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United States Recognition of Foreign, Nonjudicial Divorces

A comparison of any two states' divorce statutes readily illustrates the diverging procedures for obtaining a divorce which exist from jurisdiction to jurisdiction. Of even greater disparity are the divorce laws from nation to nation. Indeed, in some nations there is no formal divorce procedure whatsoever. Most foreign jurisdictions allowing divorce require some judicial proceeding, although Denmark and the provinces of Newfoundland and Quebec authorize divorce by administrative and legislative decree. However, many Asian and African nations authorize divorce by religious ritual or mere consent of the parties.

There is significant concern as to the effect and validity to be rendered foreign divorces obtained by procedures and methods not conforming to those of the forum where recognition is sought. Of particular concern in this Note is the recognition by American courts of the atypical, usually nonjudicial, divorces authorized in many foreign nations.

The conflicts questions generally arise in the following contexts: (1) A nonjudicial divorce is granted in a foreign jurisdiction to a party who later emigrates to and seeks recognition of his divorced status in the United States. (2) An American domiciliary obtains a foreign nonjudicial divorce according to the foreign law and seeks recognition of that divorce in the United States.


3. See generally 1 E. Rabel, supra note 2, at 497-520.

4. The quotas in 1966 for Asia and Africa, where the majority of nations which authorize nonjudicial divorce are found, were 3,590 and 4,274, respectively. Statistical Abstract of the United States 94 (88th Ann. ed. 1967). For specific quotas per country see The World Almanac and Book of Facts 191 (1968). After the effective date of the new percentage-priority immigration system on June 30, 1968, 79 Stat. 911 (1966), which replaced the quota system, the annual number of Asian and African immigrants may increase under the system of priorities, possibly up to the ceiling of 20,000 immigrants annually for any single foreign nation.
States.\(^5\) (3) A religious group grants a nonjudicial religious divorce within the United States and its recognition as a valid divorce is there sought.\(^6\) (4) Recognition is sought in the United States by a foreign domiciliary who obtained a nonjudicial divorce by methods authorized by his foreign nation while he was temporarily within the United States.\(^7\) (5) A custom or ceremonial divorce by the American tribal Indians is tested in an American court.

I. DIVORCE RECOGNITION THEORY

Marriage and divorce are changes of individual status in which society and the affected domiciliary state or nation have a significant interest.\(^8\) The judicial test of "domicile" generally

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5. A large number of Americans travel abroad each year into countries where nonjudicial divorces are available. In 1966, passports were issued or renewed for 22,670 Americans with destination Africa, 165,660 with destination the Far East, and 64,080 with destination the Middle East. Statistical Abstract of the United States 101 (88th An. ed. 1967). Of immediate importance are the many American servicemen currently serving in South East Asian countries who are marrying Asian women. In South Korea, 1,265 servicemen took Korean wives in 1964, and 771 during the first eight months of 1965; stated differently, about one out of every 40 men stationed in South Korea marry each year. N.Y. Times, Oct. 24, 1965, at 2, col. 3. In South Viet Nam, although military restrictions have been placed on American servicemen's connubial freedom, see Newsweek, Aug. 8, 1966, at 31, from June, 1964 to November, 1966, 180 servicemen had been granted permission to marry. N.Y. Times, Feb. 26, 1967, § L at 7, col. 1. In most of these Asian nations nonjudicial divorce methods are available and possibly could be utilized by servicemen to dissolve their Asian marriages.

6. Any organization, religious or not, that attempts to regulate the marital status of its members rather than conform to the federal, state, and municipal regulations applicable to all citizens potentially raises this conflict issue.

7. A significant number of "nonimmigrant aliens" are present within the United States each year on temporary visas. Of the total 2,341,923 nonimmigrant aliens in the United States in 1966, 39,327 were foreign government officials, 201,358 were temporary visitors for business, 1,472,830 were temporary visitors for pleasure, and 55,716 were students. Statistical Abstract of the United States 100 (88th An. ed. 1967). Some of these temporary visitors no doubt seek divorces while in the United States from American spouses or spouses remaining in their foreign nations and desire to utilize their foreign law and divorce procedures rather than try to satisfy the relatively strict grounds required in most states. For many Asian and African nonimmigrant aliens this reference to foreign divorce law often includes nonjudicial divorces.

requires both physical presence and either an intent to remain or
a lack of any intent to remove. Since the domiciliary state is
where one or both spouses intend to remain, it is clear that that
state has an interest in their domestic status which is paramount
to the interest of any other jurisdiction. Therefore, recognition
rules should attempt to give validity to divorces obtained in the
domicile of one or both parties, if in conformance with the laws of
that jurisdiction. Such a policy would also prevent parties from
avoiding the divorce laws of their own state, as there would be no
recognition of a foreign divorce if obtained where the proponent
had no intent to remain—where he was not domiciled.

This concept that divorce jurisdiction is dependent upon
domicile within the territorial jurisdiction10 is referred to as the
lex domicilii11 principle. Unlike our British counterparts,12
American jurisdictions maintain that the wife may procure a
 domicile separate from that of her husband,13 and jurisdiction of

9. See Restatement, supra note 8, at § 15-18; J. Beale, supra at 665-71.

 Ditson, 4 R.I. 87, 93 (1856); Le Mesurier v. Le Mesurier, [1895] A.C. 517,
527-28 (P.C.); Bater v. Bater, [1906] P. 209, 232 (C.A.); G. Cheshire,
supra note 8, at 340-41; H. Goodrich & E. Scoles, supra note 9, at 256;
3 W. Nelson, Divorce and Annulment 445 (2d ed. 1945); 1 E. Rabel,
supra note 2, at 428; J. Story, supra note 8, at 313.

Domicilii as “The law of the domicile.”

12. Because of possible undue hardship to the wife under the British
system from being unable to obtain matrimonial relief in instances of
her husband's desertion, the Matrimonial Causes Act § 18(1) (1950) was
enacted. However, the wife's ability to bring a dissolution action in
other than the husband's domicile is still very restricted. See A. Dicey,
Conflict of Laws 297-301 (Morris ed. 1958).

 Phelps, 241 Mo. App. 1203, 246 S.W.2d 838 (1952); Ditson v. Ditson,
Shaw in the 1833 case of Harteau v. Harteau, 31 Mass. (14 Pick.)
181, gives a review of the policy supporting the rule of separate domi-
ciles:
the forum may be based on the domicile of either spouse. It is well established that a marriage dissolution, granted within the United States by a court having requisite jurisdiction, is entitled to recognition in all states by the full faith and credit clause of the Constitution. Divorce judgments of foreign nations are accorded nearly equal recognition in our state courts, based not upon the full faith and credit clause, but upon the nebulous concept of "comity." Unlike sister state divorces recognized by the full faith and credit clause, foreign divorces are recognized by the concept of comity. This concept is not based on the same principles as the full faith and credit clause and is generally more restrictive.

Id. at 186.


5. The first Williams case, 317 U.S. 287 (1942), established that the domicile of one party is a sufficient jurisdictional basis for divorce if adequate notice of the proceedings is given the other spouse. See Restatement, supra note 8, at § 71. A State's finding of domicile still may be attacked collaterally in another state which has a sufficient interest in the parties' marital status. See id. at 274.

New York departed from tradition in Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709, cert. denied, 385 U.S. 971 (1965), where a Mexican divorce was upheld where neither party was domiciled in Mexico but the petitioner was physically present at the proceeding and the defendant made a voluntary appearance through an attorney.


7. In Hilton v. Guyot, 159 U.S. 113, 163-64 (1894), comity is defined as:

... neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

See Kittel v. Kittel, 194 So. 2d 640 (Fla. 1967); Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944); Clubb v. Clubb, 402 Ill. 390, 84 N.E.2d 366 (1949). Comity generally is extended to foreign divorce decrees on stricter standards than those applied in recognizing a sister state's decree by full faith and credit. Decrees of foreign nations generally will not be recognized unless at least one of the spouses had a good faith domicile in the foreign nation when the decree was granted.
under the full faith and credit clause, no foreign nation's decree or purported change of personal status will be recognized by comity in a reviewing court if offensive to some public policy of the state where recognition is sought.\(^8\) Public policy here is a broad description and generally refers to the morality and conscience of the state as embodied in its constitution, statutes, and court decisions.\(^9\)

II. NONJUDICIAL DIVORCES OBTAINED OUTSIDE THE UNITED STATES BY FOREIGN DOMICILIARIES

It is well settled that nonjudicial divorces, obtained in foreign nations by domiciliaries of those nations and recognized as legally dissolving a marriage by the \textit{lex domicilii}, will be recognized as valid within the United States.\(^20\) Most of the cases test regardless of what the law of that nation requires for jurisdiction in its courts. See Annot., 13 A.L.R.3d 1425 (1967), and cases cited therein.


The term "public policy" itself is indefinite and is not susceptible of exact definitions. It recognizes a principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law . . . . It means simply that policy recognized by the state in determining what acts are unlawful or undesirable, as being injurious to the public or contrary to the public good.

The following discussion will illustrate how loosely the public policy concept has been applied to divorces obtained according to the substantive and procedural requirements of a foreign nation's law. Most of the foreign procedures involved are typically considered contrary to our public policy, but when there is no attempted evasion of domestic law as in the Mexican migratory divorces, divorces by foreign domiciliaries under their foreign law are not considered offensive.


The same is true for England. See Lee v. Lau, [1964] 3 W.L.R. 750; Mahbub v. Mahbub, 106 So. J. 337 (1964); Silver v. Silver, 106
the validity of the Jewish "Ghet" divorces obtained from Jewish rabbis in eastern European nations which regard the Jewish religious communities as self-governing in their personal affairs and acknowledge the religious decrees as legally binding on Jewish citizens. In each case the foreign law held the religious law applicable, and thus recognition was granted in American forums by an application of the *lex domicilii* principle.

Another example of the *lex domicilii* principle being used to recognize nonjudicial divorces is *Kapigian v. Der Minassian*, where an unusual Turkish divorce was at issue. The respondent and his first wife contracted a Christian marriage while domiciled in Turkey. The wife subsequently renounced Christianity, professed Mohammedism and married an adherent of that faith. By Turkish law such a renunciation of Christianity automatically rendered her Christian marriage null and void. The respondent, relying on this law, established his domicile in Massachusetts and married the petitioner, who subsequently sued for a decree to nullify the marriage on the ground that the respondent's Turk-

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21. Under Jewish civil law a Jewish rabbi can grant a valid, binding divorce. Either party may seek out the "Ghet" for certain specified causes. The rabbi finding reconciliation impossible will issue the written bill of divorcement to the parties and they are free to remarry. See generally address by Dr. Samuel Daiches, reported by Society of Jewish Jurisprudence in 161 LAW TIMES 244 (1926); Gurewicz, *Divorce in Jewish Law*, 7 RES. JUDICATAE 357 (1957); Naamoni, *Marriage and Divorce in Jewish Law*, 3 J. FAMILY L. 177 (1963); Comment, *Jewish Divorce and the Civil Law*, 12 DE PAUL L. REV. 295 (1963).

22. See cases cited note 20 supra.

23. It is difficult to say what degree of affiliation with the Jewish community is required by the foreign governments before a valid divorce can be obtained. Most likely domicile or at least residence is required of the petitioning party within the European nation before a rabbi can grant a Ghet recognized as valid by the foreign law.

The issues usually arise in American courts after one or both "divorced" spouses have emigrated to this country and have remarried. The second marriage of one party is sought to be annulled on the basis of the prior existing "nondissolved" marriage, see, e.g., Leshinsky v. Leshinsky, 5 Misc. 495, 25 N.Y.S. 841 (Sup. Ct. 1893); or the original spouse, upon the death of his or her former spouse, claims rights as the legally married wife or husband, see, e.g., *In re Rubenstein's Estate*, 143 Misc. 917, 257 N.Y.S. 637 (Surr. Ct. 1932). It thus becomes necessary for the court to determine the parties' true status following the foreign divorce.

ish divorce was invalid, thus rendering the Massachusetts marriage bigamous and void. Since both parties to respondent's first marriage were still domiciliaries of Turkey at the time of the Turkish annulment, the court concluded that their marital status was subject to Turkish jurisdiction and law. Considering the form of the divorce immaterial, and that it was not "so revolting to the moral sense of a Christian nation to prevent recognition and enforcement by its courts," the court held that the jurisdiction of a sovereign nation over its domiciliaries prevails to effect a change of status under Turkish law. Consequently, the divorce was declared valid and plaintiff's nullity petition was dismissed. Thus, the only apparent prerequisites for recognition in American courts are proof of domicile in a jurisdiction which recognized the divorce as valid, evidence that the foreign law acknowledges the nonjudicial ceremony as legally binding, and satisfaction to the court that the mode of divorce was not repugnant to the public policy and morality of the forum state.

No logical justification can be advanced for denying recognition to nonjudicial divorces simply because the method is repugnant to the forum. The basis of the lex domicilii doctrine is to acknowledge changes of status valid by the law of the divorced parties' domiciles; thus the inquiry into the foreign law should be limited to ascertaining that the divorce is legally binding under

25. Id. at 415, 99 N.E. at 265: It does not matter that a circumstance rather than a decree of court constitutes under the domiciliary law a dissolution of the marriage tie. We are not concerned with forms of practice, but with the ascertainment of the law of a foreign country.

26. Id. at 416, 99 N.E. at 266.

27. Decisions in family law cases are often motivated by the good faith of the parties and policies favoring the stability of the family and the protection of the offspring of the parties. See Kantor v. Cohn, 161 App. Div. 400, 168 N.Y.S. 846 (1918), where a party was estopped from asserting her dower claim against a former husband based upon an invalid divorce, partly because she had lived happily for 23 years with her second husband. Kapigian v. Der Minassian and the Jewish Ghet cases, however, appear to have been decided purely on the strict application of the legal principles without regard to the individual family situations involved.

28. See Kapigian v. Der Minassian, 212 Mass. 412, 99 N.E. 264 (1912); Mahbub v. Mahbub, 108 Sol. J. 337 (1964). In People v. Kay, 141 Misc. 574, 252 N.Y.S. 58 (Mag. Ct. 1931), W and H1 began divorce proceedings in Russia but were interrupted by the revolution. W married H2 in Turkey believing H1 was killed in the war. Upon an action for divorce brought in the New York court, W's second marriage was declared a nullity because there was no valid divorce from H1; since Turkish law would not recognize polyandry in this situation, W's second marriage was viewed as bigamous and consequently against public policy in New York.
that law. By questioning further into the nature and merit of the foreign methods of divorce, American courts would be passing judgment, by American standards, on the foreign law, and disregarding the sovereignty of the foreign nation over its domiciliaries. The apparent result of reviewing foreign divorce judgments by domestic standards would be a breakdown of international comity in this area and a repudiation of international reciprocity among nations in divorce recognition.

Also, if foreign nonjudicial divorces were valid in the country of domicile but were not recognized elsewhere, "the parties would be placed in a socially objectionable and legally indefensible position." They would be relegated to a "limping marriage," deemed married in all countries except their domicile. Thus, outside their present domicile neither spouse could legally remarry, as the prior divorce would be considered invalid and a subsequent marriage bigamous.

A further disadvantage of nonrecognition is that many spouses, believing themselves validly divorced everywhere, as respondent did in Kapigian v. Der Minassian, often detrimentally rely thereon in future domestic relations. Thus the policy favoring universal recognition of personal status strongly supports a consistent application of the lex domicilii concept, which recognizes all determinations of status lawfully obtained in the domicile nation.

Variations on the fact situation of Kapigian and the Jewish Ghet cases have not been judicially entertained, rendering further applicability and usefulness of the lex domicilii rule unclear. The Massachusetts court would probably not alter its result in Kapigian if the husband were domiciled in Massachusetts while the wife remained domiciled in Turkey at the time she procured the "divorce." As noted above, it is believed in the United States that the domicile of one spouse is a sufficient jurisdictional basis for granting a divorce. If consistency in applicability...
tion of legal principles to varying fact situations is the desired policy in divorce adjudication, it follows that the same jurisdictional standards must apply equally to nonjudicial as well as judicial divorce decrees. If at least one spouse was domiciled in the foreign territory, the jurisdictional question should be satisfied and further inquiry can be directed solely to ascertaining compliance with the foreign law involved. Thus, nonjudicial divorces rendered at either spouse's domicile, valid by that foreign law, should be recognized in United States forums by the lex domicilii principle.

Consider a further situation where husband and wife, domiciliaries of France, obtain a Jewish Ghet divorce in Israel and now seek recognition of such divorce in an American court. The lex domicilii principle could resolve this question also. If the parties' French domicile recognized the Ghet as a valid dissolution of the marriage, the divorce should be recognized as valid in America; conversely, if France would not accord the divorce validity, it should not be recognized as valid here. In applying lex domicilii in this instance the court would still be looking at the law of the domicile, in particular the conflicts law of that

envisioned by the Supreme Court in the first Williams case, 317 U.S. 287 (1942), which firmly established the principle of jurisdiction based on the domicile of one spouse, certainly are magnified in questions of international divorce procedures as under discussion here. The only alternatives, however, are not to allow unilateral divorces, or to revert to the long rejected English system of maintaining the wife's domicile to be that of her husband; both work more serious inequities to the wife. See J. Beale, supra note 8, at 197-201. The overall utilization of the present American system of allowing ex parte divorces at either party's domicile if adequate notice is given to the other spouse, seems to provide fewer hardships than the other proposed systems.

33. The argument may be advanced that family law problems can be better adjudicated by not strictly following established legal principles, but by arriving at a just and socially desirable result based upon the specific facts involved. Certainly in many cases more equitable results could be reached. But a wide allowance of judicial discretion is currently not possible under the American common law system of stare decisis which is believed necessary for stability and certainty in the law, convenience, and uniformity of treatment of all litigants. See Catlett, The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied, 21 Wash. L. Rev. 158, 159 (1946).

34. Cf. Mahbub v. Mahbub, 108 Sol. J. 337 (1964). Here a unilateral nonjudicial divorce by the husband was upheld by an English court. However, it must be remembered that under English law the wife's domicile is deemed to be that of the husband. See notes 12-14 supra, and accompanying text.

35. As discussed in part III infra, it is likely that the nonjudicial methods of divorce in foreign nations are unavailable to nonnationals or nondomiciliaries without satisfying religious or domiciliary qualifications.
nation. The law of the domicile includes the domicile nation's conflicts law, and giving effect thereto again allows the law of the domicile to prevail. If the foreign conflicts law is not considered, the American court is forced to look only to France's substantive law which does not allow such divorces executed there. Again the parties would have a limping marriage—validly divorced in Israel and in France, pursuant to French conflicts law, but not validly divorced in America.

American courts have attempted to follow the lex domicilii rule consistently in recognizing nonjudicial divorces obtained in foreign countries by foreign domiciliaries. Failure to look only to the law of the domicile in these nonjudicial divorce recognition cases, and instead consider the place of the marriage, the form and procedure of the divorce, and the parties' national or religious law as relevant factors, leads to a variety of difficulties. A perfect illustration of the confusion that can result is represented by the history of English cases determining recognition of nonjudicial divorces.

Although England was the forerunner of the lex domicilii principle and has recognized foreign nonjudicial divorces obtained abroad by both spouses or by the husband domiciled within a foreign territory, in certain cases the lex loci celebrandi problem.

36. In two divorce cases the New York courts tested their validity according to foreign conflicts laws when the divorces were granted at different foreign jurisdictions. Algazy v. Algazy, 129 N.Y.S.2d 204 (Sup. Ct. 1954) (Romanian domicile; Nevada divorce; New York recognition action); Dean v. Dean, 241 N.Y. 240, 149 N.E. 844 (1925) (Canadian domicile; Pennsylvania divorce; New York recognition action).

37. Accepting the view that one can look to a foreign conflicts law may be easier than ascertaining that conflicts law. The conflicts law of the domiciliary nation may hold the divorce obtained valid only if it is valid at the lex fori. One then would have to look to the law of the forum where the nonjudicial divorce was obtained, which may hold the divorce valid only if the spouse's national or domiciliary law would regard it as valid. Thus, the cyclical renvoi problem. See generally 1 E. RABEL, supra note 2, at 75-90, and cases, statutes, and articles there cited. It is interesting to note that divorce conflicts is one instance where the Restatement of Conflicts accepts renvoi principles. RESTATEMENT OF CONFLICTS OF LAWS § 8 (1934). If this highly unlikely combination of facts ever arose to present this problem, an American court could probably best reach a result by limiting its foreign law inquiry to whether the domicile nation would regard the parties as divorced if the parties were currently at their domicile, and avoid that part of the domicile law which reverts to lex fori.


39. See cases cited note 20 supra.
tion of the marriage and the nonjudicial character of the divorce have determined its validity. It was established in Rev v. Hammersmith that Christian monogamous marriages may not be dissolved by methods appropriate to polygamous or potentially polygamous marriages.

Here a domiciliary of India, while in England, married the petitioner, an English woman. Shortly thereafter they separated and he returned to India subsequently forwarding to petitioner a "Talak" declaration of divorce appropriate to his Mohammedan religion and recognized as valid in India. A King's Bench decree that the divorce could not be recognized was affirmed by the Court of Appeals on two grounds: (1) While the form of divorce was appropriate to Mohammedan marriages which are potentially polygamous, it was inappropriate to a marriage consummated in England; (2) A judicial proceeding in a court of the domicile was lacking. Both grounds have been generally criticized, the former because it gives weight to the lex loci celebrationis in divorce proceedings.

40. BLACK'S LAW DICTIONARY 1056 (4th ed. 1951), defines Lex Loci Celebrationis as "The law of the place where a contract is made."

41. [1917] 1 K.B. 634 (C.A.) [hereinafter cited as Hammersmith].

42. England continues to struggle with the concept laid down in Hyde v. Hyde, L.R. 1 P. & D. 130 (1866), that marriages, not only polygamous, but potentially polygamous are offensive to the understanding of marriage in Christendom and cannot be recognized as valid. American courts have eliminated many of the difficulties arising in England by disregarding the potentially polygamous character of a marriage and viewing only de facto polygamy as invalid by our standards. See Bartholomew, Recognition of Polygamous Marriages in America, 12 Ind. & Comp. L.Q. 1022 (1964).

43. Muslim divorce by Talak is a written or oral pronouncement by the husband, at anytime, without any reason, that the marital relation is dissolved. The marriage is immediately deemed dissolved upon the husband's uttering three times, "I divorce you." See A. ALI, 2 MOHAMMEDAN LAW 431-55 (1955); J. DIAMOUR, THE MUSLIM MATRIMONIAL COURT IN SINGAPORE 38-77 (1969); A. QADIR, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD 148-61 (1953); SHORTEST ENCYCLOPEDIA OF ISLAM 654-71 (1953); F. TYABJI, MUHAMMEDAN LAW 204-32 (3d ed. 1940).

In 1960, the Minister of Justice in Cairo pronounced that within the United Arab Republic divorce by the free will of the husband would no longer be valid. In order to strengthen family ties divorce would henceforth be available to either spouse only upon specified grounds. N.Y. Times, Feb. 23, 1960, at 11, col. 2, and May 18, 1960, at 2, col. 6.

and is thus in direct conflict with the *lex domicilii* doctrine, and the latter because it is too narrow a limitation of the domicile doctrine.

*Hammersmith* was followed by two lower court decisions before the Court of Appeals attempted to adjust its doctrine in *Russ v. Russ*. Here a similar marriage was contracted in England followed by residence of both spouses in Egypt, the husband's domicile. While there, the husband performed a Mohammedan Talak divorce and recorded it in the court records as required by Egyptian law. In a later English action, where the validity of the Egyptian divorce was at issue, the Court of Appeals stated that the real *ratio decidendi* of *Hammersmith* was the lack of a judicial proceeding and distinguished the instant divorce as having been judicially recognized at the domicile by the recording of the Talak in the Egyptian court records. Although the Court of Appeals seemingly intended the decision to overturn the *Hammersmith* theory by confining it to its specific facts and thus return to the *lex domicilii* principle, the emphasis placed on the Egyptian court's involvement in the Talak's recording implies that foreign divorces without some form of judicial proceeding will not be recognized in England. The past, and apparently still existing, importance placed on the lack of a judicial proceeding misconceives the doctrine of *lex domicilii*. *Lex domicilii* is not concerned with the judicial forum of the domicile but with the law thereof. By disregarding non-judicial divorces valid under the law of the domicile, the English courts are repudiating the law of foreign sovereigns. The argument is well stated as follows:

The crucial question should be simply: Is the marriage dissolved by the law of the domicile? If that law permits a

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47. The alternative holding concerning the polygamous character of the divorce proceeding was apparently discarded. At page 326 of the opinion Wilmer, L.J., in the face of lower court cases to the contrary, attempts to confine this distinction to *Hammersmith*’s specific facts. Wilmer’s reasoning is very unclear based on a distinction as to the breadth of the Talak divorce within the domicile jurisdiction. Because of the general disfavor expressed, however, any arguments as to the *lex loci celebrationis* as being controlling in divorce actions will most likely be disregarded. Cf. Nachimson v. Nachimson, [1930] P. 217 (C.A.).
monogamous marriage to be dissolved in a manner "appropriate to a polygamous marriage", or vice-versa, that is surely a matter for the law-makers of the country of domicil. It is not necessary for us to admire the system or adopt it as part of our law. All that is required to do is give the same recognition here to the divorce that will be given it by the law of the domicil and in its courts, and to abstain from making laws for the country of the domicil governing the status of persons domiciled there.50

Because several recent lower courts have recognized nonjudicial divorces by applying only the lex domicilii doctrine,51 and the intimation in Russ v. Russ that this is the desired solution, it is likely that English forums will henceforth apply that doctrine consistent with the American holdings.52

III. NONJUDICIAL DIVORCES OBTAINED ABROAD BY AMERICAN DOMICILIARIES

With the large number of American servicemen and civilians in foreign countries,53 it is likely that many attempt an "easy" foreign divorce to dissolve a marriage contracted with either a national of that country or a spouse back in the United States.54 The validity of these divorces is a significant issue in the later domestic relations of the Americans involved.

Whether a recognition question of this type may arise depends initially upon whether an American national could utilize

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50. Ryan, supra note 44, at 1038.
51. See note 20 supra. One commentator advances that the ElRyami and Yousef decisions are in "direct conflict" with the Hammersmith holding and express the better view. Swaminathan, supra note 44, at 543.
52. Australia has remedied the Hammersmith problem by expressing the lex domicilii rule in legislation broad enough to include all methods of divorce. The Commonwealth Matrimonial Causes Act § 95 (2) (1959) states:
   A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognized as valid in Australia where, at the date of the institution of the proceedings that resulted in the dissolution or annulment, the party at whose instance the dissolution or annulment was effected was—
   ... (a) ... domiciled in that foreign country;
   ...;

See generally Z. Cowen & D. Da Costa, Matrimonial Causes Jurisdiction ch. 7 (1981).
53. See note 5 supra.
54. This discussion will center around unilaterally procured foreign divorces without reference to bilateral divorces. If the necessary requirements are satisfied by a single party such that the divorce obtained will be recognized by American courts, the arguments for recognition apply more forcefully if both spouses fulfill the same requirements in a bilateral proceeding.
the methods of a foreign nonjudicial divorce. If foreign laws preclude Americans from so doing, there is, of course, no recognition problem. Every nation has its own laws as to the availability of its divorce procedure to foreign nationals and these laws are far from uniform.66

Assuming an American in a foreign nation was able to utilize the nonjudicial divorce procedure therein, recognition of that divorce in America again depends upon the principles previously discussed.66 The proponent of the divorce would have to prove that at least one of the spouses was domiciled within the foreign jurisdiction, that the divorce received was valid under the foreign law where obtained, and that its recognition does not contravene United States public policy.67

"Domicile," by American standards,58 would not be met by an American serviceman serving a one year requirement within an Asian nation, and any ex parte divorce he may obtain while there could not be recognized within the United States.59 However, where an American takes a wife who is a domiciliary of a foreign nation, and they together obtain a mutual consent divorce,60 the result might well be different. Here the domicile requirement in the United States would be satisfied by the wife's foreign domicile.61 The divorce could, therefore, probably be recognized in an American court if valid under the foreign law.62

55. See, e.g., Egawa, Divorce of Foreigners in Japan in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 336 (1961).
56. See notes 8-19 supra, and accompanying text.
57. The latter element of satisfying the recognizing court's public policy may be the most troublesome. See note 19 supra.
60. Authorization of divorce by mutual consent is based upon the belief that marriage is a civil contract between the parties and therefore can be broken if both parties consent. See 1 K. Miyazaki, supra note 2, at 60-61.
62. A marriage and divorce by an American temporarily within a foreign country may be attacked in an American court as being collusive and against the public policy of the state where recognition of the divorced status is sought. Cf. Carrole v. Carrole, 232 Ark. 987, 342 S.W.2d 79 (1961).
A somewhat easier question arises on the alternative facts of an American-domiciled woman marrying an Indian-domiciled man. India and most Asian nations regard the wife's domicile to be that of her husband. Since India's jurisdictional requirement of domicile would therefore be satisfied by both husband and wife, the American wife could utilize the Indian civil divorce methods under the Special Divorce Act and any religious procedure available if she had made a proper conversion. The Muslim husband could no doubt use the Talak and the parties together could execute a mutual consent divorce. All of these divorces should be recognized as valid within the United States, for even though the wife would not necessarily be regarded as domiciled in India by American standards, India would still be considered an appropriate forum to determine the parties' status since the husband is domiciled there. Thus, an American female marrying a foreign domiciliary could obtain a foreign nonjudicial divorce recognizable in the United States without changing her American domicile.

Recognition of nonjudicial divorces obtained by Americans in foreign countries has not been a significant problem because of the restrictions imposed by foreign nations on the issuing of their nonjudicial divorces. However, in the instances suggested, if the foreign spouse were domiciled in the foreign country and the foreign divorce could be proved valid under the foreign law, the only remaining obstacle to recognition of the divorce in an American court would be establishing that the divorce was not against public policy as recognized by that court.

64. Under Muslim law the husband only has the right to use the Talak pronouncement of divorce. See id. at 136-39. Until 1939, a Muslim wife's right to divorce was quite restricted, but the Dissolution of Muslim Marriage Act of 1939 granted specific grounds for divorce causes for Muslim wives.
65. In the suggested case of Americans contracting and dissolving a marriage while only temporarily abroad, an American court may hold the divorce not valid as against public policy in order to deter such future relationships. See notes 18 & 19 supra, and accompanying text. It could logically be argued, however, that if the divorce were to be held as invalid against public policy, the marriage likewise should be declared a nullity as the marriage exhibited a fraudulent mutual consent to be bound in the marriage contract. Cf. United States v. Lut-
IV. NONJUDICIAL DIVORCES PERFORMED WITHIN THE UNITED STATES

In America's early history, the majority of the states which accepted divorce as a social necessity empowered the state legislatures to grant divorces to petitioning parties. Legislative divorces were not prohibited by the United States Constitution nor most of the state constitutions. By the end of the nineteenth century, however, exclusive jurisdiction was granted to the courts by state constitutions or statutes, often expressly negating the power of the legislatures to grant divorces. Each state thus designated particular tribunals for jurisdiction in divorce proceedings subject only to the procedures specified by the individual state legislatures. A choice of law concept, which might be called the "territorial jurisdiction of principle," is generally followed by American jurisdictions. This concept applies the lex fori to divorce suits of those domiciled within the forum, the divorce laws of other states or nations having no

wak, 195 F.2d 748 (7th Cir. 1952), aff'd, 344 U.S. 604, rehearing denied, 345 U.S. 919 (1953).
66. See, e.g., Starr v. Pease, 8 Conn. 541 (1831); LeVins v. Sleater, 2 Green 604 (Iowa 1850); Cabell v. Cabell's Adm'r, 58 Ky. (1 Met.) 319 (1858); Adams v. Palmer, 51 Me. 480 (1863); Appendix, 16 Me. 479 (1840).
67. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); see cases cited note 66 supra. See also Clark v. Clark, 10 N.H. 380 (1839).
68. See, e.g., DEL. CONST. art. 2, § 18; KAN. CONST. art. 2, § 18; N.Y. CONST. art. 1, § 9.
69. See, e.g., ALA. CODE tit. 34, § 20 (1959); ME. REV. STAT. ANN. tit. 4, § 152, tit. 19, §§ 122, 663 (1964); W. VA. CODE ANN. § 48-2-6 (1966).
70. See, e.g., MINN. CONST. art. 4, § 28; N.C. CONST. art. II, § 10; TENN. CONST. art. 11, § 4.
71. With many variations the divorce statutes usually designate the courts with divorce jurisdiction, the grounds and defenses available, residence and domicile requirements, notice and service of process requirements, alimony and property dispositions, child custody, and in some cases waiting periods for remarriage.
72. BLACK'S LAW DICTIONARY 1055 (4th ed. 1951), defines Lex Fori as: "The law of the forum, or court; that is, the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought or remedy sought is an integral part." In the divorce area, lex fori is state law binding on all courts within the state.
73. Several states will grant a divorce after the fulfillment of a statutory "residence period" rather than a fully established domicile, e.g., ARK. STAT. ANN. §§ 34-1208, 34-1208.1 (1962) (three months residence requirement), and such statutes have been held constitutional. E.g., Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958).

The presence of servicemen temporarily stationed within a state has presented problems as to divorce jurisdiction. Usually there is no
extra-territorial effect on divorce suits within American jurisdictions. Conflicts now arise when a state's domiciliaries attempt a divorce within its territorial jurisdiction by a method not conforming to the state's judicial procedures.

With numerous nationalities and religious groups present in the United States, problems develop when certain segments, believing that religious law must govern the personal status of their members, issue religious divorces and regard them as valid changes of status. The Mormons, upon settling in Utah, attempted to regulate the personal status of their members without regard to the laws of that state. It was not long, however, before Utah ruled that Mormons were subject to its laws. In two similar Utah Supreme Court cases the wives of intestates, having been purportedly divorced by "church divorces," nonetheless succeeded in their dower claims as lawful widows of the decedents. Almost summarily the court rejected the church divorces, holding them invalid under Utah law. Being domiciliaries

intention to make the temporary base a permanent residence so it is difficult to hold his state of residence his domicile for divorce purposes. See Weintraub v. Murphy, 244 S.W.2d 454 (Ky. 1951); McCauley v. McCauley, 184 Pa. Super. 361, 134 A.2d 694 (1957); Annot., 21 A.L.R. 2d 1163 (1952). Several states have by statute granted divorce jurisdiction to servicemen's causes after a fulfilled residence requirement (usually one year). See, e.g., N.M. STAT. ANN. § 22-7-4 (1954); Tex. REV. Civ. STAT. art. 4631 (1960).

74. Hilton v. Guyot, 159 U.S. 113, 163 (1894); Roth v. Roth, 104 Ill. 35, 44-45, 44 Am. Rep. 81 (1882); Miko Jung v. Rokusaburo Novaya, 47 N.Y.S.2d 48, 49 (Dom. Rel. Ct. 1944); 1 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY pt. 4, at 453-57 (2d ed. 1958); J. STORY, CONFLICT OF LAWS 291 (8th ed. 1883); see Rabel, Divorce of Foreigners--A Study in Comparative Law, 28 IOWA L. REV. 190, 122 (1943), where the author describes the lex fori system of the American courts as "unique." In several nations territorial laws do not apply to all citizens, and members of certain religious communities are governed by their own religious laws of marriage and divorce. In India, for example, Muslims may use either the religious "Talak" form of divorce or the civil procedures specified by Indian law. See generally K. SAKSENA, MUSLIM LAW AS ADMINISTERED IN INDIA AND PAKISTAN ch. VI, at 260-98 (4th ed. 1963).


within the territorial boundaries of Utah's jurisdiction, the Mor-
mans were amenable to the divorce legislation of the state and
their religious ceremonial divorces could not be recognized as
changes in status.

A recurrent problem, until recent years, has been the at-
ttempts by Orthodox Jews to live as autonomous communities
and control the domestic relations of their members. As early
as 1873 it was authoritatively reported that Jews living in a
civilized country were amenable to the laws of that country. However, with Jewish Rabbinical Courts having authorized juris-
diction to render their rabbinical "Ghet" divorces in many east-
ern European countries, many American rabbis erroneously be-
lieved such jurisdiction existed in the United States and granted,
to ignorant spouses, what they believed were valid divorces per-
mitting subsequent remarriage. A number of cases arose over
divorces procured by both spouses submitting themselves to a
tribunal of rabbis and in their presence fulfilling the procedures
for the Ghet. Other Ghets were obtained by a single spouse in
America from a nonimmigrating husband or wife. In each case
cited, the party or parties obtaining the rabbinical divorces were
domiciled within the United States. Consequently, the American
courts unanimously rejected the argument that since the rab-
binical Ghet divorce was recognized as valid at the lex loci

78. Felsenthal, Remarks on Some Points in Jewish Law, 8 Albany
L.J. 292, 293 (1873). In countries where Jews are subject to civil
divorce laws, Jewish law still requires a religious divorce by the parties
before a remarriage may be effectuated. See N.Y. Times, April 19, 1964,
at 40, col. 5; Daiches, Divorce in Jewish Law, 161 Law Times 244
(1926); Correspondence from Charles H. L. Emanuel, October 23, 1928,
79. See generally E. Schefelowitz, The Jewish Law of Family
and Inheritance and its Application in Palestine 24-60.
80. In re Schlau, 136 F.2d 480 (2d Cir. 1943); In re Cherney's Es-
tate, 162 Misc. 764, 295 N.Y.S. 567 (Surr. Ct. 1937); Shilman v. Shilman,
105 Misc. 461, 174 N.Y.S. 385 (Sup. Ct. 1918), aff'd, 188 App. Div. 908,
175 N.Y.S. 681 (1919); Kantor v. Cohn, 181 App. Div. 400, 168 N.Y.S.
81. United States v. Zaltzman, 19 F. Supp. 305 (W.D.N.Y. 1937);
Petition of Horowitz, 48 F.2d 662 (E.D.N.Y. 1931); In re Spiegel, 24 F.2d
605 (S.D.N.Y. 1929); Albeg v. Albeg, 259 App. Div. 744, 18 N.Y.S.2d
719 (Sup. Ct. 1940); In re Goldman's Estate, 156 Misc. 817, 282 N.Y.S.
787 (Surr. Ct. 1935); Chertok v. Chertok, 208 App. Div. 161, 203 N.Y.S.
163 (Sup. Ct. 1924); Saperstone v. Saperstone, 73 Misc. 631, 131 N.Y.S.
241 (Sup. Ct. 1911); Falkoff v. Sugerman, 26 Ohio N.P. (n.s.) 81 (1925).
The conclusion of the courts was that once domicile by the person seeking the divorce was established within a state's jurisdiction, the state laws control his domestic relations and foreign laws have no extraterritorial effect within the jurisdiction. To allow such unofficial divorces would conflict with each state's sovereignty to determine judicially the personal status of its own domiciliaries.

For many of the uninformed parties who relied upon the rabbinical divorces, their declared invalidity had serious consequences: later marriages were declared nullities or criminally bigamous, often bastardizing the issue thereof; long-forgotten "divorced" spouses appeared to contest estate proceedings, and applications for naturalization were refused. Applying the territorial jurisdiction principle does work hardships upon those who do not follow it, but these effects are still only the unpleasant incidents of a consistent application of the lex domicilii principle. In all the cases discussed in this section, the party or parties obtaining the nonjudicial divorces were domiciliaries.


83. The majority of these decisions arose in New York State. Article I, § 9 of the New York Constitution has an express negative provision, which states, "nor shall any divorce be granted otherwise than by due judicial proceedings." In Newfield v. Copperman, 47 How. Pr. 87, 89 (N.Y. 1873), judicial proceeding was defined as a "proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination of action of such court or officer." Clearly the rabbinical proceedings did not satisfy this definition and were declared invalid under New York law.


86. See United States v. Zaltzman, 19 F. Supp. 305 (W.D.N.Y. 1937); Petition of Horowitz, 46 F.2d 652 (E.D.N.Y. 1931); In re Spiegel, 24 F.2d 695 (S.D.N.Y. 1929). It is felt that because of the bigamous nature of a later remarriage, the applicant lacks "good moral character" as required by 8 U.S.C. § 1427 (1964). But see In re Schlau, 136 F.2d 480 (2d Cir. 1943).

87. See cases cited notes 76, 80, & 81 supra.
within a state's boundaries. The nonrecognition of the religious divorces can therefore be justified by the interest in consistent application of the recognition principles previously discussed.\textsuperscript{88} (1) Under the territorial jurisdiction principle, the attempts to utilize religious law and procedures directly conflict with each state's right to apply its own law to divorce actions concerning citizens within its territorial jurisdiction. (2) By the \textit{lex domicilii} principle a divorce valid by the law of the domicile is to be accorded recognition elsewhere, and in these cases the religious divorces obtained were not authorized methods by the domiciliary state and thus not entitled to recognition.

V. NONJUDICIAL DIVORCES OF FOREIGN DOMICILIARIES WITHIN THE STATE

An unusual recognition question arises when the \textit{lex domicilii} doctrine comes into direct conflict with the territorial principle of jurisdiction. The issue arises on the following facts. H, a Muslim from India, comes to the United States and marries W, an American.\textsuperscript{89} H, still retaining his Indian domicile, desires a divorce and presents himself to an Indian or Muslim official within the United States, thus submitting himself to Indian jurisdiction and law and availing himself of the easy Talak divorce. With numerous official emissaries of foreign nations present within the American and Commonwealth jurisdictions obliged to aid the nationals of their countries, divorce by submission to the foreign law of one's domicile has occurred several times.\textsuperscript{90} The approach taken by the Commonwealth courts in these cases will again be used for purposes of comparison and will be analyzed first to illustrate the potential difficulties.

\textsuperscript{88} See notes 8-19, 72-74 supra, and accompanying text.
\textsuperscript{89} Similar issues arise when H and W are both foreign domiciliaries and, while temporarily within the United States, retain their foreign domicile.
\textsuperscript{90} Foreign divorce decrees rendered by the \textit{courts} of foreign nations to their domiciliaries while temporarily within the United States have been upheld. Oettgen v. Oettgen, 196 Misc. 937, 94 N.Y.S.2d 168 (Sup. Ct. 1949) (German "proxy" divorce upheld where parties were represented in German action by attorneys); Gonzalez v. Gonzalez, 46 N.Y.S.2d 270 (Sup. Ct. 1943) (Dominican Republic divorce obtained by appearance before the Consul of the Dominican Republic in New York City). \textit{See also} Martens v. Martens, 260 App. Div. 30, 20 N.Y.S.2d 206, rev'd on other grounds, 284 N.Y. 363, 31 N.E.2d 489 (1940), rehearing denied, 285 N.Y. 607, 33 N.E.2d 542 (1941).
A. Commonwealth View

The Commonwealth nations, which do not apply the territorial limitations on jurisdiction in divorce actions as stringently as American states, have held the lex domicilii doctrine controlling in these cases and regard as immaterial the fact that a religious divorce was performed within their jurisdiction. In the English case of Har Shefi v. Har Shefi a marriage was contracted in Israel between petitioner, a Jewish woman of English domicile, and an Israeli domiciliary. After a short residence in London, and before the husband was to be deported, he delivered to petitioner a Jewish Ghet at the Beth Din rabbinical court in London. Petitioner thereupon asked the English court to declare the marriage validly dissolved. The Court of Appeals considered whether the English courts had jurisdiction over the petition. Singleton, L.J., felt that the English courts could not entertain jurisdiction since both husband and wife were Israeli domiciliaries, by both English and Israeli law, and the courts of Israel could best determine the validity of the divorce. However, both Denning, L.J., and Hodson, L.J., felt that the English courts had jurisdiction to decide the validity of the divorce under the laws of Israel. Upon retrial, the Probate Division held the marriage "validly dissolved by the only form of divorce which is open to a Jew domiciled in Israel." The decision was based wholly upon the lex domicilii principle, disregarding the fact that the divorce was issued in London. Thus in recogni-

93. No doubt this decision was a good deal motivated by a convenience argument. It would have been quite burdensome for the petitioner to travel to Israel to institute the declaratory action and perhaps it would have taken a considerable amount of time before judgment would have been rendered.
95. Id. at 223-24.
I do not place any reliance on the fact that the bill of divorce- ment was delivered in England. That does not make English law applicable to determine the status of the wife. The parties were at the time of the divorce domiciled in Israel, and the validity of the divorce must depend on the law of Israel and not on the law of England.
Reference again should be made to the discussion of the Hammersmith case, see notes 41-52 supra, and accompanying text, for the Har Shefi divorce involved no judicial procedure, and neither Har Shefi
tion cases arising in English courts, questioning religious divorces procured within British territory, recognition will be accorded where the religious law applied is that of the husband’s domicile.97

A Canadian court met an unusual fact situation in Dame Goldenberg v. Triffon and Dunn and Dame Vaughn98 with a tortured application of the Har Shefi holding. A Jewish couple, domiciled in Israel, commenced divorce proceedings in an Israeli rabbinical court. Before the proceedings were completed, both parties migrated to Canada and lived there as man and wife for two years and until the wife requested the Israeli court to authorize a Montreal rabbi to complete the divorce. The Montreal rabbi granted the bill of divorcement and after receipt of the bill in Israel the Israeli court declared the marriage dissolved. The Quebec Supreme Court rejected the argument that since both spouses were domiciled in Canada they could not utilize a foreign method of divorce and held that the test of domicile should relate to the time the “proceedings were commenced.”99 In this case, that time was the initiation of the divorce proceedings in the Israeli court when the couple was domiciled there.

In general, domicile is tested at the time of the initiation of the proceedings,100 but this rule was inappropriately applied to the Dame Goldenberg facts. The specific act of divorce was performed in Montreal by the Montreal rabbi after a period of cohabitation in Canada as the marital domicile of the parties.101 Considering domicile at the time of the bill of divorcement in Montreal would have been more appropriate and the divorce would have been discarded as an unauthorized method contrary both to the lex domicilii and the province's territorial jurisdic-

99. Id. at 344-45.
101. In reviewing the case, Ryan, Conflict of Laws—A Bill of Divorcement in Montreal—Domicil, 34 Can. B. Rev. 335 (1955), states that according to the law of Israel foreign rabbis cannot dissolve marriages of foreign Jews not domiciled in Israel. The religious methods of divorce are available only to domiciliaries of Israel and thus not available to those Jews domiciled in Canada.
tion. Another unwarranted statement made by the court was that the Montreal rabbi was only a "representative and func-
tionary" of the Israeli court and was not usurping the function of the Parliament of Canada in granting the divorce.\textsuperscript{102} Under this view, any emissary of a foreign government or religion could alter the personal status of its foreign nationals whether or not domiciled within Canada, under the cloak of foreign author-
ity. Certainly the Canadian Provinces desire to maintain sov-
ereignty over the personal affairs of its domiciliaries, and not to delegate such sovereignty to foreign nations through representa-
tives within the Provinces.

B. American View

American courts, by attempting to follow both the \textit{lex domicilii} and territorial jurisdiction principles, have distinguished the cases of nonjudicial divorces by foreign domiciliaries within the United States as to the place of \textit{origin} of the "actual divorce." The courts, as will be seen below, look to where the divorcing authority was exercised--either within the United States by a foreign functionary, or by a foreign official in the foreign country. Divorces are upheld in the latter, but not the former.

Three similar decisions contested the validity of divorces de-
creed by the King of Denmark to Danish domiciliaries residing in America who had applied for the divorces at the Danish Consulate in New York City.\textsuperscript{103} After admission of satisfactory proof that divorce by royal decree was valid under Danish law,\textsuperscript{104} the courts held the divorces valid because in each case the marital domicile was still in Denmark and the parties voluntarily sub-
mitted to the jurisdiction of Danish law.

In \textit{Shikoh v. Murff}\textsuperscript{105} a male Pakistani national, studying in the United States, procured a declaration of divorce from his wife, remaining in Pakistan, by application to the Spiritual Head and National Director of the Islamic Mission of America in Brook-
lyn, New York. The Islam official granted the divorce according to the laws of Islam and a copy was forwarded to the wife in

\begin{footnotesize}
\begin{footnotes}
\item[102.] [1955] Que. C.S. at 344.
\item[104.] \textit{See generally} \textit{Library of Congress, Divorce by Administrative Decree in Denmark} (1957).
\end{footnotes}
\end{footnotesize}
Pakistan. In petitioner’s subsequent application for naturalization, the court affirmed a finding that the divorce was invalid. Even though petitioner was a domiciliary of Pakistan, the court applied the principle of territorial jurisdiction and held that any divorce to be valid within the state must conform to the laws of New York.\textsuperscript{106} The Danish Royal decree cases were distinguished on the grounds that even though the Danish parties were “physically within the United States” the divorces were granted at the foreign jurisdiction of domicile.\textsuperscript{107} The Danish decrees were actually issued from Denmark, whereas here, the foreign official in New York provided the divorcing authority. Under these precedents, therefore, recognition of a foreign divorce by foreign domiciliaries while within this country depends upon the geographic origin of the authority that dissolved the parties’ married status.

\textit{Shikoh v. Murff} implies that an \textit{ex parte} proceeding of submission to foreign law as well as the bilateral proceedings in the Danish Royal decree cases will be upheld if the divorce properly originates from the foreign country. From the foregoing discussion\textsuperscript{108} and the Supreme Court holding in \textit{Williams v. North Carolina}\textsuperscript{109} that divorce jurisdiction may properly be based on the domicile of one party, this is the logical conclusion. One could expect, however, that a United States court would view with skepticism a foreigner procuring an easy foreign divorce from an American domiciled wife. The wife could voice the strong objection that in this type of \textit{ex parte} proceeding she was unable to contest the divorce and was completely at the mercy of the foreign law.\textsuperscript{110} Sympathies would certainly lie with the American wife, and a court may well disregard the legal precedents that logically answer this conflicts question and protect the interests of the wife by acknowledging her objections and hold the divorce invalid as violative of public policy.

Most fact variations involving foreign domiciliaries who procure a foreign divorce while within the United States can be resolved by ascertaining the origin of the divorce. In each case

\begin{itemize}
\item \textsuperscript{106} 257 F.2d at 306.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} See notes 31-34 supra, and accompanying text.
\item \textsuperscript{109} 317 U.S. 287 (1942); see note 15 supra.
\item \textsuperscript{110} Depending upon the circumstances in each case, objections like the following may also be raised by the wife: lack of proper notice; fraud on the part of the husband in both the marriage and divorce; failure to provide adequate maintenance, alimony and support allowances; and acquisition by the husband of an American domicile.
\end{itemize}
of this type two basic questions must be answered: (1) Is the party petitioning for the divorce subject to foreign jurisdiction by being a foreign domiciliary under the American test of domicile?\textsuperscript{111} (2) Was the divorce actually granted in the foreign nation or only by a foreign representative within an American state's jurisdiction?\textsuperscript{112} By answering these questions courts confronting future cases of this type will, as in Shikoh v. Murff, consider both the lex domicilii and territorial jurisdiction principles.

The English view, expressed in Har Shefi v. Har Shefi,\textsuperscript{113} that the lex domicilii principle is to control even if the divorcing ceremony is performed within the English courts' jurisdiction, is appealing. This is prompted by the just results reached through the application of the law of the domicile to divorce questions, wherever domiciliaries may be. Strictly applying lex domicilii as done in Har Shefi, however, has potential disadvantages. Allowing the law of the domicile to control, where the divorce was by a unilateral declaration within England's territorial jurisdiction, seems to conflict with the English belief that exclusive jurisdiction rests within its courts over divorce petitions, and that matrimonial relief should be granted only after a judicial hearing.\textsuperscript{114} England's granting authority to representatives of foreign nations to exercise extraterritorial jurisdiction over their domiciliaries while in England could have adverse consequences to the jurisdiction and sovereignty of the English court system. Under the rule established in Shikoh v. Murff, the competing policies of maintaining the jurisdictional sovereignty of the American divorce courts and providing consistent results with a minimum of hardship to the parties are both considered. As the Danish cases illustrate, American courts will uphold these divorces only when they can be justifiably regarded as emanating from a foreign jurisdiction. On the other hand, Shikoh v. Murff illustrates how a court's jurisdiction over the marital

\textsuperscript{111} Questions relating to domiciliaries of one foreign country obtaining a nonjudicial divorce under a legal system of a different foreign nation can be readily answered by the lex domicilii doctrine as discussed in notes 35-37 supra, and accompanying text.

\textsuperscript{112} Although this distinction seems somewhat insignificant, it should be readily recognizable in any divorce situation that arises, thus allowing future cases to align themselves "properly" as to whether the marriage dissolving factor was forthcoming from the foreign domicile or the American functionary. See 13 U. Miam. L. Rev. 240, 245 (1958).


\textsuperscript{114} It was recently suggested in reviewing the Har Shefi decision that the court there could beneficially have imposed territorial jurisdictional limitations on the forms of divorce issued within England's territory. Russ v. Russ, [1964] P. 315, 334-35 (C.A. 1962) (Davies, L.J.).
status of those within its territory is preserved by invalidating a divorce procured within the United States. Requiring a foreign domiciliary to obtain his divorce directly from his domicile, rather than from a functionary within the United States, is a minor hardship compared to the potential dissipation of the authority and sovereignty of the American courts over divorce cases should such foreign methods of divorce be openly allowed within United States territory.

VI. NONJUDICIAL DIVORCES BY AMERICAN INDIANS

A collateral set of nonjudicial divorce recognition issues concerns the domestic affairs of the American tribal Indians. The presence of autonomous Indian reservations within the states' territorial jurisdictions presents unusual conflicts between Indian and state law.115 Because the Indians were established inhabitants of the American continent before any state government was formed, the tribes are recognized as "distinct, independent, political communities"116 with powers of self-government, not through a delegation of powers from the federal government, but by reason of their original sovereignty.117 As such, the Indian tribes possess all the powers of a sovereign state subject only to the plenary powers of Congress granted in the Constitution.118 So long as the Indians live upon their tribal reservations they are not subject to the civil laws of the states and may regulate their internal affairs as independent nations.119


116. See F. Cohen, supra note 115, at 122-123. For a general discussion of government treatment of the American Indians, their rights, liberties, and restraints, both past and present, see a 12 part series beginning in Christian Science Monitor, March 2, 1968, at 1.


118. U.S. Const. art. I, § 8; see United States v. Kagama, 118 U.S. 375 (1886); Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); New York Indians, 72 U.S. (5 Wall.) 761 (1866); F. Cohen, supra note 115, at 123. Until 1871, the Indian nations were dealt with via treaties. See, e.g., Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1 (1831). Following the 1871 statutory prohibition of Indian treaties, 16 Stat. 566 (1871), the Indian nations have been treated as wards of the federal government, retaining their sovereignty under what has been called the "guardianship concept." Bartholomew, Recognition of Polygamous Marriages in America, 13 Int'l & Comp. L.Q. 1022, 1035 (1964).

In the specific area of domestic relations, many pagan beliefs of the tribes conflict with the American Judaic-Christian view of marriage and divorce. Nonceremonial polygamous marriages and informal divorces by agreement are common among many tribes.\textsuperscript{120} It has long been recognized that Indian marriages and divorces by tribal custom are acknowledged as valid by the federal and state governments.\textsuperscript{121} By dispensing with the territorial feature of federal and state courts’ jurisdiction, the Indian tribes are treated as autonomous foreign nations and the usual principles of comity are applied to determine the validity of Indian marriages and divorces.\textsuperscript{122} The \textit{lex domicilii} doctrine is consistently applied, for the Indian marriages and divorces will be recognized \textit{only} if the parties are domiciled within the recognized Indian reservations and thus subject to its laws. If the tribe has been dissolved, or its members are domiciled off the reservation territory, the tribal laws and customs no longer govern and the individual Indians are amenable to the laws of the appropriate state.\textsuperscript{123}

This conflicts problem has diminished in recent decades as many of the reservations have been formally or informally disbanded,\textsuperscript{124} and many of the Indians have been Christianized and acclimated to “white man’s society.”\textsuperscript{125} However, with no ex-

\begin{itemize}
\item \textsuperscript{120} Id. at 423–28.
\item \textsuperscript{121} See Morris v. Stockey, 170 F.2d 599 (10th Cir. 1949), cert. denied, 336 U.S. 914 (1949); Kunkel v. Barnett, 10 F.2d 804 (N.D. Okla. 1926), aff’d sub nom., 19 F.2d 804 (8th Cir.), cert. denied, 275 U.S. 563 (1927); Yakima Joe v. To-Is-Lap, 191 F. 516 (D. Ore. 1910); Wall v. Williamson, 8 Ala. 48 (1845); La Framboise v. Day, 136 Minn. 239, 161 N.W. 529 (1917); Earl v. Godley, 42 Minn. 361, 44 N.W. 254 (1890); Unussee v. McKinney, 133 Okla. 41, 270 P. 1096 (1928); cf. Act of May 2, 1890, ch. 182, § 38, 26 Stat. 81; 24 Am. Jur. 2d Divorce and Separation § 8 (1966); 27B C.J.S. Divorce § 334 (1959); Annot., 74 A.L.R. 1538 (1931).
\item \textsuperscript{122} Earl v. Godley, 42 Minn. 361, 362-63, 44 N.W. 254, 255 (1890); Morgan v. McGhee, 5 Humph. 13, 14 (Tenn. 1844); see Bartholomew, \textit{supra} note 118, at 1042.
\item \textsuperscript{123} Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376 (1862); Moore v. Wa-me-go, 72 Kan. 169, 83 P. 400 (1905); La Framboise v. Day, 136 Minn. 239, 161 N.W. 529 (1917); State v. Ta-cha-na-tah, 64 N.C. 614 (1870); \textit{In re Wo-gin-up’s Estate}, 57 Utah 29, 192 P. 267 (1920).
\item \textsuperscript{124} Nebraska has specifically legislated that Indian marriages and divorces by custom are invalid. \textit{Neb. Rsv. Stat.} §§ 42-401-407 (1943). From the foregoing discussion of Indian sovereignty, such a statute should be held unconstitutional by federal preemption if it were ever challenged by a Nebraskan Indian. Nebraska still has five organized tribes within its territory, so the statute someday could be challenged. Christian Science Monitor, March 2, 1968, map at 9.
\item \textsuperscript{125} See \textit{generally} Christian Science Monitor, 12 part series beginning March 2, 1968, at 1.
\end{itemize}
press authority to the contrary, one could still expect an Indian divorce between Indians domiciled within the reservation to be recognized as a valid change of personal status.

VII. CONCLUSION

Although divorce laws vary significantly among the nations, and both Americans and foreigners seek recognition of nonconforming divorce proceedings, American courts have developed logical and clear doctrines applicable to both judicial and nonjudicial divorce methods. The application of the *lex domicilii* and the territorial jurisdiction doctrines consistently resolve the unusual divorce situations heretofore discussed. The conclusions may be summarized as follows: (1) Nonjudicial divorces obtained outside the United States by foreign domiciliaries will be recognized as valid by American courts if such divorces are legally valid by the law of the domicile. (2) Nonjudicial divorces procured by Americans abroad, if available in any foreign nation, will only be recognized within the United States if at least one spouse was domiciled within the foreign nation and the divorce is not against the public policy of the recognizing forum. (3) No nonjudicial divorce performed within a state's jurisdiction by domiciliaries of that state will be recognized as valid. (4) Nonjudicial divorces by foreign domiciliaries obtained while within the United States may be recognized as valid if the act of dissolution emanated from the foreign nation. (5) Nonjudicial divorces of the American Indians will be recognized by treating the Indian reservations as foreign nations and utilizing the ordinary conflicts principles.

Use of the *lex domicilii* principle allows equal recognition of judicial and nonjudicial divorces if valid under the law of the domicile. As a result, the great majority of foreign divorces are recognized as valid, thus supporting the international law policy favoring comity and universal recognition of personal status. In addition, since the concept of *lex domicilii* is facilitated by requirements of intent to remain, attempts to avoid the laws of the state in which the party or parties intend to remain are eliminated. Finally, the *lex domicilii* principle guarantees the sovereignty of the state with the paramount interest in marital status, that is, the state where the party or parties intend to reside permanently.

126. See note 9 *supra*, and accompanying text.
127. A comparison of the various nations' conflicts laws as to di-
orce recognition was beyond the scope of this discussion. However, even the English principles—which have been used in this Note for purposes of comparison—being similar but not identical to those in the United States, show discrepancies and inconsistencies when applied to the nonjudicial divorce situations here discussed. Dr. Rabel, in comparing different divorce systems, maintains that the methods used abroad are not preferable to the strict territorial application of lex fori used by the American courts. See 1 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY pt. 4, at 493-96 (2d ed. 1958).