries that both recognise that form of divorce. For example, if the talaq is delivered and obtained between Saudi Arabia and Pakistan. In such a case the divorce would be effective in both countries, because they are both subject to Islamic law, and therefore, the Islamic law of divorce. Mayss[166] is of the opinion that there is no reason why the divorce should not be recognised by the English court in this instance.

[166]See A. Mayss' arguments in her contribution to J. Murphy (ed) *Ethnic Minorities , their Families* and *the Law* (Oxford Hart Publishing 2000).

Comity demands that, in all cases where the divorces are effective in foreign countries, then there is a strong presumption of recognition. Mayss goes further to state that even practicality should dictate that such divorces should be recognised, and that non-recognition should come only when there is proof of injustice. It is evident that the law relating to transnational divorces obtained by proceedings and also the law relating to transnational divorces obtained other than by means of proceedings is still improperly developed.

Rather than overtly stating that transnational divorces are different from English divorces which are purely judicial in nature, English law indirectly has a series of rules and hurdles to follow for different types of divorces. Given the apparent disdain of non-proceedings divorces shown in the more stringent requirements of Section 46(2), it could be presumed that the anomalies present in relation to transnational divorces may be an indirect form of public policy creeping again into English private international law. To reiterate Mayss' argument, the law has developed in a manner that favours the rich and causes inconvenience for a sizeable section of the ethnic minority population, particularly with respect to those who embrace Islam or Judaism. To date, no comprehensive review has been taken of the law relating to transnational divorces in English private international law since the passage of the Family Law Act 1986.

This author agrees with the arguments in favour of recognition and submits that there needs to be a change in the manner in which transnational divorces are recognised. As we have seen in the marriage recognition chapter,

English law permits proxy marriages in foreign jurisdictions as long as the law of the place of the celebration and the law of the domicile have been fulfilled. Therefore, someone could be represented as a wine bottle[167] in a foreign marriage ceremony and this is capable of recognition under English private international law. A proxy marriage could be deemed as a transnational marriage if the spouse 'sends' the proxy from a different country than the one the marriage is celebrated in. [168] As long as the requirements of the law of the place of the celebration are fulfilled and the law of the domicile are fulfilled, a marriage could also be uttered transnationally and still be recognised under English private international law.

Perhaps the disparity between the rules of recognition of a transnational marriage and a transnational divorce stems from the fact that in a marriage, both parties have an expectation for the marriage to be valid; whereas in a divorce, it could be only one of the parties who is seeking a divorce. Consequently, the requirements for a transnational divorce are harder to fulfill because English law has a policy that frowns upon marital breakdown, and seeks a protective role for spouses who are habitually resident here. This is an example of a covert policy consideration that affects the rules relating to transnational divorce recognition.

However, if the rules relating to the recognition of transnational divorces were relaxed, and placed on an equal footing with the ease in which transnational marriages can be recognised (that is, both transnational marriages and transnational divorces became easy to obtain/recognise) this would be simpler for both parties to the marriage/divorce. Additionally, without onerous transnational

[167] *McCabe v McCabe* [1994] 1 FLR 410.
[168] *Ibid.* Also see Chapter 2 in relation to recognition of foreign marriage.

divorce rules, the simplicity of a transnational marriage or divorce may accord with the legitimate expectations of the parties involved as they may wish to have one. The problem that would arise in this situation would be the implementation of a lenient recognition policy that would be contrary to the complex provisions of the Family Law Act 1986, which differentiates between formal and informal divorces. If we can recall, the differentiation between formal and informal divorces in the Family Law Act 1986, as well as the other procedural justice provisions often protect the weaker party from the recognition of an informal divorce.

This author submits that English law should revise its laws relating to transnational divorces not necessarily for the sake of simplicity or legitimate expectation but because the law relating to transnational divorces is unfair for those who cannot afford to fly to the foreign country to obtain the divorce. With such a diverse ethnic minority population in the UK today, it is imperative that English private international law should reconsider and revise the existing private international law rules relating to the recognition of foreign transnational divorces.

VII. Residual Discretion of Public Policy – Section 51(3) (c)

Now that we have examined the indirect strands of public policy, we can now analyse the overt form of public policy in the Family Law 1986 Act, in its residual form. So, if a divorce does not fall within the grounds of non-

recognition in Section 51(1) – Section 51(3), the divorce in question can still fall within Section 51(3)(c). The discretion itself allows a court to refuse recognition to *any* foreign divorce, whether or not it is obtained by proceedings, if its recognition 'would be manifestly[169] contrary to public policy.'

This provision is advantageous because of the number of circumstances it can cover, and yet there is confusion as to when the provision should be used. It is up to the court to extract from the facts of the case, whether or not Section 51(3)(c) should be used.

What I shall examine now are the possible circumstances in which the discretion may be used. I shall focus on certain circumstances in the past and also instances that the court may be presented with in the near future. In 1983, when surveying the state of public policy and recognition of foreign divorces in English private international law, Lord Roskill stated in the House of Lords debate on the Matrimonial and Family Proceedings Act 1984 that

> "Eight or nine years ago we were occupied with the endless problem of foreign divorces, and whether or not they had to be recognised in these circumstances...some of the foreign divorces were shocking by any ordinary forms of justice, and yet they were valid under the local law, so we had no alternative in private international law...but had to give effect to them." [170]

Lord Roskill was referring to the state of divorce recognition in the 1970's. At common law, many foreign judicial and extra-judicial divorces were

[169] Wood J stated in *Chaudhary* that the use of the word manifestly as used in the previous RODLSA legislation did not add anything to the meaning of public policy [1985] 2 WLR 350 at 359 F-G. See also
A v L [2010] EWHC 460 (Fam).
[170] 445 HL col. 76 (21.11.83).

recognised because of the liberal common law recognition rules. [171] Additionally, under the common law regime there was an unwillingness to use the residual discretion of public policy.[172] The implementation of RODSLA 1971, and then the provisions of the Family Law Act 1986 reflects a more stringent Parliamentary policy with respect to foreign divorce recognition in contrast to the lenient former common law rules.

In the year 2010, with the proliferation of cohabitation forms worldwide (and therefore, the many different forms of divorces and legal separations stemming from such unions) the time is ripe to analyse the manner in which Section 51(3)(c) has been invoked. We have seen that the residual public policy has been sparingly used in the recognition of foreign divorces, with the courts and legislators preferring to resort to implicit policy in the legislation. However, this author contends that there are still circumstances where the residual discretion of Section 51(3) (c) public policy is needed. There are not many cases in which the residual discretion has been expounded on overtly, but this author proposes that there are circumstances in which an overt stand on public policy is sorely needed. Furthermore, policy is under – utilised in many situations. For instance, this author will argue that judiciary should not hesitate to use the discretion of public policy in areas where there is injustice (either personal or financial) to an English domiciliary in certain circumstances. [173] However, when confronted with such a situation, the judiciary should not hesitate to use the residual discretion of Section

[171] *Seni Bidak v Seni Bidak* The Times 3.12.12 and also *Peters v Peters* (1968) 112 *Solicitors Journal* and also the high water mark of the real and substantial connection test *Indyka v Indyka* [1969] 1 AC.
[172] *Supra.* note 59. at pp 61.
[173] *Infra.* notes 174 – 190.

51(3) (c) upon examination of all the facts, and with reasoned judgement. Whether it be an injustice towards an English domiciliary, or some other situation which warrants non – recognition, the insight that could be provided by the judiciary as to how a conclusion or an appropriate result has been attained would be invaluable to everyone with an interest in the judicial process, as well as private international lawyers.

A. Fraud and Deception

While it would be virtually impossible to think of all circumstances which may arise, this section will examine a few instances in which public policy may be necessary. An area of possible non-recognition is if a foreign divorce is obtained by deception or fraud. If a foreign divorce is obtained by fraud or deception, this would be deemed to be against the grain of natural justice according to English law, and therefore, not be recognised under Section 51(3)(c). [174] The provisions in Section 51(1) and (2) and Section 51(3)(a)(i) and Section 51(3)(a)(ii) do not encompass fraud or deception. What would amount to fraud or deception under Section 51(3)(c) would always be construed upon the facts of the case. In *Kendall v Kendall* [175] the parties were married in Cyprus in 1967, but later moved to Bolivia. In Bolivia, the husband took the wife to three different offices and made her sign divorce papers. The wife was not aware that the husband had wanted to divorce her and was not aware that the documents

[174] Fraud and deception in this context falling under Section 51(3)(c) of the FLA 1986 and not under the procedural justice provisions of Section 51(1) Section 51(2) Section 51(3)(a)(i) and Section 51(3)(a)(ii) as we have seen previously in this chapter.
[175] *Kendall v Kendall* [1977] Fam 208 which was decided under the public policy grounds of Section 8(2) RODSLA 1971 and would now fall under Section 51(3)(c).

were divorce papers. All the documents were in Spanish language, though she spoke a little Spanish. Later, the wife discovered that the papers she signed were, in fact, divorce papers, and she was named as the petitioner. The papers she signed had also given false details for the Bolivian decree – that there was no matrimonial property, the wife had worked and the husband had physically assaulted her. She sought a declaration from the English court that the Bolivian decree was invalid due to the husband's deception, and also for a decree as to her status. The divorce was refused recognition on public policy grounds. If the ground of fraud or deception were to be relied upon, the English court would undoubtedly need to gather much evidence about the foreign law before arriving at this conclusion.

B. Religion of the parties

Another factor or factors that would be relevant in non-recognition would be whether or not the parties to the divorce each have a different religion, or to what extent the religion impacts upon the manner of their divorce. [176] As we have seen earlier in relation to section 46(2), a number of foreign divorces may be extra-judicial in nature, and may be obtained without the consent of one party. The stringent requirements of Section 46(2) deal with this problem.

[176] *Sharif v Sharif* (1980) 10 Fam Law 216, *Zaal v Zaal* (1983) 4 FLR 284 and *Viswalingham v Viswalingham* (1980) 1 FLR *cf R. v. Secretary of State for the Home Dept. ex parte Ghulam Fatima* [1986] 2 WLR 693. See also *Chaudhary v Chaudhary* [1985] 2 WLR 350 per Ormerod L.J.'s remark that it must be plainly contrary to the policy of the law in a case where both parties to a marriage are domiciled in this country to permit one of them, whilst continuing his English domicile to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favourable to him.

However, the issue of public policy may also arise under the residual discretion of public policy in relation to religious issues. Therefore, the problem shall be discussed in this section, as well. Therefore, if the law is alien to one party of the marriage, then the repudiation, and therefore, the divorce is capable of nonrecognition by English private international law. Take, for example, an English domiciliary who is visiting India, gets married to an Indian domiciliary in India. After a few months, parties get a divorce according to an Indian religious law that may allow a unilateral repudiation. In this case the Indian party divorced the English party, so it is questionable as to whether the divorce will be recognised by English law. Almost certainly the question will turn on whether the English party is still subject to English law. And, if it is deemed by the court that the English party is subject to English law (and not lost English law as the law of the domicile) then perhaps the unjust divorce would not be recognised. Similarly, this brings us to next subsection of yet another possible ground of non-recognition.

C. Connection of the parties with England

With the risk of limping divorces and limping marriages, the English court may consider not recognising a foreign divorce if one of the domiciliaries to the divorce has an English domicile and another has a foreign domicile. We have seen this example with respect to religion above, but it could also apply to any other issue. Someone who is deemed to have an English domicile may not be subject to foreign laws and foreign requirements. Therefore, if the party with an

English domicile can prove that he or she has suffered an injustice with respect to the foreign divorce, it may not be recognised in England. [177]

An example can given of an English domiciliary who has entered into a foreign marriage(and has not lost his or her English domicile) or established residence in a foreign country(and not lost his or her English domicile), and then, divorced under the foreign law in circumstances that may be construed as unfair or lacking justice. If an English domiciliary was divorced by a bare talaq[178] or a divorce by letter,[179] then it is possible that English private international law may not recognise the divorce. English private international law has taken, and should continue to pursue a protective role for English domiciliaries in English private international law. [180]

D. Financial Relief

The exercise of public policy in its residual trumping form (and therefore, non-recognition of a foreign decree) under the previous legislation of RODSLA 1971[181] was largely dependent upon the availability of ancilliary financial relief in the foreign jurisdiction. Under RODSLA, there was some support for the view that the English court would exercise public policy in order to ensure that certain parties(such as a wife and children) would receive proper, and adequate, ancilliary

[177] *R. Secretary of State ex parte Ghulam Fatima* [1986] 2 WLR 693.
[178] As we have seen earlier in this chapter there are variety of informal divorces under Islamic law and Asian countries.
[179] *Wicken v Wicken* [1999] 2 WLR 166.
[180] As we have seen in Chapter 2 in relation to underage marriages *Pugh v Pugh* [1951] P 482 and also note Chapter 2's discussion of when the protective function of public policy should surface in relation to the recognition of valid foreign marriges(forced marriage, underage marriage and marriages where the foreign law is considered repugnant.
[181] Section (8)(2)b.

relief. For example a valid talaq from Dubai was not recognised because the judge was afraid that if the divorce was recognised, the wife would lose the right to ancilliary relief in England. [182] Similarly, in the case of *Chaudhary*,[183] it was considered that the recognition of a foreign divorce which was obtained by a husband in order to circumvent the possibility of his English wife receiving English ancilliary relief would be contrary to public policy. However, with the implementation of Part III of the Matrimonial and Proceedings Act 1984, an English court is able to award maintenance and proprietary relief to divorces under Sec 46(1) and Sec 46(2). [184]

Section 12(1) defines which divorces fall within the scheme of Part III.

> Where –
> (a) a marriage has been dissolved...by means of judicial or other proceedings in an overseas country, and...
> (b) the divorce...is entitled to be recognised as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief...

Section 12 is based upon the Law Commission's recommendations and explanatory note,[185] but the explanatory note does not state whether proceedings is meant to encompass all forms of talaq (such as the informal bare talaq) or a talaq that has been obtained under Pakistan's Muslim Family Laws Ordinance VIII of 1961 (a formal talaq). Therefore, one difficulty that still needs clarification

[182] See *Zaal v Zaal* (1983) 4 FLR 284.
[183] *Chaudhary v Chaudhary* [1985] 2 WLR 350.
[184] *Agbaje v Agbaje* [2010] 2 WLR 709.
[185] Law Commission Report No. 117 (1982) Clause 1 Explanatory Note.

is which extra-judicial(section 46(2)) divorces would apply under Section 12. [186] The case of *Chebaro v Chebaro* [187] provides that a liberal approach to be taken, but there are no other cases that can provide dicta as to how wide the approach can be. In *Chebaro,* the parties were Lebanese and married in Beirut in 1966 and moved to England in 1976. In 1985, the marriage was dissolved by a Lebanese decree of divorce. [188] The parties applied for an application for financial relief under the Matrimonial and Family Proceedings Act 1984. It is notable that there is no reference in *Chebaro* as to the width of the phrase 'judicial or other proceedings.' David Gordon states that there could be either a narrow or a broad approach to recognition of a foreign divorce for financial relief under Section 12(1) of the Matrimonial and Family Proceedings Act 1984. [189] When following the narrow approach, only foreign judicial divorces such as the ones that are capable of recognition under Sec 46(1) of the Family Law Act 1986. If a broader approach were to be followed, then extra-judicial divorces such as a bare talaq,and other divorces that would fall under Sec 46(2) would also be able to fulfill Section 12(1) of the Matrimonial and Proceedings Act 1984.[190]

Therefore, it is purely up to the individual judge in question when deciding the case. If the judge feels that the divorce in question has fulfilled the jurisdictional requirements under Section 15(1) or Section 15(2) as well as the Section 12(1), then the party shall be eligible for financial relief. Therefore, if the judge does not decide English financial relief in favour of parties who had an

[186] *Chebaro v Chebaro* [1987] 2 WLR 1090 [1986] 3 WLR 96 favoured a liberal approach.
[187] *Ibid.*
[188] *Ibid.* Purchas LJ.'s judgement.
[189] *Supra.* note 59. at pp 168-173.
[190] *Supra.* note 186. See the judgement of Sheldon J.

extra-judicial divorce, that would be a direct policy stand against extra-judicial divorces. The diversity of the United Kingdom's ethnic population today would probably compel an English court to give a financial relief order in favour of foreign party who has fulfilled the stringent jurisdictional requirements.[191]

E. New Forms of Divorces

With the numerous new forms of cohabitation and marriages in the world, there will inevitably be new forms of divorces and legal separations that the English court will have to recognise these may greatly differ from domestic law. Until recently, it was unheard of to recognise same-sex divorces and same-sex separations because as there was no legal status, the question did not arise. The status of marriage in the United Kingdom, as many other countries worldwide, was limited to heterosexuals. [192] Also, English law did not have private international law recognition rules for any other form of marriage dissolution other than heterosexual marriages. [193] However, the implementation of the Civil Partnership Act 2004,[194] in conjunction with the Brussels II bis,[195] now provides for EU wide recognition of such decrees. The recognition of same-sex divorces from countries outside the EU are still in question, however, if the partnership is

[191] Law Com Working Paper No. 117 (1982) *Family Law Financial Relief After Divorce* (London HMSO).
[192] See Chapter 3.
[193] See Chapter 3.
[194] Civil Partnership Act 2004 Section 220.
[195] 2005 SI 2005/3324 para 8(1) 8(2) 8(3)(a).

similar to the UK's Civil Partnership Act 2004 the likelihood of being recognised is higher.

The argument in favour of recognising such foreign divorces is simple – if the divorce has been obtained and all the requirements for the divorce fulfilled, there should not be any reason for non-recognition. The question of whether or not a repugnant foreign divorce would be recognised here would turn on the impact of the divorce in England, and whether there are English interests at stake.

Several scenarios could occur. Firstly, both parties to the divorce could be foreign domiciliaries. Secondly, one party could be a foreign domiciliary and the other an English domiciliary. Thirdly, both parties to the foreign divorce could be English domiciliaries. It is submitted that the law should take this approach; if the link to England is weak, the stronger the argument should be in favour of recognition. Similarly to marriage recognition cases, [196] English law has a responsibility to protect its domiciliaries from repugnant foreign laws. In the first scenario, both parties are foreign. Therefore, if the English court chooses to recognise the divorce, there are no English interests at stake because it has fully foreign parties. Furthermore, recognition would be in the interests of comity. In the second scenario, one party is English and the other party, a foreign domiciliary. Before deciding whether to recognise the repugnant divorce, the court should examine the English domiciliary's links with England, and then the foreign country. If the English domiciliary lived in the foreign jurisdiction and was subject to the foreign law, and the foreign status with the foreign domiciliary was valid under the foreign law, then the English court may recognise the

[196] See Chapter 2.

repugnant decree despite the fact that one of the parties was English. If the English domiciliary had tenuous links with the foreign jurisdiction and a stronger link with England, English law may then need to protect its domiciliaries from a repugnant foreign law and not recognise the decree. In the third scenario, the case for non-recognition of the repugnant decree is even stronger as both parties are English domiciliaries, and therefore it is a marriage dissolution with English interests at stake.

This author predicts that with the growing forms of status worldwide, the recognition of many different kinds of dissolutions will gradually find acceptance through an International Convention. [197] However, until that time, the court will have to engage in a balancing act of whether or not an English interest is at stake, the level of connection the parties have with England, and the nature of the foreign law versus domestic law.

In the Brussels II bis Regulation, Article 22(a) encompasses the residual discretion of public policy. Although the use of the word 'manifestly' can, again, be taken not to add any more meaning to the discretion, as we have seen previously in Section 51(3)(c). To date, it appears that the English court is not invoking the discretion of public policy in Article 22 (a) in the Brussels II bis, and seems willing to recognise other European Community divorces automatically. Since this was one of the aims of harmonising procedural law at a European level[198] it is welcomed. The only difficulty that this author envisages is the "regional block" that the EU now belongs to may create a prejudice against

[197] See Chapter 6 and the prospect of globalised family values and the possibility of an European Family Law.
[198] See Chapter 6.

divorces that are from outside the European Union. This means that the English judiciary may be more inclined, after the implementation of the Brussels II bis, not to recognise extra –judicial divorces. Another public policy issue that could impact future Brussels II bis recognition is the issue of human rights, which pervades every aspect of English law today. [199] This author suggests that the human right that has been contested, and will be contested in the future, is the right to a fair trial in the Convention.[200]

Given that the implementation of the Brussels II bis has been ongoing,[201]and therefore, relatively new, the real effects of the legislation are yet to be seen. The Brussels II bis was implemented as a European initiative to further the harmonisation of the European Union, as opposed to the Family Law Act 1986, which was implemented to facilitate divorces within the British Isles and foreign divorce recognition. The discretion of public policy in relation to the recognition of foreign divorces, similarly as we have seen in relation to the recognition of same – sex partnerships and cohabitation forms has been preserved in Article 22 of the Brussels II bis. Future litigation envisaged under Article 22 would probably be in relation to breaches of natural justice, and human rights, but the cases and principles of national policy in both its residual and implicit forms that have been developed under the Family Law Act 1986 will still continue to guide Article 22 for cases that affect the public policy of the UK. One could offer the premise, that more work, particularly in terms of European Working

[199] Refer back to Chapter 3.
[200] Note that Articles 33(1) and (5) allow the parties to appeal against judgements.
[201] As we have seen with the Brussels II and then the Brussels II bis.

Groups[202] and more research needs to be done in this area. It is not known, whether the underlying idea of harmonisation while achieving cultural diversity can be achieved. It is hoped that the Europeanisation of divorce recognition will not create a bias in the minds of the English judiciary in terms of what is a 'European divorce' over an ethnic divorce from overseas in the respective national laws of recognition.

It is envisaged that the role of public policy will be greatly narrowed in the European context, and retained in its original scope in the provisions of the Family Law Act 1986. Since the elucidation of public policy is rare, it is hoped that the English court will take the time to expound dicta on any cases that may arise concerning public policy whether it be under the Family Law Act 1986 or the Brussels II Bis.

VIII. Recognition of Foreign Nullity Decrees

So far this chapter has examined recognition and public policy in relation to divorces, and now we shall examine the discretion of public policy in relation to nullity decrees. Although this author has treated the recognition of divorces separately from the recognition of nullity decrees, this author submits that the same policy issues drive both exercises. The court is likely to exercise the discretion in relation to protection of an English domiciliary, cases involving injustice either substantially or procedurally, cases that involve an infringement of

[202] Such as the Commission on European Family Law. See www.cefl.uu.nl (last visited April 2010).

fundamental morality, and even - as we shall see in the case of *Vervaeke v Smith*[203] - substantially differing marriage laws. The underpinnings of public policy in relation to nullity do not differ radically from the policy considerations in the recognition of foreign divorces. It should also be noted that the recognition for both nullity and divorce decrees are now encompassed by the same legislation[204] we are dealing with recognition of each separately because public policy in relation to nullity decrees has been even more rarely used and rarely discussed than recognition over divorce decrees. Furthermore, a thorough examination of public policy in relation to nullity decrees may also have lessons for divorce.

Gray v Formosa and *Vervaeke v Smith* offer examples of overt public policy in relation to recognition of decrees of nullity. What this section proposes to do is to examine these cases, and then expound on the impact that each one has had in this area of private international law. The first case of significance is *Gray v Formosa.* [205] The husband, who was from Malta, was of the Roman Catholic faith. He had acquired a domicile of choice in England, and married an Englishwoman in a valid ceremony at a register office in England in 1949. Afterwards, there were three children of the marriage. In 1951, the husband went to Malta on holiday and did not return. The husband, still in Malta, on the purported holiday, did not comply with his wife's pleas for maintenance. The wife did not want to go to Malta even though the husband sent letters asking her to go there. In 1959, the husband obtained a decree of nullity in the Maltese

[203] [1981] 2 WLR 901.
[204] The Family Law Act 1986 and the Brussels II bis.
[205] [1962] 3 ALL ER 419.

court claiming that the English marriage was void because Maltese law required a marriage to be in a Roman Catholic church. The wife countered with an English petition saying that her marriage is void, or that the marriage is dissolved on the ground of her husband's desertion.

It was held[206] that the Maltese nullity decree was offensive to English ideas of justice and would not be recognised here. Therefore the English marriage in 1949 was valid and subsisted. The decision in *Gray v Formosa* is important for Engish private international law as the decision provided dicta as to what is what should be considered offensive, and as to what is considered to natural justice. Lindley M.R. said;

> " If a judgement is pronounced by a foreign court over persons within its jurisdiction and in a manner with which it is competent to deal, English courts would never investigate the propriety of the proceedings in the foreign courts, unless they offend against English principles of justice. I confess that, when I consider the simple principles of justice, I have no doubt as to what is the result of this case should be. Here is an English woman as lawfully married as any Englishwoman could be. She has borne her husband three children in wedlock. Her husband goes back to Malta and gets the courts of Malta to declare that he has never been married to her." [207]

Lindley M.R. continued to consider the wife's unfortunate situation:

> "Is the wife to have no redress against him? Is she able to get no maintenance from him? Is he to be at liberty to throw in her face the decree of the courts of Malta and say she is not his wife and has never been? Is he at liberty to marry another woman with impunity? I do not think that there is any rule of private international law which compels her to submit to such indignity. "[208]

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[206] [1962] 3 ALL ER 423 at B and 424 at A and at H pp 425.
[207] *Ibid.* At pp 422 H.
[208] [1962] 3 ALL ER at p 423 A and B.

Lindley M.R. concluded that the English court cannot declare the marriage as no marriage. It was held that where the English courts would recognise a decision of a foreign court affecting persons within its jurisdiction, the English courts retained a residual discretion to refuse to recognise a decision which offended the English views of justice. [209]

Therefore, from this decision we can see that the English court will not recognise a valid foreign decree of nullity if it is considered unjust compared to the English viewpoint. Non-recognition due to injustice is one of the forms of public policy in operation. In a similar vein, non-recognition due to offensiveness towards morality in general is another form of public policy operation. It is submitted that the English court will take 'offence' if the foreign laws disadvantage English domiciliaries or if the foreign law drastically differs from English domestic law. [210] *Gray v Formosa* reinforces the fact that the English court will use the discretion of public policy in judicial decisions to protect English domiciliaries. The husband effectively obtained a valid foreign decree of nullity and, if the decree was recognised, the wife would not have the chance to participate in the divorce proceedings and would be subject to no maintenance or lower maintenance. *Gray v Formosa* provided dicta on what and why the court felt the foreign decree was unjust - as this is something that judges fail to do in most cases today.[211]

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[209] *Pemberton v Hughes* [1899] 1 Ch 781; 15 T.L.R. 211 CA and also *Ramsay-Fairfax v Ramsay-Fairfax* [1956] P 115.

[210] See Chapter 3 in relation to the former prospect of recognising same sex marriages or such as in Chapter 2 in which forced marriages where one party is an English domiciliary has become an issue with regards to increased protection.

[211] Note J. Murphy's call for more reasoned adjudication in *International Dimensions in Family Law* (Manchester Manchester University Press 2005) pp118-119.

Clearly, as shown above, the court needs to weigh up many factors before deciding on the degree of injustice. In the dicta expounded on above, the many factors considered(e.g. illegitimate children, lack of National Assistance, lack of maintenance available) did so offend the court and therefore the decree was not recognised. *Gray v Formosa*, therefore, sets a precedent for the weighing of factors before non-recognition in nullity cases.[212] In recent years, and other than the case of *Vervaeke*, the issue of public policy in relation to foreign nullity decrees has not been discussed again at such great length by the judiciary under the Family Law Act 1986. But, as we shall see later, the nullity case of *Pellegrini v Italy*[213] has shed new light on public policy's operation under the new European human rights legislation.

Although *Gray v Formosa* was decided in 1962, it is predicted that the court would use the same principles and would be decided in the same manner in 2010 under the Family Law Act 1986. It is surmised by this author that if one of the parties has a strong connection with England, and the other party had obtained a decree outside the European Union, then the court would feel obligated to not recognise the offensive foreign nullity decree.

In *Vervaeke v Smith* [214]the court had to decide whether or not to recognise a sham marriage. In 1954, the petitioner, a prostitute by profession, married the respondent, William George Smith, in London. The aim of the first marriage was to protect herself from deportation. In March 1970, the petitioner

[212] *Supra.* Chapter 1 generally. Arguably the judiciary should engage in the weighing of the factors before resorting to public policy in the recognition of foreign decree.
[213] (2002) 35 E.H.RR. 2.
[214] [1981] WLR 2 901.

went through a ceremony of marriage in Italy with a man named Messina who died on the same day. Messina also left a substantial estate, with property in England. Therefore, the lady had to prove that her marriage to Messina valid. And by doing so, she sought to have her first marriage annulled on the ground that she had not effectively consented to it. The English court refused to grant her a nullity decree with respect to the first marriage. She then went to seek a nullity decree from the Belgian courts with respect to her first marriage on the grounds that it was a sham marriage, and the Belgian courts granted her an annulment. Once granted this decree by the Belgian court, the lady asked the English court to recognise the Belgian nullity decree.

In the English court, the discretion of public policy was discussed at length. Waterhouse J. stated that there was clearly a direct conflict between the policies of the two countries in relation to marriage.[215] Belgian law allows sham marriages by allowing foreigners to enter into marriage without intention by the parties to cohabit whereas English law believes in the sanctity of the marriage bond. [216] Waterhouse J. emphasised that the case was not simply one of whether the Belgian decree was considered offensive to the English notion of substantial justice. [217] Waterhouse J. stated that what was decisive was the criterion of policy which was to be applied to the recognition of foreign decrees. Waterhouse J. also took into consideration the petitioner's conduct as a prostitute and intentions since 1954. This conduct, along with the fact that she entered into a sham marriage, and the fact that she was trying to avoid deportation was considered

[215] [1981] 2 WLR 938 at A and B.
[216] *Ibid.* at A and B.
[217] *Ibid.* at D, E and F.

when deciding her case. Waterhouse J. stated that he " doubted whether the application of public policy in this case should be decided by reference to the petitioner's conduct as a prostitute, her avoidance of deportation, or the manner in which she has conducted the various phases of her nullity proceedings." [218] Her application for an appeal was dismissed.

It is notable that *Vervaeke* went to the House of Lords, where Lord Hailsham L.C. of St. Marylebone, Lord Simon of Glaisdale as well as Lord Brandon of Oakbrook decided[219] that the petitioner's conduct was deplorable (practicising the profession of a prostitute, concealing the true facts of the case, and circumventing English law by entering into a Belgian sham marriage) and all believed that the case should be decided on either public policy or res judicata. Additionally, they discussed public policy in the case. Lord Hailsham L.C. of St. Marylebone considered that the marriage was not just any ordinary marriage but a marriage of convenience. [220] Lord Hailsham L.C. referred[221] back to Ormrod J.'s statement that the proceedings of this kind could be a 'horrible and sordid story' that can raise issues of public policy to which there can be more than one possible answer. Lord Hailsham also relied on the statement of Lord Merrivale in *Kelly(Orse. Hyams) v. Kelly* [222]who stated;

> "In a country like ours, where the marriage status is of very great consequence and where the enforcement of the marriage laws is a matter of great public concern, it would be intolerable if the marriage of law could be played with by people who thought fit to go to

[218] *Ibid.* at F.
[219] [1982] 2 WLR at 157 A-B, 163 A-D and 167 D.
[220] [1982] 2 WLR 855 [1983] 1 A.C. 145 and at page 5 of Westlaw document.
[221] *Ibid.*
[222] (1932) 49 T.L.R. 99.

a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it."

Lord Hailsham L.C. judged that this doctrine should extend to a statement of universal application, but had

"no doubt that it would extend to a marriage celebrated in England between a British to a foreign national in circumstances where the ceremony was intended to achieve the status of British nationality in the foreign national by means of the marriage and the private arrangement between the parties was simply to limit their personal relationships to the achievement of the status of married person with a view to acquiring British nationality for the previous alien partner."[223]

Lord Hailsham L.C. went further to state that

"according to Section 146 Civil Law, there is no marriage when there is no consent. The consent being an essential condition and element of the marriage, the lack of consent has as consequence the absolute invalidity of that marriage. As the parties[sc.the appellant and Smith] delusively indulged in a marriage ceremony without in fact really consenting to a marriage, they behaved against public policy. The disturbance of public order, the protection of what belongs to the essence of a real marriage and of human dignity, exact that such a sham marriage be declared invalid." [224]

After considering the decision of the Court of Appeal, and the previous proceedings in Belgium, Lord Hailsham L.C. stated that the case of *Henderson v Henderson*[225] must be applied to *Vervaeke* because in Henderson the petitioner had deliberately concealed the true facts of the case from the court in order to put

[223] *Supra.* note 220. pp. 5 Westlaw document.
[224] [1982] 2 WLR 855 [1983] 1 AC 145 p 6 Westlaw document.
[225] (1843) 3 Hare 100.

forward a bogus case which was inconsistent from the real facts. Therefore, Lord Hailsham L.C. believed that the same reasoning should apply to *Vervaeke* because the English judge had discovered the true facts inconsistent with her bogus case, and to recognise such a decree so obtained does affect the conscience of the court to such extent that public policy precludes recognition.[226] Lord Hailsham L.C. concluded that the appeal should fail should be dismissed firstly, on the ground of *res judicata.* Secondly, it should be dismissed on the the grounds of public policy. Thirdly, due to the circumstances of the present case, the rule in *Henderson v Henderson* should be applied. [227]

After considering the facts of the case, Lord Diplock stated that it should be decided upon *issue estoppel per rem judicatam* and therefore, the case should be dismissed. [228] Lord Simon of Glaisdale considered that the appellant tried to take advantage of English public law and in doing so, seemed to be a factor to be taken into account in determining whether to prefer English public policy, and thus refuse to accord binding force to the Belgian judgement. [229] The rest of the Law Lords[230] agreed with Waterhouse J,[231] and agreed with Lord Diplock, and dismissed the petitioner's application to have her decree recognised.

Thus, this case set a precedent in English law because it leads us to believe that the courts are able to consider many different factors, including the petitioner's conduct, before using the discretion of public policy. This author

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[226] *Supra.* note 224. p 9 Westlaw document.
[227] *Ibid.* pp. 9 Westlaw document.
[228] *Ibid.* pp 10-11.
[229] [1982] 2 WLR 855 [1983] 1 AC 145 Westlaw document pp 14-15.
[230] *Ibid.* the judgements of Lord Keith of Kinkel and Lord Brandon of Westbrook at [1982] 2 WLR 855 [1983] 1 AC 145 of Westlaw document at pp 15.
[231] [1981] Fam 88.

submits that the judiciary made the correct decision and did not overstep the boundaries of the use of public policy when considering the petitioner's conduct. Not all individuals in either nullity or divorce cases have good intentions when obtaining the recognition of a decree. If the English court is able to discern the motive behind recognition and the motive is a questionable one, then the court should exercise public policy. If *Vervaeke v Smith* were decided today, it is predicted that the English courts would decide the case in the same manner as immigration controls have increased, and the legislature and the judiciary have taken an even bolder stand against sham marriages.

Vervaeke v Smith and *Gray v Formosa* are examples of rare cases where public policy was discussed overtly by the judiciary. In these cases, the judges were bold enough to discuss public policy, and the circumstances in which public policy should be used[232] at length. This author submits that in the future, the judiciary should continue to be brave enough to provide dicta on public policy in relation to nullity decrees and not ignore such an important discretion. [233] Many factors such as the petitioner's conduct and motives should be taken into account. Again, it is only in this manner that the English court can provide a fully reasoned exercise of public policy.

However, if a case that is similar to *Gray v Formosa* was heard under the Brussels II bis, member states to the Brussels II bis (and therefore, England) has to recognise the decree even if the decree was offensive to English notions of justice. If we can recall, it is notable since the implementation of the Brussels II

[232] *Supra.* note 211. at pp 114-119 where Murphy discusses irrational decision making in relation public policy and competing values in the recognition of foreign marriages.
[233] And as we shall see later nullity decrees can be decided under the Brussels II bis as well.

bis in 2003, there are no recorded English private international law cases in relation to the recognition of European wide divorce and nullity decrees where the discretion of public policy has been used. Therefore, English private international law seems to be allowing automatic recognition of European Union divorces, so far. With the new regime at a European level, it is envisaged that most of the public policy issues arising from European and nullity divorce decrees would be with respect to procedural provisions of natural justice and public policy.

A. Pellegrini v Italy

The case of *Pellegrini v Italy* [234] is of significance for English private international law, though heard in the ECHR, because it was of the first nullity cases that arose under the Brussels II legislation. It is also because *Pellegrini* directly discussed human rights and public policy issues in private international law under the Brussels II. Furthermore, the case signals a convergence of public policy in the European Union, and towards a European Private International Law. It signals a convergence of European – wide values in family law cases. [235]

The facts of the case are as such. The applicant was married to G. The applicant petitioned for divorce in 1987 which was granted to G in 1990. Before the divorce was granted, G applied to the ecclesiastical court to annul the marriage on the grounds that they were too closely related. The applicant, who

[234] (2002) 35 E.H.R.R. 2.
[235] Athough this case was decided under the Brussels II European Communities (Matrimonial Jurisdiction and Judgements) Regulations 2001 (SI 2001/3100) and now has been replaced by the Brussels II bis EU Regulation 2201/2203.

did not know the nature of the proceedings, appeared before the ecclesiastical court. The marriage was annulled in December 1987. G then sought to have the judgement of the ecclesiastical court confirmed by the Italian court.

The applicant contested several points about the proceedings. [236] Firstly, she contended that she had not been informed in detail of her ex – husband's petition for annulment. She also did not access to the files of the proceedings. She contended that this was a breach of Article 6 of the European Convention on Human Rights, which implies that every party to a trial (whether it be criminal or civil) must have the right to inspect and discuss every document and observation presented to the court with a view to influencing its decision. She also felt she did not have the assistance of a lawyer, did not receive a copy of the petition, and was ignorant of the procedure when she appeared before the Canonical Court.

The question for the court was whether there was a breach of the right to a fair trial even when the grounds for the annulment had been duly satisfied, and based on an undisputed objective fact, by the petitioner. Given all the facts surrounding the applicant's circumstances when she appeared at the Canonical Court (no legal assistance, unaware of the precedents in the matter, no opportunity to look at the documents) the European Court held that there had been a breach of Article 6(1) of the Convention, and awarded pecuniary damages to the applicant. [237] By allowing this, although the annulment has been based on an undisputed objective fact, the judge was allowing considerations of public policy to be

[236] (2002) 35 E.H.R.R. 2 at page 12.
[237] (2002) 35 E.H. R. R. 2 at pages 13, 14 and 15.

accounted for in the decision. Thus, this was a landmark case for European divorces and nullity decrees. [238]

IX. Conclusion

As we have seen from *Pellegrini v Italy*, the recognition of nullity and divorce decrees within Europe will still be subject to the European Convention norms of procedural fairness. Therefore, although recognition of a divorce or nullity decree may be on an automatic level, all individuals (the relevant parties and respective judiciary) have to be astute as to possible breaches of natural justice under the European Convention. Furthermore, with the movement towards a European Private International Law[239] and quite possibly a European Family Law[240] with a common core of European values, we can see that public policy in its residual form is narrowing in the new European regime. It is envisaged that in the future, breaches of public policy in cases stemming from Europe will be confined to issues of procedural fairness and human rights.

Policy is always in flux in both its residual and implicit forms.[241] As we can see, it has evolved in this area due to the implementation of new legislation in the last decade. [242] Therefore, English lawyers and adjudicators will need to

[238] See *Charalambolous v Cyprus* [2008] 1 FLR 483.
[239] See Chapter 6.
[240] See Chapter 6.
[241] See generally Chapter 1 of this thesis.
[242] See generally J. Blom "Public Policy and Its Evolution in Time and Space' (2003) 50 *Netherlands International Law Review* 373 – 399.

be conscious of the old legislation and new legislation at all times when dealing with cases. It is only with a *thorough* examination of the applicable legislation and past cases that the workings of policy in this area can be understood by lawyers, adjudicators and interested parties. It is with this in mind that we can turn to the next chapter.

Chapter Six

Future Trends in Public Policy for English Private International Law and Adult Relationships

I. Introduction

Historically, judicial resort to public policy has been treated with caution by private international lawyers because the use of such a broad discretion flies in the face of international comity, and thus has been likened to an unruly horse wreaking havoc in pastures. [1] Particularly in the field of family relations, the "trumping" function of policy could be viewed with trepidation because of the particular impact it could have on the ordering of personal lives and relationships and therefore human happiness and security. Furthermore, as we have seen in previous chapters, outside of its trumping function of non – recognition, policy considerations can also factor into a court's decision. In earlier chapters of this thesis, I have analysed policy in its overt, fundamental form, and also how policy considerations have implicitly affected decisions in relation to recognition of

[1] See discussion by P. Carter 'The Role of Public Policy in English Conflict of Laws' *International and Comparative Law Quarterly* (1993) Vol 42 1. See generally Chapter 1 of this thesis for a general overview of public policy in English private international law.

heterosexual marriage, in relation to the recognition of new forms of cohabitation and same-sex marriages, and with respect to nullity and divorce decrees.[2]

Some examples of how public policy can impact on families(and therefore personal ordering) can be gleaned from earlier discussions in this thesis. If we can recall,[3] in *McCabe v McCabe*,[4] the English court was confronted with the recognition of a proxy marriage that had very different formalities from those in English law. Despite the fact that a bottle of gin and money were used in place of the parties to the proxy marriage ceremony, the English court found the marriage valid, declining to invoke public policy to deny recognition to the marriage. Similarly, in our previous analysis of public policy in relation to Section 51(3)(c) of the Family Law Act 1986,[5] we discussed *Kendall v Kendall*[6] where the husband deceived the wife into signing divorce papers in Bolivia. Because of the husband's fraud/deception, the English court did *not* recognise the Bolivian divorce decree upon public policy grounds. These two examples demonstrate the manner in which public policy in its fundamental form could be used by the court.

With regard to policy's other function as a covert consideration running throughout jurisdiction, choice of law and recognition, *Radwan v. Radwan* (No 2) [7] provided an instance where unexpressed policy considerations[8] influenced the

[2] Where, as we have seen, policy surfaces in jurisdiction, choice of law and recognition.
[3] Refer back to page number of the particular chapter.
[4] [1994] 1 FLR 410.
[5] See Chapter 5.
[6] [1977] Fam 208
[7] [1973] Fam 35.
[8] Refer back to *Radwan v Radwan* facts discussed in Chapter 2.

outcome of the decision by the judiciary. [9] If the marriage was held to be not valid by English law, the English courts(at that time) had no jurisdiction to order financial support for the wife. In this case, the court manipulated the choice of law rules (because of hidden policy considerations to protect the wife and prevent injustice to the wife's financial situation) in order to validate what was in truth a polygamous marriage.

Likewise, this author suggested in Chapter 3[10] when discussing *Wilkinson v. Kitzinger* [11] that the refusal to equate foreign same-sex marriages to domestic civil partnerships was a policy - fueled decision. Therefore, same-sex partners who have entered into a same-sex marriage abroad may not be able to have their marriage recognised by English private international law, and the stand taken by the judiciary in *Wilkinson v Kitzinger* reflected this policy. As this thesis has shown, policy has been used overtly and implicitly in many areas of adult relationships in English private international law throughout the years, but has not always been articulated by the English judiciary.

However, with the globalisation of ideas, cultures and the migration of individuals,[12] I have argued that the use of English public policy, in turn, will be narrowed in adult relationships in English private international law post-2010.

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[9] Refer to Chapter 1's discussion of J. Stapleton and judicial reasoning.
[10] Refer back to Chapter 3.
[11] [2006] EWHC 2022.
[12]See R. Michaels 'Globalizing Savigny? The State in Private International Law and the Challenge of Europeanization and Globalisation' (September 2005) Duke Law School Legal Studies Paper No. 74 ssrn.com/abstract=796228. M. Whincup and M. Keyes *Policy and Pragmatism in the Conflict of Laws* (Aldershot Ashgate Publishing 2000) see generally Chapter 1.

While the trumping discretion has been retained in the common law and legislation,[13] this author predicts that the use of the discretion in the English courts in the future, and the use of policy as a consideration that will factor into future decisions may be confined mostly to breaches of human rights and issues of procedural fairness in light of worldwide trends and domestic trends. Therefore, the historical fear that policy is an unruly horse[14] wreaking havoc in the hands of the judiciary is unfounded.

The chapter will examine several organisations, Conventions at European and international levels,[15] and legal academic Working Groups[16] that will continue to influence, shape and even "force" future trends in recognition (or non-recognition), as well as policy considerations in jurisdiction and choice of law through discussions, working papers and debates. We shall see that *much* influence, however, on policy stems from European developments. Likewise, through discussion and debate, these organisations, Conventions and legal academic Working groups will also influence adjudication for the English judiciary and English private international law-makers. This chapter will then go on to examine the possibility of an emergence of an 'European private international law' which may also signal a change to national public policies. [17]

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[13] See the common law definition for private international law cited by Dicey and Morris in Chapter 1 as well as we have seen in Chapter in Section 51(3) (c) of the Family Law Act 1986 and Article 22 of the Brussels II bis.

[14] See Chapter 1.

[15] Specifically trends from international human rights laws.

[16] Such as the Commission on European Family Law. See their website http. www.cefl.uu.nl. Or http. www2.law.uu.nl/priv/cefl.(Website Last visited May 2010).

[17] See generally the collection of European private international law essays in J. Meeusun, M.Pertegas, G. Straetmans, F. Swennen (Eds.) *International Family Law for the European Union* (Antwerp Oxford 2007), Also see P.Stone, *European Private International Law* (Cheltenham Edward Elgar Publishing 2006).

Additionally, the growing possibility of greater harmonisation or unification of family laws throughout the European Union in the future [18] may also have an impact on national public policies. The author also considers the prospect of an 'European family law' and discusses whether public policy in English private international law would still be necessary in such a situation.

II. Influences in Policy from Human Rights

The dilemma of protecting human rights affects all areas of English private international law. [19] Ever since the enactment of the Human Rights 1998, this is a concern that adjudicators and litigants will need to take into account in the future. [20] Because of the greater duties of interpretation conferred on the judiciary since the incorporation of the European Convention on Human Rights, English judges will now be able to make their own contributions to the law of human rights. This author predicts that judges will be heavily influenced by international human rights laws as well as the European Convention on Human Rights if called upon to define public policy in the future. Human rights considerations will affect private international law cases in England substantively and procedurally. As I shall examine here, decisions that are heard under

[18] See K.Boele – Woelki (ed) *Perspectives on the Unification or Harmonisation of Family Law in Europe* (Antwerp Intersentia Oxford 2003).
[19] See B. Causson 'Comparative Law and the Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple'(2001) 49 *The American Journal of Comparative Law* 420-426.
[20] See H. Swindells 'Crossing the Rubicon – Family Law Post the Human Rights Act 1998' in S. Cretney (ed) *Family Law; Essays for the New Millennium* (Bristol Jordan Publishing 2000) and also J. Murphy 'Same-Sex Marriage in England; a Role for Human Rights.' *Child and Family Law Quarterly* (2004) 15 245 and also S. Harris-Short 'Family Law and the Human Rights Act 1998; Judicial Restraint or Revolution?' *Child and Family Law Quarterly* 2005 3 329-362.

international human rights law may ultimately force the recognition or non-recognition of a status in English law. Additionally, human rights notions may again affect policy considerations outside of the residual trumping role in relation to jurisdiction and choice of law issues. [21] This author envisages more cases arising that involve consideration of Article 6, which encompasses the right to a fair trial and fair hearing under the European Convention on Human Rights. In this manner, policy will still be relevant in its general residual role, and also specifically in procedural fairness issues.

A. Change to Policy through Substantive Human Rights

As we have seen in the discussion in Chapter 3, in relation to the recognition of transsexual marriages in the United Kingdom, change and recognition was not forthcoming from English judges or Parliament before the European Court of Human Rights ruling in the conjoined cases of *I. v. the United Kingdom*[22] and *Christine Goodwin v. the United Kingdom* [23] that there had been a breach of Article 8 and Article 12. It was these judgements that forced England to allow transsexuals to marry and reconsider the position of domestic law in *Bellinger v Bellinger.*[24] Similarly, with the growing number of foreign jurisdictions allowing same-sex partners to enter to a legally recognised relationship or marriage, the United Kingdom was forced to broaden its policy,

[21] Refer to specific previous chapters.
[22] [2002] 2 FCR 577.
[23] [2002] 2 FCR 613.
[24] [2003] UKHL 21.[2003] 2 FCR 1.

and passed the Civil Partnership Act 2004, which changed domestic law as well as private international law and allowed overseas same-sex civil partnerships to be recognised here.

Further broadening in terms of the recognition of certain forms of status could also stem from outside Europe. Therefore, if pressure did not come from the European Court of Human Rights, there may be pressure stemming from international human rights law. In *Joslin v New Zealand*,[25] two lesbian couples filed an international petition before the United Nations Human Rights Committee. The couple asserted that New Zealand's failure to recognise marriage rights for homosexual couples was in breach of the International Covenant on Civil and Political Rights. Since this was the first time a UN-based Human Rights treaty has been used to recognise same-sex partnerships, this was an epoch-making case. The court finally decided that the mere refusal to provide for a marriage between same-sex couples was not in violation of the International Covenant on Civil and Political Rights. Article 23 of the International Covenant on Civil and Political Rights describes the right to marry specifically in terms of 'man and woman' rather than the more general terms used elsewhere in the Covenant. If the court had given judgement against New Zealand, it might have opened up the floodgates to other petitioners who would challenge other treaty parties to recognise same-sex relationships. Following this reasoning, this author suggests that perhaps the refusal of the English court in *Wilkinson v Kitzinger*[26] to equate same-sex civil partnerships as the same as same-sex marriages may be

[25] (2002) Human Rights Committee Communication No. 902/1999 (17 July 2002) CCPR/C/75/D/902/1999.
[26] [2006] EWHC 2022.

open to challenge in the future by international human rights. *Wilkinson v Kitzinger* was, after all, decided rather recently in 2006. Future litigation is yet to be seen because this is where international law may step in where national laws(and therefore national policies) may fail. Kirsten Walker in her contribution to the edited collection of essays *A Legal Recognition of Same – Sex Partnerships; A Study of National, European and International Law* puts forth her arguments as to how international law may change national laws and national policies.

Kirsten Walker argues[27] that several International Human Rights Conventions could have been used, and construed (rather unusually) for broader relationship recognition. She quotes provisions from the International Covenant on Economic, Social and Cultural Rights. Firstly, she argues that Article 7 which provides for equal remuneration for work of equal value without distinction of any kind, could be construed for broader relationship recognition. [28] Her argument is simple – if lesbians and gay men are doing the same work as their heterosexual counterparts, then they should receive the same renumeration. This would include benefits given to one's spouse. Similarly, Article 10 could also be construed widely to encompass couples (whatever their sexuality) with dependent children. Walker argues that several provisions in the Women's Convention[29] could also be used as a tool, in conjunction with the Children's Convention to encourage support for

[27] See K. Walker 'United Nations Human Rights Law and Same-Sex Relationships; Where to from Here?' in R. Wintemute and M. Andenaes (Eds.) *A Legal Recognition of Same-Sex Partnerships; A Study of National, European and International Law'* (Oxford Portland Oregon Hart Publishing 2001) pp 744-757.
[28] *Ibid.* at pp. 752.
[29] *Ibid.* at pp. 755 where she argues that Articles 23, 26 and 27 present avenues for recognition.

those caring for children. As Walker has illustrated, decisions stemming from international human rights law could, in turn, influence the English judiciary in future cases that may arise in England. In this manner, the use of international human rights law is an often overlooked route in which national public policy on an issue could be forced to change.

B. Change to Procedural Policy through Human Rights

Outside substantive issues of human rights, cases stemming from the European Court of Human Rights will also continue to influence the English judiciary in future cases concerning issues of procedural fairness, such as the right to a fair trial and the right to be heard. [30] It can be recalled from the discussion in Chapter 5 in *Pellegrini v Italy*[31] that the applicant challenged her ex-husband's petition for annulment on the grounds that she had not been informed in detail of her husband's petition, and did not have proper legal assistance. She argued that she did not have access to the files regarding her husband's case. She also complained that she was ignorant of what was expected of her when she appeared before the Canonical Court. Therefore, the applicant alleged that there had been a violation of Article 6 of the European Convention on Human Rights.

[30] Or, it has been coined by one academic 'procedural public policy.' See H.P. Medainis 'Public Policy and Ordre Public in the Private International Law of the EU – traditional positions and modern trends' *European Law Review* 2005 30(1) 95 – 110. The right to a fair trial has been internationally and constitutionally endorsed as a fundamental principle of law. See Articles 8 and 10 of the Universal Declaration of Human Rights 1948 and also Article 64 of the Constitution of the French Republic, 4 October 1958 and Article 13 of the Constitution of the Kingdom of Belgium of 17 February 1994.
[31] (2002) E.H.R.R.2.

The question for the court was whether there was a breach of the right to a fair trial even when the grounds for the annulment had been duly satisfied. The court found that there had been a breach of Article 6, and found in her favour. This author predicts more cases such as *Pellegrini* regarding procedural fairness as encompassed in Article 6 will arise in the future. [32]

Although provisions of procedural fairness are already embedded in legislation such the Recognition of Divorces and Legal Separations Act 1971, [33] and now the Family Law Act 1986 and the Brussels II bis Regulation 2201/2003,[34] the notion of a possible breach of Article 6 will always loom in the back of an English judge's mind since the enactment of the Human Rights Act 1998. According to O'Brien and Arkinstall,[35] Article 6 of the European Convention on Human Rights does not necessarily add to domestic public policy so as to give the notion of public policy as encompassed in the Family Law Act 1986 or the Brussels II bis provisions a new meaning, but simply *reinforces* the idea that adjudication in the United Kingdom is now done(and should be done) with a heightened awareness of procedural fairness. However, it should be noted that with all issues of human rights since the enactment of the Human Rights Act

[32] H,Stalford has deemed Article 6 to be 'one of the most prolific claims before the EctHR, particularly in relation to the length of family proceedings' in 'EU Family Law; A Human Rights Perspective' *International Family Law for the European Union* (Oxford Antwerp Intersentia 2007) pp 117. See also *Berlin v. Luxembourg*, Application No. 44978/98, 15-07-2003, *Buchberger v. Austria* Application No. 32899/96, 20-12-2001; *Mikulic v. Croatia*, Application No. 53176/99 [2002] ECHR 27 (7 February 2002).

[33] Which was repealed and replaced by the Family Law Act 1986. See discussion in Chapter 5.

[34] As we have seen in Chapter 5 in Article 22 of the Brussels II Bis Regulation.

[35] See www.doughtystreet.co.uk(Website last visited February 2010) which is a database entitled the 'Human Rights Act Research Project' compiled by C.O' Brien and J. Arkinstall entitled the 'Human Rights Act Research Project.' This database is intended by the researchers to be a historical compilation and they state on the website that the database does not represent the current state of law. Their database notes that in several cases, Article 6 has not added anything new to domestic/national law provisions in relation to criminal law trials. Therefore, this author would also assume that this would also be the case in relation to family law cases.

1998, the scope for the judiciary to achieve either an activist approach or a minimalist approach to judicial reform of domestic law is always present. The latter approach would "seek minimal compliance with Strasbourg case – law, the former would seek to build upon it and deploy Convention – like principles, in order to construct something more like a Bill of Rights approach, moreover, the former approach would tend to emphasise deference to the role of Parliament and the executive, the latter would tend to exhibit a more muscular and expansive conception of the judicial role under the Act." [36] Therefore, the opinion expressed by O' Brien and Arkinstall is merely a conservative approach to the application of Article 6. The judiciary is *still* at liberty to use a bolder, more robust approach to procedural fairness provisions under the Family Law Act 1986 and Brussels II Bis, and are free to expound dicta in this area.

Another query for an English court in the future is whether to apply notions of human rights that stem from the European Court of Human Rights to litigants from states outside the European Union. For instance, does the right to be heard and the right to a fair trial apply to a valid divorce in a foreign jurisdiction that does not require procedural fairness in the same sense as Article 6 dictates? [37] Perhaps the decision will depend upon the level of connection the parties have with England, or the level of connection that the parties have with a country that is a member state of the European Union. This author proposed in Chapter 5 of this thesis that public policy should rarely be used for non-

[36] H. Fenwick, G. Phillipson and R. Masterman (Eds) *Judicial Reasoning under the Human Rights Act* (Cambridge, Cambridge University Press 2007) pp 8 – 10.
[37] See *Kellman v Kellman* [2000] 1 FLR 785 at p 798 where Paul Coleridge QC stated that a mail order divorce was not necessarily manifestly contrary to public policy. Post - 2010, it is questionable whether such a divorce would be challenged again as a breach of human rights.

divorce unless the parties have a strong connection with the English forum. [38] In this manner, by withholding the use of the residual discretion, precedence is given to international comity by not imposing European Court of Human Rights standards to domiciliaries of non-Convention countries.

III. Conventions and Conferences – Other Vehicles of Policy Change

There are also influences for national policy (and therefore, public policy) change that may stem from, not from the judiciary or Parliament, but from Conventions, Working Groups and recommendations from groups of legal academics and practitioners working on problems that have common concern. (Unlike other areas of English law, private international law has historically always been more strongly influenced by academic commentary).[39] This section shall focus upon the work of organisations that may impact on public policy in English private international law.

The Council of Europe[40] has influenced English public policy in two ways. Firstly, the purpose of the Council of Europe is to maintain the European Court of Human Rights. The second purpose of the Council of Europe is to promote an awareness of human rights and to promote the rule of law and democracy. The Council of Europe also encourages the development of Europe's

[38] See Chapter 5 for instances in which the author proposes in which public policy should be used in relation to the residual discretion of public policy in Section 51(3)(c) of the Family Law Act 1986.
[39] See Chapter 2 for a good historical overview of English private international law in Cheshire and North (Ed. P. North and J. Fawcett) 13th Ed. *Private International Law* (London Butterworths 1999) and also Chapter 1 of Cheshire and North 14th (Eds. J. Fawcett, P. North and J. Carruthers). *Private International Law* (London Butterworths 2008).
[40] See the Council of Europe's website at www.coe.int.(Website last visited May 2010).

cultural identity and diversity to find common solutions to the challenges of European society such as discrimination against minorities, xenophobia, intolerance, bioethics and cloning, terrorism, trafficking in human beings, organized crime and corruption, cyber-crime and violence against Children. The Council of Europe has also directly influenced the implementation of Conventions on Child Abduction and Custody Orders with its discussions and debates. Therefore, the Council of Europe is influential in changing policy not only for the United Kingdom, but for other European countries.[42]

The Hague Conference is another organisation which has influenced English public policy in the past and will continue to do so in the future. It is a global organisation which has a long history and tradition [43]of promoting internationally agreed rules of jurisdiction, recognition and enforcement. On April 3, 2007 the European Union became a Member of the Hague Conference on Private International Law.[44] The admission of the European Union comes with the membership of all 27 EU states. [45] Membership of the Hague Conference will force the EU to "reinforce the Hague Conference provisions in a systematic way to promote justice and legal security for human relations and commercial transactions, by promoting and monitoring existing Conventions and by creating new international instruments of co-operation for the benefit of citizens all

[42] See www.coe.int.(Website last visited April 2010).
[43] See K. Lipstein 'One Hundred Years of the Hague Conference on Private International Law'(1993) 42 *International and Comparative Law Quarterly* 553.
[44] See www.hcch.net (Hague Conference website). Certain countries such as the Netherlands and France were already parties to the Hague Conference before 2007. See again www.hcch.net for the lists of countries and dates of accession to the Hague Conference.
[45] *Ibid.* EU Council *Official Journal of the Hague Council* 26.10.2006 Council Decision of 5 Oct 2006 on the accession of the Community to the Hague Conference on Private International Law.

around the world."[46] This author believes that the Hague Conference and the Council of Europe shall continue to have an influence on English private international law and public policy for many years to come in the recognition(and non-recognition) of personal relationships. Therefore, this author proposes that if Parliament did not enact legislation such as the Civil Partnership Act 2004 [47]and the Gender Recognition Act 2004, there would still be pressure for the reform of national law from these two organisations. If English domestic law does not change its current stand, this author predicts that there may have been pressure from the Council of Europe and the Hague Conference to recognise a foreign same-sex marriage in English law.

This author suggests this because of the discussion, debate and recommendations the two organisations have as ongoing projects in many matters that relate to European social and family law affairs. The Council of Europe's objective is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage. Therefore, since many European countries had already enacted a legal partnership for same – sex couples *before* the United Kingdom's 2004 legislation, this author merely proposes that debate could have come from recommendations of the Council of Europe.

Likewise, the Hague Conference on Private International Law has also taken an active role in recommendations and proposals throughout the years. In

[46] See www.hcch.net (Hague Conference website) Press Release – News and Events 03-04-07. Note also Martin George's post on conflictoflaws.net on 27 October 2006. (Website last visited April 2010.)
[47] See www.coe.int.(Website last visited May 2010).

the late 1990's, the Hague Conference published a work on progress paper on the private international law implications of cohabitation in Europe. More recently in 2008, a Preliminary Document was published 'Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships.' [48] It is in this manner that the Hague Conference continues to discuss and change national laws, and national policies by developing and producting research, papers, discussion and ultimately, Conventions which serve global needs.

A. Developments from European Community/European Union Law

Private international law has until recently had a distinctly national character.[49] Every developed national legal system has a system of private international law.[50] In the recent years there has been the notion of an European private international law as a separate subject because of the European Union efforts at harmonisation of procedural rules. [51] Recently, the European Union has

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[48] See www.hcch. net. Prel Doc No 11 of March 2008.(Website last visited April 2010).

[49] See generally Chapter 1 of this thesis. See also P. Carter 'Rejection of Foreign Law; Some Private International Law Inhibitions' (1984) *British Yearbook of Private International Law* 111 – 131, J. Blom 'Public Policy and Its Evolution in Time and Space' (2003) 50 *Netherlands International Law Review* 373 – 399, H.P. Meidainis 'Public Policy and Ordre Public in the Private International Law of the European Union – Traditional Positions and Modern Trends' *European Law Review* 2005 30(1) 95 -110.

[50] See generally Chapter 1 Cheshire and North(Eds. P. North and J. Fawcett) 13th Ed. *Private International Law* (London Butterworths 1999).

[51] See generally P. Stone *European Union Private International Law* (Cheltenham Edward Elgar Publishing 2006) and see also the general trend in EU law towards a European Citizenship in T.Kostokopolou 'On the Move; Ideas Norms and EC Citizenship; Explaining Institutional Change' *Modern Law Review* Vol. 68 (2005) 2 pp 233-267 and also L.Dobson brings together the notion of European integration, international relations and European citizenship in L.Dobson *Supranational Citizenship* (Manchester Manchester University Press 2006).

also moved into matrimonial matters. [52] The jurisdiction of the courts to entertain matrimonial proceedings and the recognition between Member States of matrimonial decrees is now governed by EC Regulation 2201/2203 concerning Jurisdiction and Enforcement in Matrimonial Matters and Matters of Parental Responsibility.[53] The Brussels II bis Regulation also deals with proceedings and orders concerning parental responsibility for children.

With the growing trends in all areas (in both matrimonial and commercial matters) in the form of Regulations stemming from the EU, a distinct and separate subject which is called European private international law exists today. [55] As this author has been previously examined in the context of human rights, in the case of *Pellegrini v Italy*,[56] procedural justice and therefore, the public policy of respective member states national private international law can now also be classified at a European level, as opposed to a national level. In this manner, the discretion of public policy has narrowed. This means that English public policy, *prima facie*, cannot be used to trump a validly obtained divorce or nullity decree that stems from another European Union member state due to the automatic recognition regulations encompassed in the Brussels II bis.

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[52] See generally Chapters 4 and 5 of this thesis.
[53] Denmark has opted out of the Regulation. The text is at [2003] OJ L338 and the Regulation is SI 2005/265.
[55] Stemming from the Treaty of Amsterdam (entry into force May 1, 1999). See generally P. Stone's book on *European Private International Law* (Cheltenham Edward Elgar Publishing 2006).
[56] (2002) E.H.R.R. 2.

For instance, if we can recall *Vervaeke v Smith* [57] [58] a valid nullity decree was granted in Belgium and was refused recognition in England on public policy grounds because it was a sham marriage. Perhaps due to the automatic recognition of nullity and divorce decrees encompassed in the Brussels II bis, the same case being decided in an English court in 2009 would reach a different conclusion and accord recognition *automatically* because it was a European Union nullity decree. However, with the grounds of refusal and non – recognition encompassed in Article 22 of the Brussels II bis,[59] public policy is still available for the judiciary to use. What would be 'manifestly' contrary to a member state's public policy[60] so as to necessitate non – recognition of a divorce of nullity decree is open to debate because no cases have arisen in this area yet.

Post the implementation of the Brussels II bis, the English judiciary cannot be idle with issues relating to recognition. [61] This is not to say that the judges are ignorant in matters relating to the Brussels II bis. But, as we have argued throughout this thesis, there still exists a necessity to engage in careful and reasoned adjudication in the future, particularly when dealing with the relatively new provisions of the Brussels II bis. This author suggests that if a policy issue seems contentious, the particular judge deciding the case would not move

[57] [1983] 1 AC 145[1981] 1 ALL ER 55.
[58] See the discussion in Chapter 5 in relation to the recognition of foreign divorces and nullity decrees.
[59] See specific Article 22 provisions in Chapter 5.
[60] See H.P. Meidanis 'Public Policy and Ordre Public in the Private International Law of the European Union – traditional positions and modern trends'(2005) Vol 30(1) *European Law Review* 95 -110. The word 'manifestly' has been included in the Brussels II bis and other private international conventions in order to limit the use of public policy.
[61] Or for issues relating to jurisdiction, as well.

immediately towards automatic recognition, [62] but seize the opportunity to expound their reasoning. This judicial exposition would, in turn, create much needed precedent for future litigation involving Article 22.

IV. Towards a European Family Law - The Possibility of Unification, Codification or Harmonisation of Substantive Family Laws Throughout Europe and its Implications for Policy

The ever encompassing moves towards a closer European Union brings forth the question about whether or not the unification[63] of national family laws would be advantageous or disadvantageous. This 'European trend' would ultimately have an effect upon national public policies in the future. For instance, *harmonisation* of national private international law on the road towards a common core of a European family law is sometimes 'not enough' because the difficulties associated with harmonisation actually highlight the difficulty that not all rules in the field are common.[64] Otherwise, if *unification*[65] of national family laws were to happen,[66] this would relegate English public policy to an even

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[62] *Supra.* note 60. H.P. Meidanis states that there will always be a balance between the basic principles of the Brussels Convention free movement of judgements and the need to use public policy.

[63] In this sentence I use the term 'unification' generally and interchangeably with harmonisation and codification.

[64] See M. Antokolskaia 'The Better Law Approach and the Harmonisation of Family Law' in K. Boele-Woelki *Perspectives for the Unification and the Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia Hart Publishing 2003). at pp 161 see generally pp 159-182. See also S. Clements 'Brussels Bulletin – the future EU Justice Programme' [2009] *International Family Law Journal* 67 1 March 2009, and also H. Toner's arguments in 'Partnership Rights, Free Movement and EU Law' (Oxford Portland Oregon Hart Publishing 2004) pp 6 – 10.

[65] *Infra.* note 78 and note 105. for an explanation of codification, harmonisation and unification.

[66] See C. McGlynn 'The Europeanisation of Family Law' [2001] *Child and Family Law Quarterly* 35.

narrower sphere than ever before. Two academics have argued the merits of unification or codification. Marie Therese Muelders - Klein identified why this area necessitates unification. The need for unification [69] stems from a practical standpoint. With the mobility of people across Europe, there is an increase in bi-national and multinational people.

M. Jantare - Jarebourg argues[70] that with the increase in the number of family conflicts, there needs to be unification of substantive and procedural family law. Meulders - Klein proposed that a unified private international law across Europe would not be enough in the greater political scheme of a European Union. The divergence of national family laws and different political cultures from which they stem would make complete unification a difficult task. This is because law, in itself, is inherently driven by political and cultural factors.[71] Friedman has termed this depiction of law as "an organised system of social control...a mirror held up against life. It is order, it is justice; it is also fear, insecurity, emptiness; it is whatever results from the schemings, plottings, and striving of people and groups with and against each other."[72] This is, in fact, the

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[69] Unification or codification. See also M. Meulders – Klein 'Towards a European Civil Code on Family Law? Ends and Means' in K. Boele – Woelki (Ed) *Perspectives on the Harmonisation or Unification of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 105 – 106.
[70] M.Jantare-Jarebourg 'Unification of International Family Law in Europe – A Critical Perspective' in K.Boele-Woelki (Ed) *Perspectives for The Unification or Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 194-214.
[71] See D.Bradley's historical account of deeply embedded European family law 'Sovereignty, Political Economy and Legitimation' in K.Boele-Woelki (Ed) *Perspectives for the Unification or Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 65-102.
[72] Quoting M.Friedman in *A History of American Law* (New York Simon Schuster 1973) pp 595.

objective underpinning English family law. The idea of a broader political design[73] is further supported by Kahn-Freund.

Kahn-Freund advised that;

> those interested in the family law of Europe should give serious consideration to the need for studying each rule and each institution not as a piece of legal history of dogmatic reasoning or organizational technique, but as the outcome of the social and political history and the social and political environment in which they grew and exist. [74]

Therefore, in the future, an even closer European Union would stimulate a change in policy for member states. [75] Consequently, the prospect of an European Family Law has been debated recently by the Commission on European Family Law. [76]

The establishment of the European Working Group was based on the idea that family law, with a regard to the European citizen's greater mobility, must not fail in the search for an *ius commune,* [77]and that recent intervention at European Union level and by the Council of Europe are not sufficient to reinforce further harmonisation. The members of the Commission hold the conviction that a certain level of harmonisation is needed in order to facilitate the free movement of persons and a true 'European identity'. The Commission has held several

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[73] *Supra.* note 51. See *Infra.* note 74.
[74] "Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation" in M. Cappelletti (ed.) *New Perspectives for a Common Law of Europe* (Leyden Sitjhoff 1978) pp 138 and pp 175.
[75] *Infra.* note 98 and note 115.
[76] See the Commission for a European Family Law (a European Working Group whose members are continuously working on finding a common core of family law in Europe through working papers and conferences) See the Working Group's website at www.cefl.law.uu.nl.(Website last visited May 2010).
[77] See E.Hondius "Towards a European Ius Commune: The Current Situation in Other Fields of Private Law' in K. Boele-Woelki(ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 118-134.

conferences since its establishment in 2001, and is constantly striving to find a common core in the family laws of Europe through its Working Papers and conferences and thereby provoking debate.In the meantime, there have been several proposals as to how to achieve a harmonised family law – attainment can be done through soft law and hard law. [78] Therefore, this section of the chapter will only briefly elaborate upon the several different methods that harmonisation can take. A full examination of the many different ways would be beyond the scope of this thesis, but this author would like to emphasise that whatever method is ultimately taken would have a direct, "knock – on" effect for national public policies.

The first method of harmonisation would be the soft way through the development of ideas and behaviours. Since one of the objectives of family law is to conform to certain family values and to discourage behaviour contradicting those values – the harmonisation of family law presupposes a shared ideological basis of shared values throughout Europe. [79] There are two methods of searching for this basis. The first is known as the 'horizontal and comparative approach.' [80]This is where a common core of family values shared by every country in

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[78] While this chapter's aim is to discuss *generally t*he methods of harmonisation (and therefore the ways forward of harmonisation) of family laws within Europe, it should be noted that within the EU law context harmonisation itself is a deep concept, with maximum and minimum methods. See C. Barnard *The Substantive Law of the EU – The Four Freedoms* 2nd Ed. (Oxford Oxford University Press 2007) at pp 589 – 615. The object of this chapter(and this thesis) is not to analyse harmonisation in depth but merely to elaborate that there are different methods Note also that beyond harmonisation, an even *closer* form of integration is the 'approximation' of laws. Alas, the analysis of this concept is beyond the scope of this thesis. See D. Lasok and K. Lasok (Eds.) 7th Ed. *Law and Institutions of the European Union* (London Butterworths 2001) pp 837 – 839.

[79] J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen (Eds.) *International Family Law for the European Union* (Antwerp Oxford Intersentia 2007) pp 3.

[80] *Ibid.* pp 5.

Europe could be extracted by comparing the existing laws. [81]It is observed, however, that there is divergence in the national solutions to similar problems and so the harmonisation of substantive family law by binding instruments would be a difficult task. It was concluded that the discussion and elaboration of non – binding principles could be the way forward aimed at horizontal harmonisation. Klein, in her essay 'Towards a European Civil Code'[82] also concludes that a deliberate resort to conventions is necessary for harmonisation. Klein is of the opinion that such organisations as the Council of Europe, the Hague Commission on Private International Law and the International Commission on Civil Status will facilitate the move towards a European Family Law.

Klein proposes that [83]outside the Working Groups and organisations, a more direct approach towards a European Family Law would be through the cases that stem from the European Court of Human Rights. This method is known as 'partial harmonisation' of the common core of fundamental rights in family law that European countries share.[84] Since the landmark judgement of *Marckx v Belgium*[85] and the case law in relation to transsexual marriages,[86] case law has been developing and will continue to develop throughout Convention states. Additionally, the human rights discourse in the European Union is aimed at

[81] *Ibid.*pp 5 – 8.
[82] See K. Boele- Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003) pp 105-117.
[83] See K. Boele-Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003) at pp 105-177.
[84] *Supra.* note 79. pp 5.
[85] (1979) 2 EHRR 330.
[86] See Chapter 3.

balancing conflicting individual and collective family rights. [87] Three important constitutional developments have resulted in the endorsement of family rights at EU level. Firstly, the interpretations of restrictions to economic free movement has resulted in a European recognition of family rights. The same approach has been endorsed with regard to economically inactive persons through the concept of EU citizenship. Second, the Charter of Fundamental Rights, though it is dependent of the fate of the Treaty establishing a Constitution, is already serving as a blueprint for human rights protection. Finally, a commitment to human rights has accompanied the communitarisation of family law activities in the Treaty of Amsterdam. [88]

The European Union's human rights agenda evolved so as to allow the EU institutions to ensure compliance in a positive manner by the Member States, with the fundamental rights that are part of the European Union legal order. [89] It is hypothesised that legal order in an initial stage reflected the existing human rights as prescribed by the "constitutional traditions" common to the Member States, the Council of Europe and the Hague Conference. Therefore, the human rights that stem from the emerging constitutional developments now compose a more 'robust' project than that is available under international instruments.[90] Therefore, the human rights prospect from this harmonisation may eventually constitute a substantive family law.[91]

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[87] See H. Stalford's essay in J. Meesun, M. Pertegas, G. Straetmans, F. Swennen *International Family Law for the European Union* (Antwerp Oxford 2007) para 4 – 7.
[88] *Ibid.*
[89] *Ibid.*
[90] *Supra.* note 79 at para. 35.
[91] *Supra.* note 79 at para. 34.

Although this mix of national, Community law and human rights laws[92] would seem to be a convergence of national family law, it is still not a truly coherent form of European family law. In fact, the superimposition of three different types of laws may add more complexity to national laws. [93] If there *was* a European Family Law the most current trend is only evident in harmonisation, as opposed to unification or even codification.

Yet another way forward is the harmonisation of private international family law *within* the free movement of persons framework. [94] The establishment of the internal market rests upon two fundamental concepts that are necessary for the application of Community law – the need for (a) a cross border element and (b) an obstacle, whatever its nature, to the freedom to move. [95] Therefore, the case law of the free movement of persons ranges from the very personal to the commercial. More recently, the Court of Justice has established that it is now unnecessary to establish any 'economic link' in order to prove that there has been an infringement of the right to freedom of movement. Therefore, cases involving obstacles to free movement involve refusal of recognition by certain European countries of name/surname changes, the need for free movement of civil status records (which is a corollary to the fundamental principle of free movement and the free movement of persons and services). [96] For example, in *Dafeki* [97] the

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[92] Refer back to the beginning of this chapter which illustrates the policy trend in human rights laws.
[93] As we have seen in the Brussels II bis Regulation 2201/2203 and the Family Law Act 1986 in relation to foreign divorces in Chapter 5 – having to juggle several pieces of legislation is complex for lawyers and parties involved in litigation.
[94] *Supra.* 79 at pp 15.
[95] *Supra.* note 79 at pp 8 – 11.
[96] *Ibid.*
[97] ECJ, 2 December 1997, case C – 336/94, *Dafeki*, E.C.R. 1997, I -6761.

European Court of Justice pointed out that although there is no obligation for Member States to treat as equivalent national and foreign qualifications, Member States "have to respect foreign certificates...unless their accuracy is seriously undermined by concrete evidence related to the individual case in question."

Additionally, there are circumstances where there are impediments to free movement that could be classified as cases involving 'non – economic free' movement. Such cases would involve limitations on the right to reside, and limitations to the right to equal treatment. In this manner, we can observe a burgeoning case law emerging from the harmonisation of private international law in this area.

A. Harmonisation of International Family Law

The harmonisation of international family law within the European Union is yet another possibility, though European international family law is still in its infancy. This approach would be considered even more ambitious than the harmonisation of private international law within the freedom of movement provisions. However, the development of such rules is dependent upon the political agenda of European Union legislators. At present, harmonisation seems to be limited to procedural rules, but some progress in mid – 2010 is moving towards choice of law particularly in relation to the applicable law to divorce and legal separation. [98]

[98] It should be noted that there was an attempt in 2008 to harmonise choice of law(applicable law) and jurisdictional rules in relation to nullity and divorce decrees throughout the member states of

Meesun, Pertegas, Straetmans and Swennen recommend that harmonisation should also occur for choice of law rules in European international family law. They state that

> "The combined harmonisation of procedural and choice of law rules has indeed the advantage of contributing to freedom of movement in the EU without encouraging forum and system shopping. As has been confirmed by the ECJ in recent years, and particularly so in cases which are to a certain extent related to family law such as *Akrich* [99] and *Chen,* [100] Community law protects the right of private persons to fully exploit the benefits of the internal market and to search for the most favourable legal system, which are to be given priority over the possible interests of the Member States to have their laws applied to particular persons, transactions or situations." [101]

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the European Union. It was meant to apply(in all member states) to all divorces brought in the EU, regardless of whether the parties are EU citizens or residents from outside the EU. The United Kingdom originally opted out of the proposed Regulation named the 'Proposal for Council Regulation amending Regulation (EC) 2201/2203 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.' This proposed Regulation, also known as the 'Rome III' has now been scrapped as of June 2008. However, the European Commission still debated as to whether further harmonisation in choice of law in this area is still needed. See Council of the European Union Interinstitutional File 2006/0135 (CNS) 5274/07 Brussels 12 January 2007. See also House of Lords Report with Evidence 'Rome III – Choice of Law in Divorce' which was to amend EC Regulation 2201/2203. 7 December 2006 HL Paper 272. See also S. Clements 'Brussels Bulletin; The Future EU Justice Programme' [67] *International Family Law Journal* 1 March 2009 pp 1 - 2 who emphasises that *despite* the failure of the Council Regulation to harmonise the applicable law and jurisdictional rules relating to divorce and nullity decrees, there is still an agenda for enhanced cooperation in the EU through the European Commission. It is notable that since March 2010 there has been a Draft Proposal for a Council Decision authorising enhanced cooperation of the area of the law applicable to divorce and legal separation.(COM(2010)0104. This Draft Proposal of March 2010 had been turned into a Draft European Parliament Recommendation on proposal for a Council decision authorising enhanced cooperation in the area of law applicable to divorce and legal separation.(COM(2010)(0104 – C7-xxxx-2010/0066(NLE). May 28.2010. The United Kingdom has once again opted out of this arrangement for applicable law. (As of June 2010, the countries that are signatories are Austria, Belgium, Bulgaria, France, Germany, Italy, Latvia, Luxembourg, Portugal, Romania, Slovenia and Spain). *Cf* Jurisdictions such as the United States of America who are still unable to achieve co-operation. See S. Symenonides 'The American Revolution and the European Evolution in the Conflict of Laws – Reciprocal Lessons' (2008) 82 *Tulane Law Review* 1741.

[99] ECJ. 23 September 2003. case C – 109/01, *Akrich* E.C.R. 2003, I – 9607.

[100] ECJ. 19 October 2004, case C – 200/02, *Chen* E.C.R. 2004, I – 9925.

[101] *Supra.* note 79 at 16.

The above narration of the different methods exemplifies that the harmonisation of private international law, and ultimately European family law, could occur in many ways and at many levels. Which way forward the EU should take for harmonisation is one of considerable debate,[102] but whatever approach is taken in the future would ultimately effect national public policies in their residual role as well as implicitly. This brings us now to a discussion of what may happen to public policy in light of integration.

V. A Narrowing of Public Policy in the Future?

Throughout this thesis, public policy has been discussed in relation to adult relationships in English private international law. It has been long established that public policy is a necessary tool in private international law in its residual form to correct situations of injustice. This thesis has also seen that policy may often be used indirectly to manipulate the desired outcome of the situation. [103] However, if pursuing the idea that a substantive European family law is feasible,[104] the need for public policy in domestic private international law may greatly lessen. Countries would be compelled to submit to a European – wide notion of policy and so the usage of policy directly and implicitly would be constrained under national laws.

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[102] And is beyond the reach of this thesis. *Supra.* note 79. See Chapter 1 generally.
[103] See Chapter 1 of this thesis.
[104] *Supra.*to page 12 of this chapter.

Therefore, the extent of policy ultimately lies in the level of co-operation the EU has chosen.[105] Public policy would get narrower and narrower as the level of co-operation increases.[106] As we have seen earlier, in the event of *harmonisation,* national public policies would be substituted in favour of a 'European' policy as we have seen from the intense amount of legislation being passed in the area of private law. Consequently, depending on the *extent* of harmonisation, the need, and therefore, usage of public policy in English law would depend on the level of harmonisation. [107] Following this, if the European Union *unified* its Family Laws, this would indicate more sacrifice (in the reduction of each member state's national laws) than harmonisation, and therefore the need for public policy in unification would be even less. [108] Therefore, in the most extreme case, if there was a complete *codification* of Family Law,[109] the need for public policy within Europe may not be necessary anymore, but this eventuality would be an unlikely situation. [110]

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[105] *Supra.* notes 77 – 90. M.Meulders-Klein explains the concepts of harmonisation, unification and codification in her essay in K.Boele-Woelki(Ed) *Perspectives on the Unification and Harmonisation of Family Law* in Europe (Antwerp Oxford Intersentia 2003) pp 105- 106. Harmonisation is the gentlest approach to reconcile the 'preoccupations and interests' of the various systems as opposed to unification or codification. Unification means the voluntary or imposed uniformisation. Meulders-Klein notes the EC/EU language uses the term approximation. Codification is the technique of drawing up a structured and coherent code. Meulders - Klein states that codification is the most radical means.

[106] *Supra.* to footnotes on harmonisation notes 77 - 90. See also *Infra.* note 115.

[107] *Supra.* footnotes 77 – 90.

[108] See H.P. Meidanis 'Public Policy in EC/ EU Law ' *European Law Review* 2005) 30 (1) 95 - 110

[109] See H.R.Halo 'Codifying the Common Law; Protracted Gestation' *Modern Law Review* (1975) Vol 38. 23-30 and also S.Cretney 'The Codification of Family Law' *Modern Law Review* (1981) Vol 44 1-20.

[110] See again, H.P. Meidanis 'Public Policy in EC/EU Law' *European Law Review* 30(1) at 110 where Meidanis made reference to a EU public policy and states that "Should it ever substitute the national public policy, this would be the result of an ever going deeper co-operation in the EC/EU, a prospect which cannot be guaranteed at all.'

In the eventuality of a European family law, this author suggests that it is in England's interests to retain its public policy. Particularly in cases which involve litigants from outside the European Union, public policy in its residual trumping form may still be needed for cases involving injustice and offensive situations. Additionally, it should be kept in mind that many European citizens today hold dual nationality or multinationality with non-EU countries. Therefore, foreign matrimonial proceedings that stem from outside the EU may affect EU citizens, and they may need redress against procedurally or substantively unfair matrimonial decrees (and/or proceedings).

This author predicts that harmonisation at a European level[111] will have an effect for domestic policy that could result in two different approaches by the judiciary. Firstly, harmonisation of policy (with national policies being substituted and narrowed) at European level could result in a restricted interpretation of policy, and what would offend policy in the national courts for non EU litigation. Consequently, judges would not be willing to use policy or policy reasons for non – recognition of a non – EU divorce or nullity decree. This could also apply to the recognition of a foreign marriage or relationship. So, policy in this instance would be used in a restrained manner following EU trends.

Secondly, harmonisation at European level and the somewhat limited use of policy due to the automatic recognition provisions[112] may create a 'European

[111] I refer to harmonisation at either EU law or EU PIL.
[112] Keeping in mind the balance between free movement of judgements and what would be 'manifestly' contrary to public policy in Article 22 of the Brussels II bis, and whether or not the procedural fairness provisions of the Brussels II bis have been breached.

block' or prejudice towards non – EU decrees. [113] Hence, judges in English law may be more willing not to recognise foreign decrees by using public policy (or policy issues) in non – EU litigation more because non – EU cases would appear to be 'foreign' as opposed to EU decrees. This author strongly recommends that whatever approach the English judiciary chooses in light of harmonisation[114] and its eventuality, the English and European judiciary should be acutely aware of the considerations for global co-operation and international comity and handle cases from outside the European Union sensitively before jumping to non – recognition.

VI. Conclusion

With the numerous trends that have been examined in this chapter, it is envisaged by this author that the pressure to change public policy at a national level in the future will continue to flow from both European and international levels. [115] Additional discussion about the role of policy will come from the Hague Conference, the Council of Europe and legal academic debates. [116] While *acknowledging* the need for change is a major step, the next stage is to *implement*

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[113] *Supra.* note 98.

[114] Though the trend towards a European Family Law is merely at the stage of harmonisation at the moment. See generally K. Boele – Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp Oxford Intersentia 2003).

[115] See *Supra.* note 98. Especially with the continuing concerted movement towards an ever closer European Union. See Opinion of the Economic and Social Committee on the Communication for the Commission to the European Parliament and the Council – An Area of Freedom, Security and Justice Serving the Citizen' (COM) 2009 /262/2/ Final. Also, the European Commission Plan to deliver justice, freedom and security to citizens (2010 – 2014). Brussels 20 April 2010. MEMO/10/139. See also www.se2009.eu(Website last visited April 2010). Note as well the European Commission's timetable for 2010 – 2014 at www.conflictsoflaw.net April 22. 2010 (Website last visited May 2010).

[116] See www.conflictsoflaw.net as there are a few conferences in later 2010 which are hosted by Continental institutions and think-tanks debating the notion of European private international law and public policy.

change in circumstances that necessitate the use policy either in its residual or trumping form.

Therefore, this author hopes that in the future, English legislators and the judiciary will *listen* to these organisations, and be conscious of trends that stem from the European Union and international law when using public policy in English private international law.

Conclusions for Thesis

What have we learned from our exploration of policy in the context of adult relationships in English private international law? It would be useful to re-visit the list of circumstances in which we have discovered policy being used in both its residual and implicit forms. [1] As we can recall from Chapter 1 of this thesis, policy tends to surface in situations that are repugnant or offensive outright. Usually this would be a status or a foreign law that is considered to be completely incompatible with domestic law or infringe the national order or national interests. Additionally, policy may also surface as a consideration in adjudication when there is injustice to the parties in question and also in the manipulation of choice of law rules in relation to the recognition of foreign marriages.

Consequently, this thesis has shown that the manner in which policy has been applied by the English court has also changed significantly in the last half century. In the past, it was thought that judges resorted to policy solely in its residual trumping ground to deny recognition or foreign law. This thesis has discovered that while this discretion is still open to the judiciary to use in either its common law residual form or its statutory forms, the English courts are still cautious of using this overt form of policy. This thesis has argued that there exists a need to utilise this form of policy in certain circumstances, particularly in relation to heterosexual marriage recognition. In fact, this thesis has pointed that

[1] See Chapter 1 generally.

there are still situations that necessitate the overt residual form of policy *more often.*

Throughout this thesis, this author has discovered that policy (and therefore, policy considerations) creep into judicial decision making through jurisdiction and choice of law rules, so the English court can manipulate the outcome of the particular case. This author has suggested that although the desired result can be achieved by manipulating choice of law rules, the *manner* in which it has been achieved needs more elaboration by the judiciary. A similar argument could be made in relation to the jurisdictional rules for divorce and nullity proceedings under the Domicile and Matrimonial Proceedings Act 1973. [2] Before deciding whether a stay should be allowed, the court should elucidate all reasons, and be transparent about the particular policy considerations that were considered before arriving at the final decision.

The circumstances in which we have found policy issues arising in this thesis should not be taken to be exhaustive. While our judiciary has used policy (in its residual form) with restraint, there are many global, cultural and societal trends that will continue to shape policy in its residual and implicit forms. The nature of policy is in flux and new circumstances may arise for the English court to consider. [3] Although many areas of the recognition of adult relationships in English private international law are now on a statutory basis, it is still imperative

[2] As we have seen in Chapter 4.
[3] Such as we have seen in the cases of *KC, NNC v City of Westminster Social and Community Services Department ICC (a protected party)* [2008] EWCA Civ 199 and also *Wilkinson v Kitzinger* [2006] EWHC 2022.

that the judiciary realises the significance of policy and the effect that policy considerations have when being factored into adjudication.

With ever closer harmonisation of European Union laws, the judiciary should be cognizant of the effects that new European legislation may have on policy considerations in English private international law. As we have examined in Chapter 6, there are many new policy trends stemming from not only from European Union developments but from international human rights law, as well.

Beyond everything else, English private international law will also have the perennial problem of promoting certainty, consistency and flexibility in decisions while exercising judicial restraint with the use of policy. Ultimately, this will always be a balancing act for the English judiciary. With a continuing emphasis on global cooperation and international comity, this author concludes that these goals can be achieved in several ways – more academic commentary, increased judicial commentary and awareness, and more Conventions to discuss and analyse in adult relationships and issues arising in English private international law. In an increasingly globalised society in which many of our citizens possess binational or trinational citizenship, the necessity for an awareness of policy (and therefore, policy considerations) would be of interest not only for our judiciary but also litigants. And to this end, the careful perusal of problems and policy considerations arising from past cases and legislation could provide answers to future dilemmas for English private international law, and the evolution of policy.

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