CHAPTER: III

MARRIAGE

PART: I

POSITION IN ENGLAND

Introduction;

According to the English law marriage is considered as a contract by which a man and a woman\(^1\) express their consent to create the relationship of husband and wife. Fundamentally, this type of contract, differs from a commercial contract in the following three ways:

i. As a general rule it can only be concluded by a formal public act;

ii. It can only be dissolved by formal public act; and

iii. It creates a status, which is taken into account in relation to (succession, tax, legitimacy of children, and to some extent in relation to immigration laws.

It has been observed that, while 'marriage' may be based on agreement, it is an agreement *sui generis*, in that it confers on the parties a particular status.\(^2\) The conceptual approach, which English law has adopted in this regard, as in most other areas of the conflict of laws, requires that positive approach is taken and that approach is one that is sufficiently flexible to accommodate the foreign institutions of marriage.

**CONCEPT OF MARRIAGE**

Until the establishment of the Court for Divorce and Matrimonial Causes in 1857, the Civil Courts had operated upon an ill defined, though widely assumed, understanding of the Christian marriage.\(^3\) The transfer of the jurisdiction from

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\(^1\) At Common Law, the parties to the marriage are a man and a woman; see *Corbett v Corbett (Orse Ashley)* [1971] P 83.

\(^2\) Lord Penzance had given the classical definition of marriage in the leading case of *Hyde v Hyde* (1866) L.R. 1 P & D 130, which will be discussed below with some detail.

\(^3\) Judicial divorce was introduced into England in the *Matrimonial Causes Act* 1857. Under which the court formed part of the Probate, divorce, and Admiralty Division of the High court in 1875. In 1972, it was reconstituted as the Family Division of the High Court.
ecclesiastical courts and the introduction of the new powers to make financial orders made the need for a clear statement of the concept of marriage as understood in English law all the more pressing.

The issue arose in the leading case of *Hyde v Hyde*, in which the facts were that an Englishman, who had embraced the Mormon faith, married a Mormon lady in Utah according to Mormon rites. After living with her for three years and having children by her, he renounced the Mormon faith and, soon afterwards, became a Minister of a dissenting chapel in England. He petitioned for a divorce in England after his wife had contracted another marriage in Utah according to the Mormon faith. Lord Penzance assumed that the Mormon marriage was potentially polygamous and he refused to dissolve the marriage. The laws of England, the Judge thought, were not adopted for polygamy and the parties to a polygamous marriage were 'not entitled to the remedies, the adjudication, or the relief of the English matrimonial law'. Lord Penzance sought to define marriage for the purpose of 'the remedies, the adjudication, and the relief of the English matrimonial law'. He defined marriage as follows: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

This common law definition was based on the Christian marriage and, therefore, resulted in the original refusal to recognize marriages celebrated under other rites. This definition would not include a marriage entered into for a fixed term. But it does include a union entered into for an indefinite period even though it is capable of being dissolved during the life of both parties. Moreover, it does not matter that such dissolution can be easily effected, for example, by mutual consent or unilateral repudiation followed by the conclusion of certain formalities, as was the position with Soviet Marriages in 1930.

However, it should be noted here that this is no longer the case in relation to most foreign marriages. As shall be seen, the definition given by Lord Penzance is no

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4 Sections: 32 to 35 of the *Matrimonial Causes Act* 1857.
5 (1866) LR 1 P&D 130.
longer comprehensive, that in many cases, foreign marriages are recognized in English law. Moreover, we are concerned here with the concept of marriage for the purpose of the conflict of laws. Once a court as falling within the definition has accepted a relationship, the rules of choice of law on marriage come into play and they may involve reference to a foreign law, which takes a different view of the nature of the institution of marriage. The foreign law may require, for example, that, for a marriage to be valid, the parties must intend at the time of the marriage to establish a special matrimonial relationship. Where this is the case, it will be for the national court to decide whether account is to be considered of the foreign law and this may well involve issues of morality, public order (public policy). Now, each of the Lord Pezance’s definition of marriage components will be examined:

1. *Voluntary union:*

The first component of the above definition is the term ‘voluntary union’. It is a settled principle that, if one party to the marriage does not consent to marry the other, the marriage will be regarded as invalid. Lack of consent may result from fear for one’s life caused by duress or other forms of lack of consent, which would not be recognized in the English courts. This may be illustrated in the case of, *Szechter v Szechter*[^7] in which, a husband, his first wife and his secretary were all domiciled in Poland. The secretary, who was imprisoned as a result of being accused of a political crime, suffered from serious ill health. The husband, in order to obtain her release from prison, divorced his wife and married his secretary, who intended to divorce him as soon as they were to leave the country so that he could remarry his wife. All three come to England, and soon after acquiring an English domicile, the secretary petitioned for annulment of her marriage on the ground that the ceremony performed at Warsaw was inoperative due to duress.

[^7]: See; *Vervaeke v Smith* [1983] 1 A.C. 145.
[^8]: *Matrimonial Causes Act* 1973, s 12(c). Which provides that a marriage shall be voidable for lack of consent whatever the cause of failure.
[^9]: *Parojcic v Parojcic* [1958] 1 W.L.R. 128 (marriage in England voidable because of coercion by father of bride); *Buckland v Buckland* [1968] P 296 (bridegroom threatened with prosecution).
The fact gave rise to choice of law problems. Polish law was the *lex loci celebrationis* and the law of the domicile of both parties. English law was the *lex fori* and the law of the domicile at the time of proceedings. Simon P held that the marriage was invalid under the Polish law, invalid under English domestic law and would have been invalid under the English conflict of laws rules even if it had been valid under Polish law. The Learned Judge, in giving his judgment, was influenced by the proposition stated in Dicey and Morris\(^{11}\) which is 'no marriage is valid if, by the law of either party’s domicile, one party does not consent to marry the other'. However, Simon P expressed the test of voluntariness in the following way:

"In order for the impediment of duress to vitiate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties has been overborne by genuine and reasonably held fear caused by threat of immediate danger, for which the party is not himself responsible, to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock.\(^{12}\)

Similarly, in *Hirani v Hirani*,\(^{13}\) the Court of Appeal held that duress was capable of vitiating a party’s consent to a marriage. The fact of this case was that; a nineteen year old woman, who had been living with her parents in England, was given an ultimatum by them that if she did not consent to an arranged marriage she would be ousted from the family home. The marriage took place, but was not consummated, and after six weeks she deserted her husband. The Court of Appeal held that the crucial question was whether the threats or pressure were such as to overbear the individual’s will and destroy the reality of consent. Duress, whatever form it took, was a coercion of the will, which had the effect of vitiating consent. Accordingly, the marriage was declared invalid.

Although, English law gives relief where the marriage has not been consummated by sexual intercourse, it does not require a marriage to be a sexual

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11 Dicey and Morris: *The Conflict of Laws*, (8th ed) 1967, P. 271; the proposition is stated in similar terms in subsequent editions. Simon’s judgment was approved by the Court of Appeal in the Case of *Singh v Singh* [1971] P 226.
relationship. However, one qualification and one observation in regard to the validity of a marriage, which is that, the parties to the marriage must be male and female. Under English law there is no requirement that the parties intend to live together as husband and wife or, indeed, have any serious intention to make the marriage any kind of relationship, thus, marriages entered into for the purpose of conferring nationality or enabling immigration or preventing the deportation of a prostitute as an undesirable alien have all been upheld as valid under English law and would fall within the concept for the purposes of English conflict of laws rules.

2. Union for life;

The requirement that the ‘union should be for life’ does not mean that the marriage must be indissoluble. It clearly means now, that the relationship must be potentially for life and a ‘marriage’ delimited at its inception cannot be recognized as a marriage for the purpose of the conflict of laws. Indeed, that was the view taken in Nachimson v Nachimson, where the facts were the parties were married in Russia in 1924 under the Bolshevik Law of 1918. At that time, the marriage could be unilaterally dissolved by Russian law and without any proof of causes. The Bolshevik law provided for dissolution by mutual consent through an administrative process. In the event of no consent, a judge could grant dissolution. Hill J refused an application for judicial separation, arguing that the marriage was terminable at will. The Court of Appeal dismissed this argument and held that it was immaterial that, under the local law of the foreign country where the marriage was celebrated, dissolution could be obtained. What was important was that the parties, when they were married, had envisaged that the marriage was potentially indefinite in duration and, therefore, the possibility of its termination by the lex loci celebrationis was not relevant.

14 Matrimonial Causes Act 1973, s. 12(a), (b).
15 Ibid, s. 11(c).
3. One man and one woman;

According to Lord Penzance’s definition the marriage union must be of one man and one woman. This requirement is, however, still applicable under the current English laws. This requirement means that a marriage between parties of the same sex is not accepted as a valid marriage. Neither is a marriage between one man and one woman who had been born as a male but underwent a sex change operation accepted as a valid marriage, and a homosexual relationship cannot be accepted for the purpose of the English conflict of laws. For example: in Corbett v Corbett,\(^{19}\) where a husband and a wife went through a ceremony of marriage in 1963. The wife had been registered at birth as a male and had in 1960 undergone a sex change operation. On a petition for annulment, it was held that a marriage was essentially a relationship between a man and a woman. It was further held that, in order to determine the sex of a party for the purpose of marriage, the law should adopt the chromosomal type, ignoring any operative intervention. Therefore, the wife was not a woman for the purposes of marriage, but was from birth and had remained at all times a biological male'. Thus, the marriage was declared void.

Further problem arise in relation to this requirement that is polygamy. Clearly, the institutions of English law were directed at monogamous relationships and so, not only with regard to marriage itself, but for all related purposes, for example, legitimacy and succession, the monogamous marriage was the model. The expression of trade, and more significantly, the expansion of trade, and, more significantly, the expansion of Empire, brought English law in touch with vast numbers of peoples who lived under regimes where polygamy, if not norm, was a legitimate form of relationship. However, initial reaction was to deny these relationships the status of marriage and this rejection was often accompanied by chauvinistic and vituperative ignorance\(^{20}\) yet throughout the world, there were many peoples who accepted the institution and were prepared to define its social function.\(^{21}\)

\(^{19}\) [1971] P 83.
\(^{20}\) Warrender v Warrender (1835) 2 Cl & Fin 288.
Nevertheless, when *Hyde v Hyde*,22 was decided, polygamous marriages could be found not only among Muslims, the most obvious group today, but also among Hindus, Jews, and those living under African and Chinese customary laws. However, polygamous marriage is dealt with separately in the next Chapter.

*To the exclusion of all others;*

The final component of Lord Penzance's definition is that the union must be of one man and one woman to the exclusion of all others. Although, at the time of the judgment in *Hyde v Hyde*, adultery was the main basis for judicial divorce, this part of definition reinforces the point about polygamy and is not a requirement of sexual continence. The adultery of one party, or, indeed, of both, never resulted in the invalidity of a marriage but only in grounds which might allow one party to petition for its dissolution. A polygamous marriage cannot take place in England, since the rules on formalities set out in the marriage Act 1949 prohibit such act.23 A person who is already lawfully married cannot contract a second valid marriage in England during the subsistence of the first.24

To conclude, it appears that Lord Penzance's definition in 1866, though no longer comprehensive is still applicable to a limited extent. Certainly, marriage may still be defined as a union for life of one man and one woman. However, Christian marriages are no longer the only type of marriages recognized in English law. For example, in *McCabe v McCabe*,25 a customary marriage celebrated in Ghana was recognized in English law despite the fact that neither the bride nor the groom was present or represented at the ceremony. As for the component 'to the exclusion of all others', this is no longer correct, for polygamous marriages have been recognized, for various purposes, unless celebrated in England.

22 (1866) 1 LR & D 130.
23 *R v Bham* [1966] 1 QB 159.
24 *Matrimonial Causes Act* 1973, s 11(b).
MARRIAGE VALIDITY

Classification;

Classification is considered as one of the most complicated problem in regard to validity of marriage, by reference to which law the formal and essential validity of the marriage is to be decided? The problem gets complicated as the domestic laws of countries of the world exhibit great diversity. Therefore, it happens that the courts of one country consider a matter relating to marriage as a matter of formal validity, while courts of the other country consider the same matter as of material validity.

From the 19th century onwards-English courts distinguished between matters of formal validity and matters of material validity. Only the formal validity was subject to the *lex loci celebrationis*, while the material validity was referred to the domiciliary law or the law of the intended matrimonial home. This distinction raises a classification problem that in general seems to have been determined in accordance with the *lex fori*.

There are some matters which seem clearly to be formal in character, such as; the time of celebration of the ceremony, what witnesses are required, whether a civil or religious ceremony is required and registration of the marriage. More difficult to classify are requirements of parental or guardian consent. The question arose in the case of *Simonin v Mallac*, in which two French domiciliaries who had married in England failed to seek their parent’s consent as required by French law. It was quite clear that under French law the actual consent of the parents was not an essential condition to the validity of the marriage. The parties were being of age under French law were merely required to seek the consent of their parents by a “respectful and formal Act”. If consent was not given, then the Act had to be renewed two or three times and after three months they were free to marry without parental consent. Failure to comply with these requirements rendered a marriage voidable but it could only be impeached within a certain time. Moreover, the parents could subsequently assent to the marriage. The court treated these requirements as matters of form and,

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26 (1860) 2 Sw & Tr 67.
therefore, irrelevant to the celebration of a marriage in England. The court, however, intimated that another provision of the Code Napoleon, Article 148, which imposed an absolute prohibition on the marriage of minors without parental consent, might well receive a different interpretation. But this suggested distinction was not subsequently taken up by the court in Ogden v Ogden.27 where the requirements of Article 148 were also treated as a matter of form.

However, it is suggested that questions of capacity related to the ability to conclude a valid marriage while questions of form relate to the mode of doing so. On this analysis, the decision in Simonin v Mallac, is correct while that on Ogden v Ogden, is doubtful. In this regard Graveson adopted a functional test to resolve this problem that he says, “we must...resort to a functional test, namely, what is the reason or purpose of a particular legal system in imposing any requirement for marriage?” Applying this test, it will be found that whether or not any requirement of marriage is an essential or a formality depends on the degree or intensity of the public or social interest, which it embodies and expresses. Those matters which are regarded as vital to the maintenance of an accepted standard in the matrimonial or family relation of any given society, whether on ground of consanguinity, religion or otherwise, will be regarded as essentials of the marriage, to be governed by the personal law of each party; while matters of less vital social interest; e.g. the length of public notice to be given before celebration of marriage, or the number of witnesses whose presence is required at a ceremony, will be treated as pure formalities, to be determined exclusively by the law of the place of celebration.28

The question that arises here is: according to which law the classification of the requirements of marriage is to be made. Chesire29 in this regard says that the law of the matrimonial home of the parties should determine it. Graveson says, “in justice

27 [1908] P 46, See also Lodge v Lodge, [1963] 107 Sol Jo 437.
and logic" the law of the party’s domicile should make it, “since it is on a basis of control by the personal law that essentials are established.”

PARTICULAR CASES

It is proposed to examine and discussed two specific areas where difficulties have arisen before proceeding to the general categories of formal and essential validity. These cases are parental consent and proxy marriage;

Parental consent to marry: the issue of parental consent is one of the most controversial question as whether lack of parental consent is a matter relates to formalities of marriage or to capacity to marry. The primary answer appears to be that it relates to the formalities, whether the English domestic law or foreign law imposes parental consent.

It is of high significance to the validity of marriages. The main reason behind this is the reduction in the marriageable age (the age of majority). English law requires parental consent to the marriage of persons below the age of 18. The Western idea of romantic love would suggest that the parties, once they are of an age to marry, should be able to decide freely whom they wish to marry. The principle of parental authority, and that marriage is more socially significant that the decision to have sexual intercourse and that parental guidance, in the interests of the child, are something which should be taken sufficiently seriously to justify a parental veto for the two years in the case of English law, between the age of sexual consent and the age of majority.

Parental consent was first introduced by Lord Hardwicke’s Marriage act of 1753. The legislation required a license to be obtained and banns to be published. The act, however, did not apply to Scotland, so there was an understandable temptation for young English couples, unable to obtain their parental consent, to travel to Scotland and marry there without formal ceremony at Gretna Green. The

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Graveson; supra, at p 265
validity of such marriages was established in a series of 18th century cases,31 which were decided at a time when English courts did not distinguish between the formal and essential requirements, but referred both aspects to the law of the place of celebration.

While the English requirements as to parental consent had proved irksome, more extensive requirements were set out in the French Civil Code. In Simonin v Mallac,32 the question arose as to the validity of a marriage celebrated, in England, between a 29 years old Frenchman and a 22 years old Frenchwoman. Such marriage was contrary to the provisions of Articles 151 and 152 of the French Civil Code. The marriage was held lawful in England on the basis that questions of validity were to be determined by the law of the place of celebration.

However, in 1861,33 when that distinction was introduced, the Gretna Green cases were explained away as having turned on the formalities of marriage.34

The tendency to see questions of parental consent as a matter of form was placed beyond doubt after the Court of Appeal decision in Ogden v Ogden.35 In that case, a domiciled Frenchman aged 19 married in England a domiciled Englishwoman without his parent consent as required by Article 148 of the Civil Code, which provided that a son who had not attained the age of 25 years could not contract marriage without the consent of his parents. The Court of Appeal held: (a) that questions of parental consent were matters of formality; (b) that formality was governed by the lex loci celebrationis, and (c) that, in any event, the marriage was valid under the principle in Sottomayor v De Barros (No. 2).36 Although the correctness of this decision was heavily criticized,37 because the operative provision

31 The leading case of which is Compton v Bearcroft (1769) 2 Hagg. Cons. 430; Grierson v Grierson (1781) 2 Hagg. Cons. 86; Beamish v Beamish (1788) 2 Hagg. Cons. 83.
32 (1960) 2 Sw & Tr 67.
33 Brook v Brook (1861) 9 H.L.C. 193 at 215,228-229,236.
34 A trend that was developed further by Hannen P in Sottomyar v De Barros (No. 2) (1879) 5 PD 94.
35 [1908] P. 46.
36 (1879) 5 PD 94.
of the French Civil Code quite clearly made the issue one of capacity, it has since been followed in Scotland\textsuperscript{38} and England.\textsuperscript{39}

\textbf{Proxy marriage;} the validity of proxy marriage is an issue related to the mode of giving consent, and the question of whether the parties must be physically present at the ceremony.

English law requires both parties to be present at the marriage ceremony.\textsuperscript{40} However, in some countries proxy marriages are permitted and questions can be arising as to validity. In \textit{Apt v Apt},\textsuperscript{41} an English domiciliary authorized a representative to go through a marriage on her behalf with an Argentinean domiciliary in Buenos Aires. Proxy marriages are lawful under Argentinean law but not under English law. In upholding the validity of marriage, the Court of Appeal drew a distinction between the method of giving consent and the fact of consent. The employment of a proxy was within the formal category and, thus, part of the method by which the ceremony was performed; in such circumstances, it was a matter of formality and, thus, fell within the \textit{lex loci celebrationis}.

Equally in \textit{McCabe v McCabe},\textsuperscript{42} a marriage ceremony was celebrated in Ghana under Akan Custom. The man was Irish and the woman was Ghanaians. They lived together in London and neither of them attended the ceremony. He sent £ 100 and a bottle of a Gin. Relatives of both parties attended the ceremony during which the £ 100 was distributed and the Gin drunk as the blessing of the marriage by them. On the issue of formal validity, the Court of Appeal applied Ghanaian law as the \textit{lex loci celebrationis} and the marriage was held to be formally valid the conduct of the ceremony complied with the relevant customary law.

\textsuperscript{38} \textit{Ibid. Bliersbach v McEwan} (1959) S.C. 43.
\textsuperscript{39} \textit{Lodge v Lodge} (1963) 107 SJ 437.
\textsuperscript{40} \textit{Marriage Act} 1949, Section 44(3). Which requires each of the persons contracting the marriage to make various declarations.
\textsuperscript{41} (1947) P. 83.
\textsuperscript{42} [1994] 1 F.L.R.410 (C.A).
FORMAL VALIDITY

The primary rules;

It is considered as one of the clearest principles of private international law that question of the formal validity of a marriage are governed by the lex loci celebrationis.43 The courts have frequently stressed the absolute nature of both the aspects of this principle. “Every marriage must be tried according to the law of the country in which it took place,” 44 and if it is good by that law, then so far as its formal validity alone is concerned “it is good all the world over, no matter whether the proceedings or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses.”45

In Berthiaume v Dastous,46 Viscoant Dunedin delivered the opinion of the Privy Council in an appeal from Quebec. In that case two persons domiciled in Quebec had gone through a ceremony of marriage in Paris according to the rites of the Roman Catholic Church. Such a ceremony would have constituted a valid marriage if it had been celebrated in Quebec, but according to French law a religious ceremony had no legal significance, the Privy Council held the marriage void.

In some countries, analogous problems can arise from the rule of lex loci celebrationis that parties may not marry in religious form unless both of them are members of the religion in question. This is the situation in Israel, where Jews may marry only in the Jewish form,47 but such marriages are void if either party is not Jewish. Despite the fact that this rule precludes Jews from marrying non-Jews in Israel,48 English law regards it as relating to form. Thus where a non-Jews woman resident (and presumably domiciled) in England went through a Jewish ceremony of

44 Herbert (Lady) v Herbert (Lord), (1819) 3 Bhillim 5 at p. 63.
46 Ibid, at P. 83.
47 Israel conflict rules do recognize civil marriages celebrated outside Israel by Jews domiciled in Israel.
marriage in Israel, falsely asserting that she was Jewish, the marriage was annulled by
the English court for non compliance with the formalities required by the *lex loci
celebrationis*.49

However, circumstances may arise where it may be impossible to comply with
the *lex loci celebrationis*. Such a problem arose in Europe at the end and in the after
math of the second world war, where many people were married without complying
with the requirements laid down by the authorities, who often were the Germans. The
validity of such marriage was examined in *Taczanowska v Taczanowski*,50 where the
Court of Appeal applied English Common law and upheld the formal validity of
marriage on Italy between two Polish nationally, one of which was serving as an
officer with the British Armed Forces. The marriage, which was celebrated by a
Roman Catholic Priest, did not comply with the local forms and was, therefore, void
by the Italian domestic law.

*Marriages in foreign Consulates and Embassies;*

The question of the formal validity of marriages celebrated in a foreign
consulate abroad was considered in *Radwan v Radwan (No.2)*,51 where in 1951, the
husband domiciled in Egypt married Ikbal in Egypt in polygamous form. In 1952, he
married the petitioner, Mary, a domiciled English woman, in the Egyptian Consulate
General in Paris, in polygamous form and their matrimonial home was established in
Egypt. In 1953, the husband divorced Ikbal by *talaq*. In 1956 the husband and Mary
come to live in England and acquired a domicile there. In 1970, the husband obtained
a *talaq* divorce from Mary in Egyptian Consulate General in London and then Mary
petitioned the English courts for divorce.

This case raises a number of separate issues; first, it was held that the *talaq*
divorce in the Egyptian Consulate General could not be recognized in England
because the diplomatic premises were to be regarded as English and not Egyptian

49 *Elbaz v elbaz*, (1966) 110 S.T. 287; *Swifte v Attorney General for Israel*, A.C. 276.279; *Re Alison’s
Trusts*, (1874) 31 L.T. 638.
51 [1973] Fam. 35.
However, there was the logically anterior question of the validity of the marriage in the Egyptian Consulate General in Paris. Two questions had to be examined – whether the parties had capacity and whether the marriage was formally valid. Cumming Bruce J decided that, although Mary was incapable by English law of entering a polygamous marriage, she was capable by Egyptian law, the law of the intended matrimonial home. As to formal validity, the court held that the Egyptian Consulate General in Paris was to be regarded as French, and not Egyptian territory. The court presumed the marriage to be formally valid in absence of decisive evidence of French law to rebut this presumption.

**Retrospectivity;**

It is clear that formal validity should be determined according to the *lex loci celebrationis* at the time the marriage takes place. In certain circumstances there might be a case for accepting retrospective legislation, which makes up for a technical defect and repairs it before any one has acted in reliance on the formal invalidity. The willingness of English courts to approach matters in a liberal spirit was illustrated by the case of *Starkowski v Attorney General,* where a wife of Polish domicile of origin enter into her first marriage at a church in Austria in May 1945, at that time, by German Marriage law, which was then in force in Austria, a religious ceremony did not constitute a valid marriage since a civil ceremony was required. In June 1945, an Austrian decree was passed to the affect that religious marriage celebrated between 1st April 1945 and the date of the decree should become valid as soon as they were registered in the Family Book. However, the marriage was not registered until July 1949, by which date they were resident in England. In 1950, the wife went through a ceremony of marriage in Corydon, London with another man. They had a son born before the marriage.
The narrow issue before the House of Lords was whither the son was legitimate or not, this question could only be resolved by determining whether the 1945 marriage was still valid in 1950. The House of Lords ruled that the first marriage was valid, being retrospectively validated by the statute of 30 June 1945, and that legislation had been complied with by registration even though the parties were neither domiciled nor resident in Austria at the time of registration. It therefore followed that the second marriage was void and the son was illegitimate.

Although the rule that question of formality are governed by the *lex loci celebrationis* is a rule of long duration and supported by the clearest authority, there are a number of exceptions to the general rule that need to be examined.

**STATUTORY EXCEPTIONS**

There are two statutory exceptions to the general rule that the *lex loci celebrationis* governs questions of formal validity, which are as follows:

1. **Consular marriages;**

The first statutory exception that applies in relation to consular marriages is embodied in the Foreign Marriages Act 1892, as amended by the Foreign marriage Act 1947, and the Foreign Marriage (amendment) Act 1988, which provides that a marriage where one party is a British subject conducted by a marriage officer in a foreign country in the manner set out in the Legislation shall be as valid if the same had been solemnized in United kingdom. Such marriages are often referred to as consular marriages in that, while Ambassadors or High Commissioners may serve as marriage officers, the task is normally regarded as a consular function, but they must hold a marriage warrant from the Secretary of State.

56 The proceedings were for a declaration of legitimacy under the Legitimacy Act 1926 and Matrimonial Causes Act 1950, Section 17.
57 See ; Ambrose v Ambrose, (1961) 25 DLR(2nd) 1; and Salvesen v Administrator of Aurian Propert, (1927) A. C. 641 At 651.
The 1892 Act includes provision as to the giving of notice of the marriage,\textsuperscript{58} parental consent,\textsuperscript{59} the registration of the marriage\textsuperscript{60} and those who can act as marriage officers. Section 8 is the most important which provides that the marriage is to be conducted at the official house of the marriage officer,\textsuperscript{61} with open doors, in the presence of two or more witnesses and according to such form as the parties see fit to adopt.

However, the Act has to be read with the Foreign Marriage Order of 1970,\textsuperscript{62} which stipulates that a marriage is not to be solemnised in a foreign country unless there is evidence:

\begin{itemize}
  \item [a.] That at least one of the parties is a United Kingdom national, and
  \item [b.] That the authorities of that country will not object, and
  \item [c.] That there are insufficient facilities for the marriage of parties in that country, and
  \item [d.] That the parties will be regarded as validly married by the law of the country in which each party is domiciled.
\end{itemize}

In a rather curious provision, the Act lays down that no marriage is to be celebrated where it would be a breach of the international law\textsuperscript{63} or the comity of nations, which Section 23 provides that the provisions of the Act are not to Affect the validity of other marriages celebrated abroad.

Therefore, according to this exception, so long as the foreign marriage complies with the requirements laid down by the Act, it will be held formally valid in England from the point of view of form, even though it might be void under the law of the place of celebration.\textsuperscript{64}

\textsuperscript{58} ss. 2,3.
\textsuperscript{59} s. 4, as substituted by s. 2(1) of the 1988 Act.
\textsuperscript{60} s. 9
\textsuperscript{61}Defined in Section 1 1970/1539. Para 5.
\textsuperscript{62} Sec. 1 1970 / 1539, as amended by Sec 1 1990 / 1598.
\textsuperscript{63}\textit{Foreign Marriage Act} 1892, s. 22.
\textsuperscript{64}\textit{Hay v Northcote}, [1906] 2 ch 262.
2. Marriages of Members of British Forces serving abroad;

The second statutory exception to the general rule is embodied in Section 22 of the Foreign Marriage Act 1892, as amended by both the 1947 and the 1988 Acts which provides that;

1. A marriage solemnised in any foreign territory\(^{65}\) by a chaplain serving with any part of the naval, military, or air forces of His Majesty serving in that territory or by a person authorised...by the commanding officer of any part of those forces serving in that territory shall, subject as hereinafter provided, be as valid in law as if the marriage had been solemnised in the United Kingdom with a due observance of all forms required by law.

(1.a) Subsection (1) above shall not apply to a marriage unless;

(a) At least one of the parties to the marriage is a person who;

(i) Is a member of the said forces serving in the foreign territory concerned or is employed in that territory in such other capacity as may be prescribed by Order in Council; or

(ii) Is a child of a person falling within sub-paragraph (i) above and has his home with that person in that territory, and

(b) Such other conditions as may be so prescribed, are complied with.

(1.b). In determining for the purpose of sub-section (1.a) above whether one person is the child of another;

a. It shall be immaterial whether the person's father and mother were at any time married to each other; and

b. A person who is or was treated by another as a child of the family in relation to any marriage to which that other is or was a party shall be regarded as his child.

Thus, this exception applies to marriages entered into by members of Her Majesty British forces whilst serving abroad. However, there is no requirement that either party must be a British citizen.\(^{66}\) The term "foreign territory" does not include any part of the Commonwealth,\(^{67}\) but it does include a ship in foreign waters.\(^{68}\)

\(^{65}\) Which is defined in s. 22(2). as any territory other than the Commonwealth, colonies, British protectorates and other territories under the protection or jurisdiction of the Crown. The original Section 22 was limited to "British lines."

\(^{66}\) Taczanowska v Taczanwski [1957] P. 301. 319-320 (with reference to the original Sec. 22)

\(^{67}\) s. 22(2).
operation of the section depends very largely on Order in Council. Unlike the rest of that Act, Section 22 is largely declaratory of the common law. It is a real exception to the principle that compliance with the formalities prescribed by the local law is necessary to the validity of a marriage, but its scope is limited.

**COMMON LAW EXCEPTIONS**

Prior to the introduction in England by statute of specific marriage formalities, English law, subject to one qualification, adopted the rule of the Canon law, which merely required that the parties voluntarily exchange mutual marriage vows, the so-called marriage *per verba de presenti*. This type of marriage emerged a very long time ago at a time when canon law marriage was in force. Prior to 1843, the only essential requirement to formal validity was that the couple should take each other as man and wife. However, the House of Lords, in *R v Millis*, imposed that further requirement that an episcopally ordained priest or deacon, whether of the English or Roman Catholic Church, should perform the ceremony. In this case, a marriage celebrated in Ireland by a Presbyterian Minister according to the rites of the Presbyterian Church was held to be invalid, on the ground that it was contrary to the common law requirement that the marriage should be celebrated in the presence of an episcopally ordained Clergyman.

The nature of this later requirement has been criticised and it appears that it does not apply to marriage celebrated outside England and Ireland. For example, in *Wolfenden v Wolfenden*, where the parties both Canadian, went through a ceremony of marriage at a Church of Scotland Mission Church in a remote part of China, the ceremony was performed by the Minister of the Mission without banns or licence. Moreover, the Minister was not episcopally ordained, nor was he authorised to perform such a marriage in accordance with the Foreign Marriage Act, 1892. The court after examining the decision in *R v Mills*, and subsequent decisions, held that the

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68 s. 22(3).
70 (1944) 10 C.I. & Fin s.34.
rule in the case had been qualified to apply only to marriages performed in England and Ireland. Additionally, under the circumstances, the parties were unable to celebrate their marriage before such an Ordained Priest. Accordingly, the marriage was formally valid.

Similarly, in *Penhas v Tan Soo Eng*,72 a common law marriage performed before a layman in Singapore between a Jewish man and a Chinese woman was held to be valid, for the layman had observed both Jewish and Chinese customs.

However, it has never been doubted of course, that a marriage in a Foreign Country, where local formalities are non-existent or where those that exist are in applicable to an English marriage, is valid if it is contracted in the presence of an episcopally Ordained Priest.73 What is not clear is whether the requirement of celebration by an episcopally ordain priest can be ignored even if there is no difficulty in obtaining his services. The weight of authority favours compliance with the requirement in such a case.74

There are two situations where reliance has been placed on the concept of the common law marriage;

1. *Where there are insuperable difficulties in complying with the Common Law;*

There are a number of situations where a valid common law marriage is found because the demands of the *lex loci* were impossible for the parties to fulfill, and not because the territory is deemed subject to the common law.75 Lord Stowell considered that “legal or religious difficulties” might justify a relaxation of the principle *locus regit actum*.76 Lord Eldon held that a common law marriage had been

75 *Kent v Burgess*, (1840) 11 Sim. 361.
76 *Ruding v Smith*, (1821) 2 Hag Con 371

established where two Protestants had been married in Rome before a Protestant clergyman when the Court received evidence that no Roman Catholic Priest would perform the ceremony.\textsuperscript{77}

Thus, the parties must have found it impossible, or virtually impossible to comply with the local law, and not only that they found it embarrassing, distasteful or inconvenient so to comply as in the case of, Kent \textit{v} Burgess,\textsuperscript{78} where a marriage in Belgium was held void for non compliance with Belgian residence requirements, there being no insuperable difficulty in the parties waiting the prescribed six months period.

2. \textit{Marriage in Countries under belligerent occupation};

During the concluding weeks of the Second World War and its immediate aftermath, a particular problem was raised by the large numbers of religious marriages celebrated in Germany and Italy between Roman Catholics or Jews domiciled in Poland and other Eastern European Countries. These marriages were not valid by the local law either because these was no civil ceremony or because some formality required by the local law was committed. To deal with this problem, the English courts adopted an old institution – the common law marriage (the marriage \textit{per verba presenti}) – in order to give these marriages formal validity by English law, although the marriages, at that time they took place, had not the slightest connection with United Kingdom. There is little to be said for the reasoning in these cases and much for the good will of the courts in seeking to resolve a serious problem. It is best to

\textsuperscript{77} Lord Cloncusry's case; (1811) see Westlake, \textit{Private International Law}, (7th ed) 1925, Sec. 26. 
\textsuperscript{78} (1840)11 Sim. 361.
regard the cases as a particular response to what is a one off problem and it is unlikely that there will be any further development of the concept.

The leading case in this regard is *Taczanowska v Taczanowski*,\(^{80}\) where the fact as follows; a Polish soldier stationed in Italy as a member of the Allied Forces in occupation of that country at the end of the Second World War, married a Polish woman at a religious ceremony in Rome. The ceremony did not comply with the forms which Italian law considered essential to a valid marriage. The ceremony was also insufficient under Polish law, the law of their common law nationality and domicile, to constitute a valid marriage. Since the husband as a member of a belligerent force in occupation of Italy, was not subject to the finding force of Italian law, the wife petitioned for a decree of nullity in England on the ground non-compliance with the local forms.

The Court of Appeal held that the marriage was valid as a common law marriage. The main ground of the decision appears to have been that the husband was not in Italy from choice but under the orders of his military superiors, he was exempt from the operation of the local law unless he submitted to it of his own volition. Widely constructed, this ratio could be taken to include ordinary civilians who are present in a country from necessity and not from choice. But it is now clear that the principle does not extend to them.\(^{81}\)

Sacks J took up the principle of presumed submission in *Kochanski v Kochanska*,\(^{82}\) to validate a marriage entered into in Germany between displaced Polish persons. The learned judge held presumed submission was rebutted and the marriage was validated as a common law marriage.

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\(^{80}\) [1957] P 301; All ER. 563.

\(^{81}\) *Preston v Preston*, [1963] P.41 at PP. 426-427, 434-435, disapproving *Kochanski v Kochanska*, [1958] P. 147, where the principle was extended to the marriage of inmates of Polish displaced persons camp in Germany, but in *Preston v Preston*, case the same camp was held to be a military one.

\(^{82}\) [1958] P 147.
In later cases, attempts were made by judges to insure that the principle was drawn no wider than was absolutely necessary. In *Lazarewicz v Lazaewicz*, where a Polish corporal, serving with the Polish army in Italy, was married in 1946 at Barletta in Italy to an Italian national. The ceremony, performed at a Polish refugee camp by a catholic priest did not comply with Italian law. Phillimore J held that the principle in *Taczanowska v Taczanowski*, could not apply where the parties had expressly intended to comply with local law, while in *Marker v Marker*, Sir Jocelyn Simon P, in applying the principle, defined it as being restricted to marriages within the lines of a foreign army of occupation and his approach was followed by the Court of Appeal in *Preston v Preston*, where the court asserted that those who marry abroad will be presumed to have submitted to the local law save in the case of members of occupying forces. As indicated above, this stream of case of law was prompted by the devastation and dislocation existing in Europe in 1945 and is unlikely to be subject to any judicial extension.

Thus, the general principle that persons are deemed to submit to the marriage laws of the place of celebration can not be evaded merely because the parties claim that they did not intended to submit to that law. The circumstances where this general rule is inapplicable were narrowly, though not explicitly, defined. Therefore, the principle of submission is relevant only to marriages contracted by a member of conquering forces in the conquered country. This is one type of case in which it is not unreasonable to offer the parties on alternative to the law of the place of celebration, for the incongruity of compelling a conqueror to submit to the conquered is obvious.

3. *Marriages on board merchant ships;*

Due to the public international law theory which says that a ship is a floating portion of the country whose flag it carries, it has been thought that a

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86 Ibid at PP. 427-428.
marriages celebrated in merchant ships would be held valid if celebrated in accordance with the formalities prescribed by the law of the ship’s port of registration, and that if this was English law, it seems that it would suffice if parties took each other for husband and wife \textit{per verba de praesenti},\textsuperscript{89} provided the court is satisfied that it was impracticable for them to wait the ship reached a port where sufficient facilities were available either by the \textit{lex loci} or under the 1892 Foreign Marriage Act.

However, unless there was an insuperable difficulty in marrying ashore in compliance with the \textit{lex loci} or the Foreign Marriage Act, there would be no such element of emergency if the ship were lying in a foreign port. In \textit{Culling v Culling},\textsuperscript{90} where a marriage celebrated in a British warship lying off Cyprus has been upheld. The parties were British subjects domiciled in England, and the ship’s chaplain in the presence of the captain performed the ceremony, though without banns or licence. Section 22 of the Foreign Marriage Act 1892 as amended in 1947 and 1988 regulates marriages on board of British warships now.

**ESSENTIAL VALIDITY**

We turned now to consider the second major question relating to choice of law in context of marriage, the law governs the essential validity or as it is sometimes called capacity to marry.

Until the mid of the nineteenth century English Courts did not separate questions of capacity to marry from issues of formal validity and assumed that all matters of marriage validity were governed by the \textit{lex loci celebrationis}.	extsuperscript{91} The turning point came in \textit{Brook v Brook},\textsuperscript{92} where the House of Lords held void a marriage celebrated in Denmark between two English domiciliaries which was valid

\begin{footnotesize}
\textsuperscript{89} In the Case of \textit{DuMoulin v Druitt}, (1860) 13 Ir C. L. 212. it was held , following \textit{R v Mills}, (1844) 10 Ci & F. 534, that the presence of an episcopally ordained clergyman was necessary. But since \textit{Wolfenden v Wolfenden} [1946] P. 61; \textit{Du Moulin v Druitt} is no longer a safe guide in this regard.

\textsuperscript{90} [1896] P. 116.

\textsuperscript{91} \textit{Scrimshire v Scrimshire} (1752) 2 Hag. Con; 161 E.R. 782; \textit{Dalrymple v Dalrymple} (1811) 2 Hag. Con. 54; 161 E.R. 665.

\textsuperscript{92} (1861) 9 H.L.C. 193; 11 E.R. 703
\end{footnotesize}
by Danish Law on the ground that the parties were within a prohibited degrees of affinity by the English Law. The reverse situation subsequently arose in *Sottomayar v Barros (No.1)*, where the Court of Appeal held void a marriage celebrated in England between Portuguese domiciliaries, and valid by English Law, on the ground that the parties were within a prohibited degree of relationship by the law of Portugal.

Questions of essential validity includes matters relating to impediments of the prohibited degrees of consanguinity, affinity, marriageable age and existing marital status (bigamy) e.g. whether a person is already married and therefore cannot remarry under a monogamous system). Indeed question of essential validity probably include all questions that arise in relation to marriage validity other than question of formal validity, Consent and personal impediments will be discussed as matters of capacity, as is at least arguable, then a single category of essential validity can be constructed to encompass all matters other than issues of formal validity.

**TWO MAIN THEORIES IN CHOICE OF LAW**

Why was English law applied in *Brook v Brook*? According to Lord Campbell L.C. it was because "the essentials of the contract depend upon the *lex domicilii*, the law of the countries in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." Therefore, for the essential validity it is the personal law, which is important. But is it to be the law of the country or countries to which the parties belonged immediately before the marriage, or the law of the country in which they are to set up their home together after the marriage? Herein lies the seed of the two rival theories as to choice of law on capacity to marry.

I. *Dicey’s Dual Domicile Theory;*

According to this theory capacity to marry is governed by the law of each party’s ante nuptial domicile. Therefore, the law of each party’s domicile at the time of the marriage has to be considered. This theory based on the idea that the

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93 (1877) 3 P.D 1.
94 (1861) 9 H.L.C. 193; 11 E.R. 709
community to which each party belongs is interested in his or her status, and that in these days of sex equality no preference should be shown to the laws of one community rather than the laws of the other.95

According to this view, a distinction is drawn between matters that arise up to the date of the marriage ceremony and those that arise after that date. Those that arise separate before the marriage, when the parties are separate, are governed by their personal laws, which are the laws of their separate domiciles, which are each thought to provide a personal safeguard to a certain extent. The law of their matrimonial domicile governs matters that arise after the marriage, when the parties are one, which is the law of the place where they have their permanent home.

2. **Cheshire's Intended Matrimonial Home Theory;**

According to this theory, pre marital domicile is irrelevant and the only relevant law is the law of the place where the parties intend to live their married life. The law of the intended matrimonial domicile is presumed to be the law of the husband's domicile (but that presumption may be rebutted if it can be inferred that the parties at marriage intended to settle in a different country and can show that they did so within a reasonable time).96

According to this theory all questions of essentials should be and are in fact governed by the law of the law of the intended matrimonial domicile although it is probably also necessary to comply with the *lex loci celebrationis* as to both essentials and form. There can be little doubt that the law of the matrimonial domicile applies to all matters of essentials arising after the marriage but there is controversy as to

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whether it applies to capacity. However, authority in favour of the matrimonial home is rare\textsuperscript{97} and criticism of it not hard to find.\textsuperscript{98}

Nevertheless, Cheshire's view has the advantage of ensuring that only one law governs capacity to marry. It is predicted on the assumption that the law which should determine whether the parties have assumed the obligations of is that of the community to which the parties belong after their marriage.

However, on the facts the majority of cases can be fitted in either with Dicey's "dual domicile" theory. A dictum in some cases, including an old Victorian decision, supports Cheshire's view.\textsuperscript{99} But dicta in more cases accept Dicey's formulation.\textsuperscript{100} The case of \textit{Radwan v Radwan (No. 2)},\textsuperscript{101} supports Cheshire's theory but comes from the relative specialty of polygamous marriages, and is not well regarded in any event. Admittedly in the area, now gone, of breach of promise of marriage actions, the English courts referred the question of remedy to the law of the legal system in which the intended marriage was going to be performed i.e. where the parties intended to set up their home.\textsuperscript{102}

The intended matrimonial home theory drives some support from the case of \textit{Lawrence v Lawrence},\textsuperscript{103} which is interesting in a number of respects. It not only supports the intended matrimonial home test, but also like \textit{Radwan (No. 2)} it suggests that different aspects of capacity may be subject to different choice of law rules. Further, Anthony Lincoln J. described the intended matrimonial home test as referring to the law of the country with which the marriage has the most real and substantial connection. Finally, one wonders whether it was necessary to apply the intended

\textsuperscript{97} Denning L.J. at p 144 and 146, \textit{Radwan v Radwan.} (No.2); [1973]fam.35; [1972] 3 All ER. 1026; and Schmittoff: \textit{The English Conflict of Laws;} (3\textsuperscript{rd} ed) 1954 at pp. 312-314 (which support Cheshire's theory).  
\textsuperscript{98} See for example R.H.Graveson. \textit{Conflict of Laws;} (7\textsuperscript{th} ed ) 1974, at pp. 257-263; And Wolff ( 2\textsuperscript{nd} ed) at pp. 335-356 and pp. 586-601 especially at p.595.  
\textsuperscript{101} [1972] Fam. at P. 35.  
\textsuperscript{102} \textit{Kremezi v Ridgway.} [1949] 1 All ER. 662; \textit{Hansen v Dixon} (1906) 23 T.L.R. 56.  
\textsuperscript{103} [1985] 2 All ER. 733.; See Per Sir David Cairns at 746.
matrimonial home test to uphold the validity of the marriage. Even had the dual domicile test been applied, it is possible that the marriage would have been regarded as valid in England. It is true that under the law of the wife’s domicile, Brazil, the divorce was not recognized and the wife lacked capacity to remarry but this incapacity was penal in that it did not apply to her divorced first husband (at least in regard to a remarriage outside Brazil). Being a penal prohibition on remarriage it is arguable that it should not have been recognized in England.

Against Radwan (No. 2) and the views of the Anthony Lincoln J. at first instance in Lawrence case, there are several decisions, which on their facts support the Dicey’s “dual domicile” theory. Therefore, in Padolecchia v padolecchia a husband who was domiciled in Italy but lived in Denmark married a Danish resident and domiciliary in England during a one-day visit there. The parties returned to Denmark to live. The husband had been previously married but had obtained a divorce in Mexico prior to the second marriage. Italian law did not recognize the divorce and consequently regarded the husband as still married to his first wife. An English court granted a decree of nullity on the ground that the husband lacked capacity to marry his Danish “wife” under the domiciliary law. The court did not consider it necessary to examine Danish law, which was almost certainly the law of the intended matrimonial home.

In Sottomayor v De Barros (No. 1), where a marriage was held valid on the ground of lack of capacity under the common domiciliary law, it apparently had been alleged that England was the place where the parties intended to live. But the case involved determination of the law prior to trial of the facts and in any event was subject to a different decision remission in Sottomayor v De Barros (No. 2).

However, these two theories, and number of other possibilities, were fully examined by the Law Commission Working paper, here the view taken was in

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106 (1877) 3 P.D. 1
107 (1879) 5 P.D. 94

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favour of the ‘dual domicile theory’, the Commission’s provisional view was that the
dual domicile test be adopted to govern all issues of legal capacity. But it was
decided that no legislative action should be taken in this area, as this is best left to be
dealt with by case law, that they felt this flexibility would be lost if firm statutory
rules were adopted. Thus, and since no legislation has been passed on capacity to
marry, the courts remain free to develop the law in this regard.

We shall now consider a number of further issues dealing with the various
aspects of essential validity. As the various domestic rules that may invalidate
marriages are different in their nature and purpose, it will not be surprising to find that
there is no one unified choice of law rule covers the whole matters of capacity to
marry.

**PROHIBITED DEGREES OF RELATIONSHIP**

Most legal systems impose restrictions on marriages between persons who are
closely related. The rules vary between different countries. Moreover, in some
systems the prohibitions are not only restricted to consanguinity, but also to
relationship by marriage (affinity). However, one reason for the prohibition of
marriage between blood relations must be the eugenic one of reducing the risk of
defective offspring. The other reasons for the prohibitions are sociological, moral,
and religious. Thus, it is the public interest more than the protection of the spouses
themselves, which is the main object of these impediments.

Until 1835 a marriage between parties within the prohibited degrees of
consanguinity or affinity was only voidable, but since 1835 Lord Lyndhurst’s
Marriage Act (now section 1 of the Marriage Act 1949) rendered such marriages void.

However, as a general rule, the prohibited degrees of English law were more
restricted than other European countries, which will often result in couples within the
prohibited degrees to visit another country temporarily, where they can validly marry

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without such restrictions. Thus, the question arises here is; Are such marriages regarded as valid according to the English law?

In *Brook v Brook*,\(^{111}\) the House of Lords decision provides authority for the view that such marriages are governed by the *dual domicile* rule. In this case a man whose first wife died in 1847, married her sister in Denmark in 1850. Both the parties were British subjects and domiciled in England. At that time, a marriage between a man and his former wife’s sister, aunt or niece (or between a woman and her former husband’s brother, uncle or nephew) was prohibited under English law, so the parties celebrated their marriage in Denmark, by the law of which it was valid. The House of Lords held the marriage void, establishing that questions of essential, as opposed to formal validity are not to be decided by the *lex loci celebrationis*. Lord Campbell stated that:

“... the essentials of the marriage depends on the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated,”

The practical importance of this matter has been much reduced by legislation, in the Deceased Wife’s Sister’s Marriage Act (1907) and in (1931) where a marriage between a woman and her deceased husband’s brother become lawful. Marriages between a man and his deceased wife’s niece or aunt, or between a woman and her deceased husband’s nephew or uncle, were legislated in (1931).\(^{112}\) But marriages between a man and his divorced wife’s sister, niece or aunt, or between a woman and her divorced husband’s brother, nephew or uncle, remained invalid until 1960.\(^{113}\) Where Section 1(3) provides that this section does not validate a marriage if either party is at the time of the marriage domiciled in a country under whose law there cannot be a valid marriage between the parties.

\(^{111}\) (1861) 9 H.L.C. 193.
\(^{112}\) Marriage (Prohibited Degrees of Relationship) Act 1931. Now these three Statutes are consolidated in Section 1 of the Marriage (Enabling) Act 1960.
\(^{113}\) Marriage (Enabling) Act 1960.
In *Mette v Mette*,\(^{114}\) which concern the revocation of a will by marriage, a German who was domiciled in England married his deceased wife’s sister, who was domiciled in Germany, in a ceremony there. Though the marriage was valid by German law it was invalid under English law, whereby the man had no capacity to marry his deceased wife’s sister. The marriage was held to be void because “there could be no valid contact unless each was competent to contract with the other.” The reasoning closely supports the *dual domicile* rule. Nevertheless, since the judge felt the need to add a further reason in his judgment in favour of the *matrimonial home* rule, it is doubtful which of the rules was applied.

In *Re Paine*,\(^{115}\) a clear indication was given in the decision that the *dual domicile* theory was the best to be applied, where the wife, a British subject and domiciled in England, visited Germany, where she married her deceased sister’s husband, a German subject. This marriage was void in England until their respective deaths. On the question of whether the surviving daughter was legitimate for the purpose of succession, the court had to decide the validity of the marriage. Bemett J applied the dual domicile rule and held that the marriage was void, since the ante nuptial domicile of the wife attached incapacity on her to contract such a marriage.

However, there is an exception to the *dual domicile* theory, to the effect that if a marriage is celebrated in England at the time of the marriage, then English law alone governs it. Any invalidity under the law of the foreign domicile of the other party is ignored. This rule was laid down in *Sottomayor v De Barros (No. 1)*,\(^{116}\) where both parties to the marriage were Portuguese first cousins. Both their respective parents had come to England in 1853 and occupied a house jointly in London. At the time of the marriage, the husband was aged 16 and the wife 14. Moreover, the marriage was one of convenience, in order to preserve the Portuguese property of the wife’s father from bankruptcy. Although the couple has lived in the same house for 6 years, the marriage was never consummated. That, by the law of Portugal first cousins were incapable of contracting a marriage on the ground of consanguinity, and such a marriage was null and void unless solemnised under a “papal dispensation”.

\(^{114}\) (1859) 1 S.W. & Tr. 416. at P. 423.
\(^{115}\) [1940] Ch. 46.
\(^{116}\) (1877) 3 P.D. at PP. 1,5,6, and 7; See also: *Sottomyor v De Barros (No.2)* (1879). 5 P.D. 94.
wife petitioned for a decree of undefended, but the Queen Proctor intervened and alleged that, at the time of the marriage, the parties were domiciled in England; therefore, the validity of the marriage was to be determined by English domestic law. This question of law was ordered to be determined before the question of fact. Then on the assumption that the parties were both domiciled in Portugal at the time of the marriage the Court of Appeal held that the marriage was void.

**LACK OF AGE**

Countries have varying rules on the minimum age for marriage. In English law, a marriage between persons, either of whom is under the age of 16, is void,117 in other legal systems the minimum age for marriage may be higher or lower than 16. The question arises as to what law governs such an issue if one of the parties, not necessarily the party domiciled in England, is under the age of 16, there is no doubt that the dual domicile rule applies here. The law which is most fitted to decide whether a young person needs protection against his own immaturity and want of judgment is the law of country to which he belongs at the time of the marriage.

Thus, in *Altaji Mohammed v Kontt*118 where a man of 27 and a girl of 13, both domiciled in Nigeria, had married each other there, and came to England four months later, where they were to live while the husband was a student. The court held that the marriage was valid, because the wife was old enough by the Nigerian law, even though she was much too young by English law.

The surprising result came in *Pugh v Pugh*,119 where the provision was understood by the Judge to mean that under English law, not only does a person under 16 lack capacity, but also a person of whatever age lacks capacity to marry some one who is under 16. The court held void a marriage celebrated in Austria between a husband domiciled in England and a wife domiciled in Hungary because the wife was only 15, on the ground that the husband lacked capacity to marry her according to the

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117 s. 2 of the Marriage Act 1949. (Re-enacting the Age of Marriage Act 1929).
law of his English domicile, even though the wife was old enough by her own law also to be old enough according to the other party's law.

Therefore, it appears that in England no marriage is valid to which either party are under 16. Thus the conclusion, which may be drawn here, is that; Lack of age effects capacity to marry and that if either party lacks capacity by the laws of his or her ante nuptial domicile the marriage is void, wherever celebrated.  

Suggesting a role for the law of the intended matrimonial home, it might be argued that the purpose of a rule lying down a minimum age for marriage is not only to protect young people, but also is the public interest to discourage unstable marriages, although the country in which the parties set up their home after the marriage is concerned that they should be mature enough for marriage, it can defer reasonably to the judgment of the law of the country to which each belongs before the marriage as to whether he or she is sufficiently mature.

**REMARriages AFTER FOREIGN DIVORCE AND NULLITY DECrees**

There is a general agreement that the impediments related to the case of bigamy or remarriage after a divorce or nullity decree should be included under the heading of essential validity or (capacity to marry). In this regard, we are concerned with the cases where none of the possibly applicable laws permit polygamy. The conflict arises because one of the parties is already married according to one of the law but not according to the other. In such case the marriage will be bigamous only if the English courts decline to recognise the foreign divorce or annulment.

There are several different kinds of choice of law problems arises here needs to be discussed separately as follows;

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120 See; *Buclu v Sabau* (1997) F.L.C. 92-765, stressing that it is the Ante nuptial Domicile alone is relevant.  
121 See for example; *Conway v Beazley,* (1831) 3 Hag, Ecc. 639, 647, 652, Per Dr. Lushington; *Brook v Brook,* (1861) 9 H.L.C. 193, 211-212. Per Lord Campbell; *Shaw v Gould,* (1868) L.R. 3. H.L. 55,71. Per Lord Granworth; *Padolecchia v Padolecchia,* [1968] P.314, 336. Per Simon P.
1. **Remarriage after a recognized divorce or nullity decree;**

If English court recognises a foreign divorce, the parties will be regarded as unmarried and capable of remarrying under the English law. But if they (or one of them) are regarded by their personal laws as still married, they will be incapable of remarrying as those laws do not recognise the divorce. The question here is; is the English law to regard them as capable or incapable of remarrying? In United Kingdom, before 1986, the resolution of this conflict seemed depend on where the remarriage took place:

**A- Remarriage in United Kingdom;**

According to the recognition of Divorces and Legal Separation Act, if the foreign divorces was recognised and the marriage was in the United Kingdom, any incapacity under the law of the domicile to be ignored.

In *R v Brantwood Marriage Registrar*, the first marriage of the husband, who was domiciled in Switzerland but a national of Italy, was dissolved by a Swiss court, this divorce was recognised in England but not in Italy. The husband wanted to remarry in England, and the question came before the Divisional Court whether he was entitled to do so. The court held that Swiss law, as the law of his ante nuptial domicile, governed his capacity: According to Swiss law since he was an Italian national, his capacity to marry was governed by Italian law. As the divorce was not recognised in Italy, if followed in the court's view, that the husband lacked capacity to remarry. In other words the incidental question of the validity of the Swiss divorce was decided by the *lex causae*, Italian law. The consequence was that a single person was not permitted to marry. This decision was reversed by Section 7 of the Recognition of Divorces and Legal Separations Act 1971, which provided that if a foreign divorce was entitled to recognition under the Act; “...neither spouse shall be precluded from marrying in the United kingdom on the ground that the validity of the divorce would not be recognised in any other country.”

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122 1971, s. 7.
The effect of the way in which George Baker P. decided *perrini v Perrini*,\(^{124}\) case was that what it took Section 7 to achieve in respect of recognised foreign divorces was achieved at common law for recognised foreign nullity decrees.

### B- Remarriage Abroad:

The statute was silent regarding remarriages outside the United Kingdom, and it was a matter of doubt as to whether recognition of the divorce carried with it capacity to remarry.\(^{125}\)

In *Lawrence v Lawrence*,\(^{126}\) where the wife domiciled in Brazil, obtained a divorce from her first husband in Nevada; the next day, she married the second husband in Nevada, who was domiciled in England. England was their intended matrimonial home. The wife’s Nevada divorce was recognised by English law but not by Brazilian law, under which she remained married to her first husband. The wife petitioned in the English court for a nullity decree on the ground that the marriage was bigamous. English and Brazilian law agreed that the wife did not have capacity to contract the second marriage unless she was single. The conflict arose because the two laws also took different views as to whether the wife was single when she remarried.

The wife contended that her capacity to marry her second husband was governed by Brazilian law as the law of her ante nuptial domicile. Since the Nevada divorce was invalid by Brazilian law she lack capacity by that law, so the marriage was void. However, the trial Judge held that the validity of the marriage was governed by English law, because, being the law of the intended matrimonial domicile, it was the law of the country with which the marriage had its most real and substantial connection.\(^{127}\) Since the divorce was recognised by English law, the marriage was held valid.

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\(^{124}\) [1979] Fam. 84. at P.262 and above.


\(^{126}\) [1985] Fam. 106.134 (C.A).

\(^{127}\) Following Lord Simon in; *Vervacke v Smith*. [1983] 1 A.C. at 166, [1982] 2 All ER. 144. at 159, H.L.
However, as recommended by the Law Commission, the cases of *Perrini v. Perrini* and *Lawrence v. Lawrence*, have been given the force of statute. That Section 50 of the Family Law Act 1986, provides that where a civil court in the United Kingdom has dissolved or annulled a marriage or a divorce or annulment has been obtained overseas and is entitled to recognition under the Act, the fact that the divorce or annulment would not be recognised elsewhere does not preclude either party to the marriage from remarrying in England, or cause the remarriage of either party (wherever the marriage takes place) to be treated as invalid in England.

2. **Remarriage after un-recognized divorce or nullity decree;**

The converse situation is where the divorce is not valid by the *lex fori*, but is valid by the *lex causae* (English law), that if the English court refuses to recognise a foreign decree it should follow that it considers the spouses as still married and, thus, as unable to remarry in United Kingdom or abroad. This point arose in the Canadian case of *Schwebel v. Ungar*, in which the wife and her first husband were originally domiciled in Hungary. On their way to settle in Israel, while in Italy but still domiciled in Hungary, the husband divorced the wife under Jewish law, they then made their way to Israel, where both become domiciled, and where the divorce was recognized as valid. Some years later, the wife, still domiciled in Israel, married in Ontario a second husband who was domiciled there. The divorced obtained in Italy was not recognized in Ontario court for a nullity decree on the ground that when the wife’s second marriage was celebrated, she was still married to her first husband. The Canadian courts held the remarriage valid, because, using the dual domicile rule, the wife’s capacity to remarry was governed by the law of Israel, and by that law the divorce was valid, even though it was not valid by the *lex fori*, Ontario law.

In United Kingdom, there is no statutory provision dealing with this situation, as there is for the converse case under Section 50 of the Family Act 1986, that in 1984 the Law Commission examined this case but conducted that no legislative provision

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should be made for it. Nevertheless, the *lex fori* approach seems preferable in the *Schweble* sort of case as much as in *Lawrence*. In the later case, the *lex fori* must decide the validity of the divorce to avoid the consequence that a single person is not free to marry. In the *Schweble* sort of case, the *lex fori* should be used to avoid the more lurid result that a person is validly and monogamously married to two spouses of the same time.

3. **Prohibition against re-marriage**;

Some legal systems impose prohibition or restrictions on the remarriage of divorced persons. Prohibitions of this kind appear to be imposed for three main reasons as follows:

1. **Those are directed against the guilty party**: which might prohibit remarriage to both or any one of the parties, and might apply only until the death or remarriage of the innocent party, or permanently. Now it seems settled that penal provision of this kind will not be applied in England, irrespective of the domicile of the parties. Thus in *Scott v Attorney General*,\(^{131}\) where two persons domiciled in South Africa were divorced in that country, and thereupon become subject to a rule of South Africa law which provided that the guilty party could not remarry as long as the other party remained unmarried. The wife who was the guilty party, remarried in England, her former husband being still unmarried. It was held that her remarriage was valid, because after the divorce she was a single woman and therefore free to acquire an English domicile separate from that of her first husband. But the same judge James Hannen P, in the later case of *Warter v Warter*,\(^{132}\) explained *Scott v Attorney General*, on different ground that the prohibition on remarriage attached only to the guilty party and therefore could be disregarded in England because it was discriminatory.

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Of course, if such a person were to acquire a domicile in England when she wished to remarry and her divorce was recognized in United Kingdom, the incapacity under the foreign law would be no impediment to her remarrying, since it does not form part of her domiciliary law.\textsuperscript{133}

In \textit{Warter v Warter},\textsuperscript{134} a husband domiciled in England but resident in India, divorced his wife there for adultery.\textsuperscript{135} The wife then married an English man in England after the decree absolute. Section 57 of the Indian Divorce Act 1869 provided that it should be lawful for the parties to remarry when six months from the date of the decree absolute had expired and no appeal had been presented, but not sooner. It was held that the remarriage was invalid.

However, it is thought that, at any cost, when the marriage is celebrated in United Kingdom, if the parties are domiciled in a foreign country whose law precludes them from marrying racial or religious grounds, such a restriction would be disregarded.

\textbf{2. Those that postpone the date at which either party may contract a further marriage;} the purpose of which is to protect the unsuccessful party's right to appeal; the practical effect of such prohibition is the same as that of a system in which a decree \textit{nisi} is granted in the first instance and decree absolute is pronounced only after all appeals have run their cause.

In \textit{Miller v Teale},\textsuperscript{136} the wife and her first husband were divorced in South Australia, where they were both domiciled; she obtained judgment absolute on the morning of 5\textsuperscript{th} September. In the afternoon of that same day she married her second husband in New South Wales. South Australian law prohibited the parties to a dissolved marriage from remarrying until the expiration of 21 days from the decree absolute. It was clear that South Australian law was not relevant in New South Wales.

\textsuperscript{133} Ibid.
\textsuperscript{134} (1890) 15 P.D. 152.
\textsuperscript{135} At that time it was supposed that the Indian courts had jurisdiction to grant divorces to persons domicile in England and resident in India. In \textit{Keyes v Keyes}, [1921] P. 204 it was decided that they had not. Their jurisdiction to do so was restored by the \textit{Indian and Colonial Divorce Jurisdiction Act} 1926, which however, no longer apply to India after independence.
\textsuperscript{136} (1954) 92 C.L.R. 406.
as the ant nuptial law of domicile of the woman and therefore the law governing her capacity to marry. The wife had a dependent domicile on her marriage. It was dissolved in the morning of 5th September and soon the wife acquired a domicile of choice in New South Wales. Nevertheless, the High Court held that the South Australian prohibition would be recognized so that the South Australian prohibition would be recognized so that the wife’s second marriage in New South Wales was invalid.

3. **Those, which prevent disputes about the paternity of children subsequently born to the woman**, the only reported case in which a restriction of this kind seems to have been considered is the Australian case of *Lundgren v O'Brien (No.2)*, which concerned a breach of promise action by a woman against a man. The plaintiff had been divorced in Belgium and the marriage to the defendant was to take place in Australia. The court held that a provision of Belgian law that prohibited the remarriage of a divorced woman (but not a divorced man) for a period of ten months after the divorce was inapplicable to a marriage in Australia and could not furnish a defence to the action. The judgment does not state the purpose of the prohibition, nor is the relevant Section of the Belgian Civil Code cited, but it seems likely that the prohibition was of the kind now under consideration. There may be good reasons for not applying foreign prohibitions of this kind, but they are not penal in the same sense as the prohibition in issue in *Scott v Attorney General*.139

**PHYSICAL IMPEDIMENTS**

Under many legal systems including English legal system a marriage can be annulled by reason of certain personal defects. These do not go so much to the possibility of contracting to enter the marital status but rather to the possibility of property sustaining the obligations of that status.

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138 [1921] V.L.R. 361; See also *Scott v Attorney General*, (1886) 11 P.D. 128 as explained in Warter case (1890) 15 P.D. 152 at 155.

139 (1886) 11 P.D. 128.
According to Section 12(a) of the Matrimonial causes Act (1973) a marriage will be voidable by English law if it is not consummated either because one party can not consummate it by reason of impotence or because he or she will not do so that i.e. willful refusal. However, impotence is a fairly common ground for nullity in many legal systems, whereas willful refusal is sometimes a ground for nullity, sometimes a ground for divorce, and sometimes gives no right to matrimonial relief at all. 

The choice of law question is uncertain and still largely unresolved. In some cases the lex loci was apparently applied, while other cases support the application of the lex loci celebrationis, the ante nuptial law of domicile of both parties or of the husband’s alone or the law of the intended matrimonial home until 1947 no other law than English domestic law was applied. It was assumed that the same law applied to the annulment of marriages on the grounds of impotence and willful refusal, and it may well be that this is still the law.

In the inclusive case of Robert v Robert, in 1947 Barnard J expressed preference for the lex loci celebrationis. That the marriage was celebrated in Guernsey, between parties there domiciled. So Barnard J held that the question whether it should be annulled for willful refusal to consummate must be decided by the law of Guernsey, either because “willful refusal” to consummate a marriage must be considered as a defect in marriage, or because a question of capacity was involved, with the result that the law of the parties’ domicile must be applied in accordance with the decision in sottomayor v De Barros, (No.1). But Robert v Robert can not be correct; that the matter is not one of forms, as was pointed out in De Reneville v De Reneville, where the law of the husband’s domicile or that of the intended

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140 Matrimonial Causes Act 1973, s.12.
141 As in England.
142 As in Canada , see the Canadian Divorce Act 1968, Section 4(1)(d).
143 As in Scotland , Report of the Royal Commission on Marriage and Divorce (1956), Cmd.9678. paras 288-289; and in Australia, see Section 51(1) of the Family Law Act. 1975. Abolished proceeding, (other than pending proceedings) for the Annulment of a voidable marriage.
146 De Reneville v De Reneville, [1948] P. 100.
149 (1877) 3 P.D.I. at P. 157.
150 [1948] P.100.118.
matrimonial domicile was favoured. But that case is equally inclusive. Moreover, it was not concerned with choice of law but with jurisdiction.

In *Ponticelli v Ponticelli*,151 a marriage was celebrated in Italy between a wife domiciled there and a husband domiciled in England, where the parties set up their matrimonial home. The husband petitioned the English court for a nullity decree on the grounds of the wife’s willful refusal to consummate the marriage. Italian law did not consider willful refusal as the ground of nullity. Saches J held that English law governed, either as the *lex loci* (the view he preferred) as the *lex domicile*, by which he meant ‘the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.’152 He said; this normally coincides with the law pertaining to the husband’s domicile at the time of marriage; so a nullity decree was granted.

On the other hand the House of Lord in *Ross Smith v Ross Smith*,153 held that the English court had no jurisdiction to annul a marriage for a willful refusal to consummate only because it had been celebrated in England. Both Lord Reid154 and Lord Morris155 gave as one of their reasons for declining jurisdiction the undesirability of granting relief on grounds unknown to the law of the parties’ domicile. This could be taken to imply that, had jurisdiction been held to exist, the *lex fori* would have been applied. And in *Magnier v Magnier*,156 a marriage was annulled for willful refusal without reference to the law of the husband’s domicile; but foreign law was not pleaded.

However, there is no reported case in which the court has applied the foreign law, which differed from English domestic law. Thus it has been suggested that the applicable law should be that of the petitioner’s domicile.157 It has been further suggested that the problem could be made to disappear if willful refusal (which is the

151 [1958] P. 204
152 Citing *Brook v Brook*, (1861) 9 H.L. Cas 193 at 207.
154 Ibid at P 306.
155 Ibid at PP.313-322.
only post-nuptial defect which affords grounds for a nullity decree) were to be made aground for divorce.\textsuperscript{158}

**CONSENT OF THE PARTIES**

As we have seen earlier, marriage is a voluntary union, that there can be no valid marriage unless each party consented to marry the other. However, the question of consent is often a question of fact, but sometimes it may be a question of law. The issue here concerns the reality of consent not the form of giving it. At Common Law, after a long period of uncertainty, it appears now settled that a marriage was not valid if one or both of the parties did not genuinely consent due to duress,\textsuperscript{159} mistake\textsuperscript{160} and more doubtfully, want of intention to contract at monogamous marriage\textsuperscript{161}.

The Marriage Act (1961) declares void a marriage where the consent of either of the parties is not real because;

(1) It was obtained by duress or fraud,
(2) That the party or as to the nature of the ceremony performed; or
(3) That party is mentally incapable of understanding the nature and effect of the marriage ceremony.\textsuperscript{162}

Now the matter is set at rest, so far as marriages celebrated after (July 31\textsuperscript{st} 1971), are concerned. By Section 12 (c) of the Matrimonial Causes Act 1973, which provides that a marriage shall be voidable if either party did not consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise. Under Section 12 (e) a marriage is voidable if at the time of the marriage the respondent was suffering from venereal disease in a communicable form, and under Section 12 (f), if at the time of the marriage the respondent was pregnant by some person other than the petitioner. As it is provided by Section 13 (3) that a decree shall not be granted in

\begin{footnotes}
\item[158] Morris, Ibid
\item[161] Re Bethell, (1887) 38 Ch.D.220at 235.
\item[162] Marriage Act 1961.(Ch) Sec. 23(1) (d), Sec. 23 B(1)(d).
\end{footnotes}
these later two cases unless the petitioner was at the time of the marriage ignorant of the facts alleged.

However, there are some reported cases which suggest, but have no conclusive answer to the question what system of law governs the requirement of consent.

In *Apt v Apt*,\(^{163}\) where a marriage by proxy, valid by the *lex loci celebrationis*, was upheld, the Court of Appeal held that the validity of proxy marriages was a question of formalities.

In *Way v Way*,\(^{164}\) a marriage had been celebrated in Russia between a wife domiciled there and a husband domiciled in England. The husband sought a nullity decree in the English court, one of the grounds being lack of consent, that he had entered the marriage under the mistaken belief that the wife would be permitted to come to live with him in England. The judge’s view seems to have been that whether the husband had consented was to be decided according to English law of his own domicile. By that law the mistake was immaterial, so the marriage was not invalid for lack of consent. There is no suggestion that Russian law, as the law of the wife’s domicile, could be relevant to test whether the husband had consented or not. This case does not amount to a clear decision in favor of the dual domicile rule, because no difference was shown to exist between English law and Russian law.

In *Szechter v Szechter*,\(^{165}\) the parties were domiciled in Poland, where the marriage was celebrated. The parties only entered into the marriage in order to obtain the wife’s release from prison. On her release, the parties went to England. The wife brought nullity proceedings in the English court on the ground that she had entered the marriage under duress. Judge Jocelyn Simon P, applied Polish law as the law of each party’s ante nuptial domicile. This case also is not a clear-cut authority in favour of the rule, which stated that; “No marriage is valid if by the law of either party’s domicile he or she does not consent to marry the other.”\(^{166}\) Because the law of the parties’ domicile and the *lex loci celebrationis* coincided, and, because, before

\(^{164}\) [1950] P. 71,78.
\(^{166}\) Ibid, at P 288
pronouncing a decree of nullity, the learned President held that the marriage was also invalid by English domestic law.

In *Parojci v Parojci*,\(^{167}\) the *lex loci celebrationis* was applied, but the decision would have been applied, because they had lost their Yugoslav domicile of origin and acquired an English domicile of choice before their marriage in England. Moreover, it so happens that in all the reported cases,\(^{168}\) English domestic law has been applied, either alone or cumulative with the law of the domicile as in *Szechter v Szechter*, even where the marriage was celebrated abroad and both parties were domiciled abroad at the time of their marriage. Thus, it cannot be said that the matter is finally settled. But it is submitted in *Sottomayor v De Borros (No.2)*, which the best rule is that no marriage is valid if by the law of either party's domicile he or she does not consent to marry the other.\(^{169}\)

Moreover, it had been held in *Vervacke v Smith*,\(^{170}\) that the *Sottomayor v De Borros* exception applies to consent which means that if one party is domiciled in England and the marriage is celebrated there, any issue of consent is to be decided solely by English law.

\(^{167}\) [1958] 1 W.L.R. 1280.

\(^{168}\) See, in addition to the cases cited above; *Cooper v Crane*, [1891] P. 369; *Hussein v Hussein*, [1938] P. 159; *Silver v Silver*, [1955] 2 All ER. 614; and *Di Mešto v Vsalli*, [1973] 2 N.S.W.L.R. 199.

\(^{169}\) See Morris, at p. 167.

MARRIAGE AND MARRIAGE VALIDITY

POSITION IN JORDAN

In Jordan marriage and all its related matters is a matter of high importance and considered as a matter related to the Jordanian 'public order and morality' and 'public interest'. Therefore, whenever the Jordanian courts are to apply foreign law its main priority is to make sure that the foreign law' provisions are not contradicted with the provisions of the Jordanian rules of "public order and interests". The main source of the Jordanian family rules is the Islamic Shari'a teachings. There are, however, four major Sunni schools of law, namely; Hanafi, Shaft'i, Hanbali, and Maliki, within each of which there exist differing and often conflicting opinions on practically every aspect of family law, all of which are regarded as legitimate attempts to define God's will on the matter in hand, although some gained the position of majority opinions while others remained minority views or even individual statements from great jurists. In 1951 Jordan became the first independent Arab State to issue a code of family law named, Jordanian Law of Family Rights 1951. Since, some areas of family law, notably succession, were not covered, and others, such as custody, were not covered in any detail, it was necessary to reform the Law.

Thus, in 1976 a new code of family law was enacted in Jordan, the Jordanian Law of Personal status, replacing and repealing the Jordanian Law of Family Rights 1951. The new law both expanded and modified the old one and was described in the accompanying explanatory memorandum as aiming to provide provisions that "meet the needs of Jordanian society, drawn from Islamic jurisprudence (Fiqh) and various sources, and including all that is sound in the Shari'a laws in effect in neighboring Arab countries". The Law of Personal Status incorporates many of the Egyptian\textsuperscript{1} and Syrian\textsuperscript{2} provisions not taken up by the former Law.

The provisions provided by the Jordanian Law of Personal Status govern marriage and all its related matters, including dissolution of marriage and its

\textsuperscript{1} The Egyptian Law of Family Rights, 1956.
\textsuperscript{2} The Syrian Law of Personal Status, 1953.
consequences. Thus, the Jordanian courts should apply this law on any conflict related to marriage. In case of a conflict involving foreign element related to family law, and where the Jordanian law is the one to be applied on the conflict in accordance with the choice of law rules then the main source will be the Jordanian Law of Personal Status.3

This part will be dealing with the concept of marriage its validity and consequences under Jordanian law.

THE LAW GOVERNING ENGAGEMENT

In spite of the fact that engagement is considered as an ancient legal phenomenon which was well known in both Roman and German Legal Systems, yet the vast majority of current legal systems, such as Islamic Shari’ā, French Legal System, and Jordanian law considered it as event related to the private lives of individuals without giving it any special legal treatment.4

The French law did not tackle the question of engagement regulations nor its consequences. Therefore the French Judicial Authorities went to classify disengagement as the act of withdrawing the promise of marriage which consequently leads to the right to financial compensation for both financial and moral damages on the basis of tort primarily if the disengagement is carried out of one party without any justification and in a way that results in tort to the other party.5

In Islam, the marriage contract is considered as one of the most sublime and precious contracts, that it concerns family, which is the basis of the society. Therefore elaborate preparations are specified in advance in order to give the parties a fair chance to reveal their desire and will to conclude the contract which is suppose to continue till the death of one of the parties. Engagement comes as one of those preparations.

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3 Law No. 61 (1976).
5 Ibid. at p. 479.
Engagement from the Islam point of view can be defined as: “the proposal extended by the man to the woman for the prospect marriage.” Thus, engagement takes place only when a marriage proposal extended by a man to a woman is accepted with consent. According to Islamic Shari‘a marriage does not take place by engagement because engagement is nothing but a non-binding formal step towards marriage; that both parties have the right to step back at any time. Some Jurists such as Professor Hassan Hadawi,⁶ have considered engagement as a promise for marriage.

In its turn, the Jordanian Law does not consider the marriage contract as final by engagement, as Article 3 of the Jordanian Law of Personal Status⁷ provides that: “marriage contract is not considered final by engagement, promise of marriage, reciting Al- Fateha (The Opining Sura of The Holy Qura’n) by the parents of the parties, by accepting any payment as a part of dowry (Maher), nor by accepting or exchanging gifts”. Article 4 of the same Law provides that “each party has the right to step back and break the engagement.”

It is worth mentioning that the legal systems of some countries such as Turkey, Germany and some Latin American Countries have regulated engagement rules, its formal and substantial requirements, and its consequences in case of breaking the engagement. These Legal Systems consider engagement as a personal status issue governed by the law of the respective country of the parties not on the basis of tort rather as a matter of family rights.⁸

As a result of the differences in the legal systems regarding the classification of engagement and its consequences, engagement has become a focal issue in the private international law particularly the determining of the law that governs the capacity of the parties and the legal consequences resulting from disengagement such as financial compensation for damages or claiming back the exchanged gifts. In order to determine the law that should be applied to engagement and its consequences, it is of great importance to distinguish between the conflict of laws resulting from the

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⁷ *The Jordanian law of Personal Status, No. 61 1976.*
essential requirements of engagement and the conflict of laws resulting from the formal requirements of engagement as follows:

1. Essential requirements:

Since it is classified as a matter of personal status, the conflict resulting from the essential requirements is subject to jurisdiction of the law of the country of parties’ common nationality. However, since the parties might happen to be of different nationalities, it is important to discuss the conflict of laws resulting from fulfilling the essential requirements of engagement. This can be summed up in the following two cases:

A. If both the parties hold the same nationality, then the essential requirements of engagement will fall subject to their national law with respect to determine their capacity and the legal consequences resulting from disengagement unless if this law is against the public order and morality of the court looking into the case.

Article 4 of the Jordanian Law of Personal Status, provides that “each party has the right to step back and break the engagement and it is not allowed to force any of them into marriage.” Thus, any penal clause that binds the parties to finalize the marriage contract is considered as a form of duress, which vitiates a party’s consent to a marriage. Such a penal clause is null and void, but still the party’s right to break the engagement should not be abusive. Thus, if right is misused by one of the parties, and if this causes damage to the other party, then the victim party has the right for compensation on the basis of tortious liability governed by the law of the country in which the tort took place.” In this regard, Section 22(1) of the Civil Code provides that: “(1) Non-contractual obligations shall be governed by the law of the country in which the act giving rise to the obligation has been committed, and (2) The provisions of the preceding sub-Section shall not in respect the obligations arising from a harmful act be applicable to the facts which occur out of but are lawful in the Hashemite Kingdom of Jordan even though they are considered unlawful in the country in which they occur.”

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9 Law, No. (61) 1976.
10 The Jordanian Civil Code, Law, No. (43) 1976
Moreover, both parties have the right to claim back the gifts exchanged during the engagement period on the basis of unlawful enrichment and according to their common law. If any conflict related to claiming of exchanged gifts were raised to Jordanian court, the Jordanian court would apply the law of the parties' common nationality provided that this law doesn't contradict the Jordanian Public Order and Morality (public policy). This is provided by s. 29, which states that: “The provisions of a foreign law determined by virtue of the preceding provisions shall not be applicable if those provisions contravene the public order or morality in the Hashemite Kingdom of Jordan.”

B. If the parties are of different nationalities, then it is essential to determine the law that should be applied in the conflict related to engagement, its consequences, and the exchanged gifts. In this regard, Jurists have proposed several points of views to deal with such cases. The most important of them are:

1. To apply the national law of the defendant; advocates of this opinion proposed that the adoption of the national law of the defendant in cases related to payment of compensation for material and moral damages resulting from disengagement facilitates the defendant's notification and presence before the court, and is more economical for trial.

2. To apply the national law of the male party; Advocates of this opinion based their argument on the idea that the man (patriarch) is the head of the family, therefore, the law of the man should be applied in cases related to any marriage-related conflict. However, this opinion was criticized for being based on discrimination and the inequality between man and woman in their rights. Natural justice requires that people are equal before law irrespective of their sex.

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13 Ibid.
3. To apply the Lex Loci Delicti Comissi; this opinion calls for applying the law of the country in which the damage took place i.e. the place of disengagement, especially if the conflict is related to the compensation for the disengagement or from the abusive use of the right of the parties to revoke the engagement. This opinion has been adopted by the French judicial system.\textsuperscript{14}

4. To apply the law of the court (lex fori); this opinion advocates the necessity of applying the law of the court looking into the case because it is the most explicit to apply and that, according to the advocates of this opinion, such a conflict is not highly sensitive. Moreover, there is no reason whatsoever to rate the law of one party over the other.\textsuperscript{15}

As for the Jordanian law, the legislators kept silent on this matter and decided to leave it to the judicial authorities, which adopted and applied the rules of marriage on engagement. These rules will be further discussed in details in the following part of this Chapter.

2. Formal requirements;

As a prevalent rule, and as is the case in marriage, conflicts related to formal requirements are subject to the law of the place of celebration (\textit{lex loci celebrationis}). The Jordanian legislator has adopted this rule, that engagement is valid if it is celebrated in accordance with the rites and formalities of the place of celebration. Regarding the formal requirements of marriage Section 13(2) of the Civil Code\textsuperscript{16} provides that: “But in respect of form marriage between two foreigners or a foreigner and a Jordanian shall be considered valid if made in accordance with the conditions prevailing in the country where it was celebrated, or if the conditions prescribed by the law of each of the two spouses have been complied with.” And since there are no special rules regarding engagement this is applied in the case of formal requirement for engagement.

\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid, see also, Hassan Hadaw; supra Note 6 at P. 113.
\textsuperscript{16} Law No. (43) 1976.
It is important to note here that the Jordanian law does not specify any form for celebrating engagement. In other words, the form of the celebration solely depends on the rites of the local community of the parties.

**THE LAW GOVERNING MARRIAGE**

*Concept of Marriage;*
According to Islamic *Shari'a*, marriage is “a contract entitling both the Spouses (husband and wife) to enjoy the right of intercourse and procreation and legalization of children.” Article 2 of the Personal Status Law\(^\text{17}\) defines marriage as:

“A contract between a man and a woman to form a family and procreate provided that the relationship between them is outside the circle of prohibition degree of relationship in Islam.”

In this regard, the difference between the Jordanian law definition of marriage and Lord Penzance’s definition of Christian marriage in the English context\(^\text{18}\) is that the latter included the Phrase ‘for life’. This is by no means implies that the Jordanian or the Islamic concept of marriage is a temporal marriage or even permit temporary marriage. According to them, it is suppose to be understood as indefinite and this is why the Jordanian law did not explicitly provide for this point since it is implicitly implied in the concept of family formation and procreation. The second difference is linguistic in nature; the Jordanian law explicitly stated that marriage is a contract as compared to Lord penzance who stated that it is a union. Although both terms are more or less equivalent in essence, yet it is a well-known fact that marriage contract has special privileges different from those of commercial or civil contract.

However, marriage is a social regulation the main object of which is the establishment of a mutual living relationship and procreation by forming a family, which is the basic cell of any society. The protection and the development of the family is the duty of the country and society by enacting rules and regulations that suit

\(^{17}\) Jordanian Law of Personal Status, Law No. 61 1976.

\(^{18}\) *Hyde v Hyde* (1866) L.R. 1 P. & D. 130; See also R.H. Graveson: *Conflict of Laws, Private International Law, (7\textsuperscript{th} ed)* 1974, at PP. 241-244.
the requirements of the country's religion, tradition, and culture. Henceforth, marriage laws varied from one country to another in accordance with the difference between the cultures and traditions of these countries. They can even sometimes differ from one community to another within the same country such as the case in India, for example.

There are three aspects to the marriage under Islamic law as follow:

**Legal aspect:** juristically it is a contract and not a sacrament. Qua contract, it has three main characteristics; (1) there can be no marriage without consent, (2) as in a contract, provision is made for its breach, to wit, the various kinds of dissolution by act of parties or by operation of law; and (3) the terms of a marriage contract are within legal limits capable of being altered to suit individual cases.

**Social aspects:** in its social aspect, three important factors must be noticed; (1) Islamic law gives to the woman a definitely high social status after marriage, (2) restrictions are imposed upon the unlimited polygamy of pre-Islamic era, and a limited and controlled polygamy is allowed, and (3) Prophet Mohammed (peace upon him) both by example and precept, encouraged the status of marriage.

**Religious aspects:** marriage is recognized in Islam as the basis of society. It is a contract, but it is also a sacred covenant. Temporary marriage is forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. Spouses are strictly enjoined to honour and love each other. Moreover, Prophet Mohammed (peace upon him) was determined to raise the status of woman, that He asked people to see their brides before marrying them, and taught that nobility of character is the best reason for marrying a woman.19

Despite the fact that marriage is a private act based on the mutual consent of the contracting parties (husband and wife), yet it differs from the rest of the private law contracts in the sense that it is un-dissolvable by mutual private agreement between the parties on the basis of the concept of freedom of the contractors.20

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20 Ibid, see also G. A. Al-dawodi; supra Note. 8 at P. 101.
law in every society protects the requirements of marriage contracts by means of exclusive (directive) rules, which cannot be avoided by any mutual agreement between the contracting parties. Because of the real and substantial connection between marriage and its related matters and the principles of public order and morality of every society (public policy). Since such rules are subject to religious, moral, and social factors in every society, they differ from one society to another the thing that leads to a difference in laws in different countries.

Nevertheless, such differences become evident as we compare and contrast the marriage laws in different western societies or between western and eastern societies. For instance, there is a considerable difference in the required marriage age among countries such as in Jordan (16 for male, 14 for female), Spain (14 for male, 12 for female), Germany (21 for male, 16 for female), and France (18 for male, 16 for female)... etc. These differences are not only in marriage age; they are rather extending to marriage formation, its consequences and ending. On the other hand, marriage systems can be identical in countries, which have identical societies in terms of religion, cultures, and traditions, as is the case in Islamic countries in general and Arab Countries in particular where the Islamic rules apply on marriage and its related matters.

In Islam, the legal incidents of marriage are remarkable for their extreme simplicity that it can be constituted without any ceremonial, there are no special required rites, no irksome formalities. The main essential (substantial) requirement is offer \((ijab)\) and acceptance \((qabul)\). Marriage is legally contracted by a declaration made by one contracting party being followed by a corresponding acceptance from the other at the same meeting. The parties or their agents may make the declaration and acceptance, if both are competent. In case of legal incompetence due to minority their guardian may validly sign their marriage contract on behalf wards.

For a marriage to be valid, it is essential that there should not exist any disability to prohibit the marriage or else the marriage will be void. Marriage

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22 See G. A. Al-Dawodi, Supra Note 8 at p. 101.
23 M. Sirtawi, supra Note 19.
Disabilities can be related to religious, political, racial, or health (physical or mental impediments) reasons approved by the society according to its high standards and public order and morality. These differences in the bases of marriage, capacity for marriages, its consequences, and disabilities triggers the problem of the conflict of laws. To discuss the issue of the conflict of laws, it is essential first to distinguish between the essential and the formal requirements for the validity of marriage.

Disabilities;

There are some of the disabilities or limitations that have been subject to a great deal of controversy regarding its effect on Muslim marriage validity, the most important among them are as follow:

Number; as to plurality of husbands or wives, the rule in Islamic law is that a Muslim man may marry any number of wives, not exceeding four, but a Muslim woman can marry only one husband. The question that arises here is, what effect can be given to a Muslim marriage if it does not comply with this limitation? Some Muslim jurists consider such marriage as void, but the most prominent opinion goes for considering the marriage as irregular (Fasid) and can be validated. For example, if a Muslim man marries a fifth wife, his fifth marriage is irregular but can be validated if he divorce any of his previous four wives. More difficult question is what if a Muslim woman marry a second husband, this question has raised a great deal of controversy and one can say that no perfect solution is been given to solve this issue. Some simply consider the second marriage of the Muslim woman as committing adultery which is subject to a severe punishment in Islam, others have consider such marriage as void, while others consider it as irregular, Jordan law does not cover this question and left it to the judicial authority to decide it in accordance with the circumstances of the case. However, I am not intended to go any further in this matter due to the fact that it is not closely related to the purposes of this research, so I will satisfy by briefing the problem and giving the main opinions regarding it.

24 M. Sirtawi, supra Note 19.
25 Ibid.
Religion; A Muslim man may marry a Muslim woman or a *Kitabiyya*; but a Muslim woman cannot marry anyone except a Muslim. It is necessary to explain the term *kitabi* and *Kitabia*, the former of which refers to a man and the latter to a woman. A *kitai* is a man believing in a revealed religion possessing a Divine Book. The words *kitabi* and *kitabiyya* have also been rendered scripturary. In Jordan and most Muslim Countries it is a term applied only to Jews and to Christians. The question arises here is: what is the position if a marriage prohibited on the ground of religion take place? Is it to be treated as entirely void (*Batil*) or merely irregular (*fasid*)? In Jordan, even though there is no special provision in the Civil Code, but according to the Personal Status Law, this problem is considered as a matter of essential requirements and a matter is related to morality and public order so such a marriage is void regardless of the nationality of the parties or the place of celebration.

**Prohibited Degree of Relationships;**

Prohibition may be on the ground of relationship between one party to another. Under Muslim law this can be divided into the following categories:

**Consanguinity;** this is based on the ground of blood relationship. According to which, a man is prohibited from marrying (1) his mother or grandmother how high so ever, (2) his daughter or grand daughter how low so ever, (3) his sister whether full, consanguine or uterine, (4) his niece or high great-niece how low so ever, and (5) his aunt or great-aunt how high so ever, parental or maternal. Thus, a marriage with a woman prohibited by any of these degrees of blood relationship is totally void and the issue is illegitimate.

**Affinity;** prohibition of affinity is based in the relationship arising out of marriage. The peculiarity of the doctrine is that prohibition of affinity arises once a marriage has taken place. According to prohibition, a Muslim man is prohibited from marrying: (1) his wife’s mother or grandmother how high soever (2) his father’s wife or father’s father’s wife, how high soever, or grand-daughter, how low soever, (3) his

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wife's daughter or grand-daughter how low soever, (this prohibition arises if marriage has been consummated with the wife), and (4) his son's wife or son's son's wife, how low soever. A woman cannot marry her daughter's husband or daughter's daughter's husband, how low soever. Only one exception is recognized that is a man may marry the descendent of a wife with whom the marriage has not been consummated. However, a marriage prohibited on the ground of affinity is void regardless of the nationality of the parties.30

**Foster relationship:** foster relationship arises on account of the fact that a child has been suckled during the normal period of suckling by a woman other than his natural mother. On this ground, prohibition from marrying arises between the child and his foster mother and between the child and his foster mother's relations. The bar on this ground arises only when the child has been actually nourished at the breast of his foster mother. According to this ground a Muslim man cannot marry: (1) his foster mother, (2) his foster mother's daughter (his foster sister), and (3) his foster mother's son's wife. A Muslim woman cannot marry: (1) her foster mother's husband, (2) her foster mother's son, and (3) her foster mother's daughter's husband. A marriage forbidden by reason of fosterage is void.31

**Unlawful conjunction:** a Muslim man is forbidden to have at the same time two wives who are so related to each other by consanguinity affinity or fosterage, that they could not have lawfully intermarried with each other if they had been of different sexes. Thus, a Muslim man cannot marry two sisters, or an aunt and her niece. As a general and accepted rule, such bar will render the marriage irregular (Fasid) but not void.32

Nevertheless, it is necessary to mention the issue related to marriage between cousins under Muslim law. In Muslim law relationship between cousins including all the first cousins, parallel as well as cross, does not create any bar to marriage. Thus, a Muslim male can lawfully marry his paternal or maternal uncle's daughter, paternal and maternal aunt's daughter, and any female cousin of his father or mother. A

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30 Ibid. see also M. Sirtawi, comments on these Articles, Supra Note 19.
31 Ibid. see also Hashim Ali Sadiq; supra Note 12 at PP. 483-484.
32 Supra Note 28.
female can, similarly marry her paternal and maternal uncle's son, paternal and maternal aunt's son, or any male cousin of her father or mother. Thus, in Jordan such a marriage is valid even though if it is not in accordance to any of the parties' national law.

**Marriage with a woman undergoing idda:** in Muslim law, when a marriage is dissolved by death or divorce, the woman is prohibited from marrying within a specified time. This bar is imposed with a view to ascertaining the pregnancy of the woman as so to avoid confusion of paternity. Thus, "iddat" can be defined as period of continence imposed on a woman on the termination of marriage in the interests of certainty of paternity during which a woman is supposed to live a life of seclusion and to abstain from certain luxuries.\(^{33}\)

Muslim law provided for different periods of *idda*, on the basis of the manner in which a marriage is dissolved. On this basis the following periods of *idda* are laid down: (i) when a marriage is dissolved by divorce and marriage has been consummated, the woman must undergo an *idda* of three menstruation courses if she is subject to them, otherwise, she would undergo *idda* of three lunar months, (ii) when marriage is dissolved by divorce and it has not been consummated, she is required to perform no *iddat*, and (iii) when marriage is dissolved by the death of the husband, she is bound to observe *iddat* for a period of four lunar months and ten days, irrespective of the fact whether or not marriage had been consummated. If the woman is pregnant, her *iddat* should continue till she delivers, and finish the natural fosterage period, though some does not required fosterage as part of *iddat*. However, if a marriage with a woman undergoing *iddat* takes place, then it is to be considered as irregular *(fasid)* and not void.\(^{34}\)

It is worth noting here that the classification of the requirements of marriage into essential and formal is subject to the law of the court. This problem has been discussed in details earlier in the part related to the position in England and in order to avoid repletion I will suffice by mentioning it without any further elaboration.

\(^{33}\) Ibid.

\(^{34}\) See, M. Sirtawi, supra Note 19.
ESSENTIAL REQUIREMENTS

Essential requirements comprise those basic fundamental requirements for validating a marriage contract; the violation or non-observance of any of those requirements will render the marriage contract as void. As a general rule, it is the duty of the court to determine whether these requirements are essential or formal, and accordingly apply the rules of the law that it finds applicable in accordance with the common rules of conflict of laws. The applicable foreign law should not contradict the public order and morality of the country of the court. In other words, the court should strike a balance between the law that should be applied in the conflict and its national law so that in case of any contradiction between the two, the court should discard the rules of foreign law in favour of its national law especially if the former contradicts the country's public order and morality.

According to the Jordanian law, however, the court resorts to the application of the national law of both the parties jointly. This is provided by Section 13 Civil Code, which states that; “(1) The substantive conditions of the validity of marriage shall be governed by the law of each spouse.”

Therefore, in case of any conflict related to essential requirements of marriage and involving a foreign element, the Jordanian court applies the common national law of the two parties if they were of the same nationality. The time at which the essential requirements should be fulfilled is the date of celebrating the marriage not that of the commencement of the proceedings. The Jordanian law provided for an exception in this regard which takes effect if one of the spouses was a Jordanian national at the time of celebrating the marriage. In such cases, the Jordanian law will be exclusively applied except for capacity-related matters, which are subject to the law of the party. This provided by Section 15 of the Civil Code, which states that; “If in the cases mentioned in the preceding two Sections one of the two spouses shall be a Jordanian

35 Section 29 of The Jordanian Civil Code, Law No. 43, 1976.
36 Ibid.
37 See M. A. Armoush: supra Note 21, at PP. 88-89; see also Hashim Ali Sadiq: supra Note 12, at PP. 496-497.
38 Supra Note, 35; see also Hassan Hadawi: supra Note 6, at pp 114-115.

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at the time of celebrating the marriage, the Jordan law shall alone be applied except in respect of the condition of capacity for marriage."

According to the provisions of this Section, the marriage of a non-Muslim Jordanian man to a French Muslim woman is rendered as void even if the French law permits such a marriage. I would like to mention here that it is not allowed for a Muslim woman to marry a non-Muslim man. This rule is clearly specified by the Islamic Shari'a. On the other hand, a Muslim man has the right to marry a kitabiyya (Christian and Jew), but he is not permitted to marry a woman beyond these three religions (Islam, Christianity, and Judaism). According to Shari'a and Jordanian law, the marriage of Muslim man to a Hindu, Buddhist, or Nihilist woman is considered as void and baseless. Section 33/1 of the Personal Status Law\(^{39}\) provided that the marriage of a Muslim woman to a non-Muslim man is void.

It is understandable that problems don't usually arise when the two spouses were of the same foreign nationality at the time of celebrating the marriage since their common law is applied in case of conflict; the real problem arises when the two spouses are of different nationalities and none of them is a Jordanian. There are two opinions to deal with this problem:

A. **Accumulative application:** this opinion was adopted by the old French jurisprudence because, to them, this opinion is based on the fact that neither the husband’s law nor the wife’s law intend to protect the party associated with it only, they rather intend to protect the marriage institution as a whole, the thing that necessitates the application of the two laws accumulatively. This point of view has been criticized because it implies the application of the more stringent law at the expense of the other law, the thing that contradicts the objection and the main purpose of behind applying this method, which is to respect the law of both the parties.\(^{40}\)

B. **Distributive application:** this opinion was adopted by modern French and Arabic jurisprudence. According to this opinion, the validity of the husband’s marriage is subject to his national law and the validity of the wife’s marriage is

\(^{39}\) The Jordanian Law of Personal Status; Law No. 61 1967.

\(^{40}\) See Hashim Ali Sadiq: Supra Note 12, at P. 497.
subject to hers without any connection between the two laws. In other words, the validity of marriage is subject to the national law of each party respectively. Hence, the husband’s marriage is valid if it complies with the requirements of his personal law. The same applies to the wife irrespective of the requirements of the personal law of the other party. The application of this opinion involves a practical difficulty particularly with regard to prohibitions of marriage where marriage is regarded void if any of these prohibitions occurs.

Jordanian law specifies that the provisions of foreign law should not contradict the Jordanian public order and morality. Since the Jordanian law considers prohibitions of marriage as an integral part of public order and morality, thus, there is no problem whatsoever in applying this method.

❖ **FORMAL REQUIREMENTS**

The formal requirements of marriage are the social and religious rites and ceremonies for announcing the marriage to the public by publicly celebrating it. Sharia does not stress the form or the shape of the celebration as much as it stresses the concept of public announcement. According to *Shari‘a*, the main objection of the ceremony should be the announcement of the marriage to the public.

As a common Conflict of Laws rule, the formal requirements of marriage are subject to the law of the place of celebration (*lex loci celebrationis*). This law determines the formal requirements of marriage.

In the Hashime Kingdom of Jordan, though the formal requirements of marriage are not specified by the Jordanian Legislator following the *Shari‘a* teachings, yet the specification regarding the registration of the marriage contract officially by a marriage registrar (*Mazoon*) and its authentication in special judicial registrars and imposing punishment only without rendering the marriage void in case of not fulfilling this requirement is considered as a matter of formal requirements.

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42 Section 29 of the *Jordanian Civil Code*, Law No. 43 1976; see also M. A. Armoush, supra Note 21, at PP. 98-99.
43 Article 17/F of the *Jordanian Law of Personal Status*, Law No. 61 1967.
In Jordan, the marriage celebration should be done in the presence of two male witnesses at least, or a male and two females. Moreover, the male party should approach the Magistrate court for registering the marriage contract. If the marriage contract is not officially registered, the marriage registrar (Mazoon), both souses, and the witnesses will be punished according to the Jordanian Penal Code, and will each pay a fine of no more than 100 JDs.

Every marriage registrar who does not register a marriage officially after receiving the registration fees from the parties will also be punished in accordance with the Jordanian Penal Code in addition to a fine of no more than 100 JDs and termination of his services.

If two foreign spouses, whether of the same or different nationalities, want to celebrate their marriage in Jordan, this can be done in accordance with the Jordanian law. However, if one or both of the spouses are Jordanian nationals, and the marriage is to be celebrated in Jordan, then it is mandatory to abide with the formal requirements of marriage provided by the Jordanian laws. On the other hand, if the ceremony is to be celebrated outside the Kingdom, it is allowed to celebrate the marriage in accordance with the law of the place of celebration even when both the spouses are Jordanian nationals. The Jordanian Cassation Court stresses this point providing that; “since the case file shows that the marriage contract of the two parties of whom one is Jordanian, was conducted in accordance with the local civil form of the law of the place of celebration, then the marriage is formally valid.”

In other words, the formal requirements are not subject to the exception provided by Section 15 of the Civil Code, because section 13/2 of the same Code, clearly provides that a marriage between a foreigner and a Jordanian or two foreigners

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44 Law No. 16, 1960, Article 279, which provides that; “(Every party who participate in marriage ceremony in a way that violates the law of Family Rights or any other law or religious teachings will be sentenced for one and up to six months of imprisonment. The same applies to the spouses if they know that the marriage was not conducted properly).

45 Supra Note 43.

46 Supra Note 44.

47 Jordanian Law of Personal Status, supra Note 45.


is valid if it was conducted (celebrated) according to the law of the place of celebration.

According to the Jordanian Personal Status Law, Jordanians can celebrate their marriages before the Diplomatic Counselors of the Jordanian Embassies abroad in the same way they celebrated in Jordan. However, these marriages should be officially registered in a special record designated for such purpose. The Counselors jurisdiction includes extend to cases where one or both parties are Jordanian. Likewise, Foreign Counselors in Jordan have the same jurisdiction over marriages of their national parties.

There are few matters, which caused some controversy regarding their classification as whether they are essential or formal:

**The presence of witnesses:** Although some jurists consider it as a matter of essence, yet the widely accepted opinion is to classify it under the formal requirements since it is not a part of consent but a means of publicly announcing the marriage.\(^{51}\)

**Parental consent:** when the marriage involves a minor, the consent of one of the parents or the legal guardian (Walee) of the minor is essential for the celebration of a valid marriage. Contrary to the position of the English law, which considers it a formal requirement, the French as well as the Arab Laws consider it as an essential requirement because it is an integral part of consent.\(^{52}\)

**Religious ceremonies and rites:** some of the old laws consider it as an essential requirement, which should be celebrated before a Priest, such as the Greek law which recognize the marriage of a Greek Orthodox as valid only if this marriage

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51 Hashim Ali Sadiq; supra Note 12 at P. 487.
52 Ibid.
is celebrated before an Orthodox Priest. Presently, the vast majority of laws including Jordan consider it as a matter of form.\textsuperscript{53}

Stipulations in marriage contracts: the inclusion in the marriage contract of stipulations is allowed by all Muslim Sunnis schools. The Ottoman Law of Family Rights\textsuperscript{54} allowed the inclusion of one specific stipulation: that the wife might stipulate that her husband might not take another wife while married to her. The Jordanian Law of Family Rights\textsuperscript{55} opened the provisions to a general acceptance of all lawful stipulations and allowed either spouse to insert them; contravention of the stipulation could lead to judicial dissolution (faskh) of the marriage by the judge (qadi). In the Jordanian Law of Personal Status,\textsuperscript{56} the Jordanian Legislator went into unprecedented detail on the subject of stipulations, giving examples of lawful stipulations that might be made by the wife or the husband and of stipulations that might be made by the wife or the husband and of stipulations that are invalid because they contravene the Shari‘a’s teachings or militate against the intentions of marriage itself. Thus, in case of a foreign marriage or a marriage involving foreign element, and where the marriage contract contains such stipulation or delegation of the power of talaq will be regarded as legal and “binding”, but they should not contradict the rules of Shari‘a public order or morality.\textsuperscript{57}

In spite of the fact that proving the marriage is considered as procedural matter, yet the prevalent view in this regard is that the court has the jurisdiction to provide for the method that should be followed in proving the marriage in accordance with the lex fori (the law of the court) because it is a matter of form subject to the jurisdiction of the court looking into the case irrespective of the nationalities of the parties.

\textsuperscript{53} Ibid; see also Hassan Hadawi, supra Note 6, at p. 117.
\textsuperscript{54} 1917, which codified the rules on family law that Jordan like most of the Arab lands formerly included in the Ottoman Empire.
\textsuperscript{55} 1951. Article 83.
\textsuperscript{56} No. 61. 1976.
\textsuperscript{57} Ibid. Article 19.
Finally, in Jordan, "proxy marriage" is considered valid if it is celebrated in accordance with the requirements of the law of the place of celebration. There is no clear provision in Sharia't teachings, which indicates the validity or the invalidity of proxy marriage. However, Muslim Jurists consider such marriage as valid because they found no harm in doing so.

❖ CONSEQUENCES OF MARRIAGE

When a marriage is valid, all the essential requirements are satisfied in accordance with the laws of both the spouses and the formal requirements in accordance with the relevant law, this marriage will have consequences on both spouses. Determining the law that should govern these consequences becomes a matter of paramount importance.

According to the Jordanian law, when both parties are foreign nationals, then the consequences of marriage will be subject to the husband’s national law at the time of celebrating the marriage. However, if one of the parties, whether husband or wife, was a Jordanian at the time of celebrating the marriage, then, in this case, the Jordanian laws will be exclusively applied to the consequences of marriage. Henceforth, as a general rule, the law of the husband’s nationality should be applied to the consequences of marriage, unless one of the parties is a Jordanian national, because the husband is considered as the head of the family and the responsible for most of the marriage consequences. This rule is absolute except for one case that is when the law of the husband’s nationality contradicts the rules of public order and morality of Jordan, in which case this foreign law will be excluded, and the Jordanian law will apply.

Consequences of marriage are of two types:

➢ Personal consequences; these are concerned with the personal relationship between the two spouses and the mutual rights, duties and responsibilities resulting

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58 M. Sirtawi, supra Note 19.
59 Section 14 (1) of The Jordanian Civil Code. Law No. 43. 1976.
60 According to Section 15 of The Jordanian Civil Code. Ibid.
from the marriage such as obedience, expenses, well-treatment, sincerity, cohabitation, the right of the husband to fair sexual intercourse, and the right of the wife to carry the husband’s name during the period of marriage.

Financial consequences: this is also known as “the family fund system” which specifies the duties of each party regarding their possessions and properties and the way to manage and benefit from them. It is interesting that the Sharia provides for the financial independence of the spouses contrary to the laws of some countries, which grant the husband the right of management. According to the Jordanian law, these consequences, whether personal or financial, are subject to the law of the husband’s nationality at the time of celebrating the marriage except if this law contradicts the Jordanian public Order and Morality.61

61 Section 29, Ibid.