# External public policy, the incidental question properly so-called and the recognition of foreign divorce orders*

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"Das [Internationale Privatrecht] enthält keine allgemeine Vorschrift über die Beantwortung von Vorfragen. Das ist auch gut so ..." – Kurt Siehr[1]

## 1 *Introduction*

In this article, the case of *Phelan v Phelan*,[2] a decision of the Cape high court[3] in South Africa, is employed as point of reference to illustrate the influence public policy could have on the resolution of the incidental question properly so-called where it entails the recognition or non-recognition of a foreign divorce order. The main question was the inherent validity of a marriage concluded in Australia. The incidental question involved the recognition or non-recognition of a divorce order given by a court in the Dominican Republic in respect of the previous marriage of one of the parties to the Australian marriage.[4]

## 2 *The incidental question in private international law*

According to Sykes and Pryles, "[t]he incidental question ... arises in a situation where the ultimate or final question requiring solution involves a conflictual reference to the law of a particular country but the decision of that final question is dependent upon a primary or preliminary question which has to be determined".[5] The ultimate or final question is usually called the main question, while the primary question and preliminary question are synonymous with the incidental question.

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1 Siehr *Das Internationale Privatrecht der Schweiz* (2002) 581.

2 2007 1 SA 483 (C).

3 today the Western Cape high court. See s 1 of the Renaming of High Courts Act 30 of 2008.

4 See par 7 below. The main question therefore concerned a choice of law issue and the incidental question involved a matter of recognition. Not only in common-law countries but also in many civil-law systems similar scenarios are dealt with as incidental questions, irrespective of the fact that in some of the latter systems a (more or less strict) division exists between private international law and international civil procedural law (for instance, the division in German law between *Internationales Privatrecht* and *Internationales Zivilverfahrensrecht*). See, for instance, Fawcett, Carruthers and North (*Cheshire, North and Fawcett: Private International Law* (2008) 51; Kahn "Conflict of laws" in Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 579 608-609; Kropholler *Internationales Privatrecht* (2006) 228; Siehr (n 1) 581; and Strikwerda *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2008) 48.

5 Sykes and Pryles *Australian Private International Law* (1991) 228.



[ISSN 0257 – 7747] 

A straight-forward example[6] of an incidental question from the perspective of South African private international law could be the following. Ms X, who was domiciled in country A at the time of her death, left movable property in South Africa. She died intestate or perhaps did not provide for the goods in her will. According to the applicable Roman-Dutch conflicts rule in this regard, the law of the country of X's domicile at death determines who the intestate heirs of the movables will be.[7] The law of A will therefore apply to the main question of the intestate succession to the movables. Assume that, in terms of the law of A, only X's intra-marital children must inherit. The incidental question then entails the determination of who the intra-marital children are.

The incidental question[8] (*in casu*: who are the intra-marital children?) may be governed by any one of four legal systems:[9] (a) the internal *lex fori* (*in casu* internal South African law); (b) the legal system referred to by the private international law of the forum (South African conflicts law);[10] (c) the internal *lex causae* (the legal system applicable to the main question) (*in casu* the internal law of A); or (d) the legal system referred to by the private international law of the *lex causae* (the conflicts law of A).

## 3 Excursus: *Legitimacy in South African private international law*

Which legal system would apply in respect of legitimacy if South African private international law were to be employed? Roman-Dutch private international law referred this issue to the law of domicile of the father at the time of birth.[11] The rule may in the future be found to be unconstitutional, as being in conflict with the equality principle in section 9 of the Constitution of the Republic of South Africa.

6 Crawford and Carruthers *International Private Law in Scotland* (2006) 59: "This deeper mystery of the conflict of laws is most readily understood if set in narrative form."

7 See Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2003) 366-368; Kahn (n 4) 614-615; Neels "Private international law of succession in South Africa" 2005 *Yearbook of Private International Law* 183 186; and Schoeman and Roodt "South Africa" in Verschraegen (ed) *International Encyclopaedia of Laws – Private International Law* (2007) par 220.

8 namely the incidental question properly so-called. See par 5 on the incidental question not properly so-called.

9 See Gotlieb "The incidental question revisited – theory and practice in the conflict of laws" 1977 *ICLQ* 734 769 (reprinted in Simmonds (ed) *Contemporary Problems in the Conflict of Laws. Essays in Honour of John Humphrey Carlile Morris* (1978) 34). There may be more legal systems to choose from if the doctrine of *renvoi* is applied (Gotlieb). In South Africa, *renvoi* cannot be applied (a) in the context of the formal validity of wills (s *3bis* of the Wills Act 7 of 1953); and (b) where domicile is a connecting factor (s 4 of the Domicile Act 3 of 1992). The exclusions do not pertain to the *lex loci celebrationis*, which governed the main question in the *Phelan* case (n 2). For a critical discussion of the partial exclusion of *renvoi*, see Neels "Die gedeeltelike uitsluiting van *renvoi* in resente wetgewing" 1992 *TSAR* 739. Having the incidental question governed by a system other than the internal *lex causae* does not entail the application of *renvoi* as it is not the main question but a subsidiary question that is so referred. See Gotlieb 750 and Neels "Die onegte insidentele vraag in 'n internasionaal-erfregtelike geskil" 1993 *TSAR* 760 765.

10 See par 3.

11 Kahn "Jurisdiction and conflict of laws in the South African law of husband and wife" in Hahlo *The South African Law of Husband and Wife* (1975) 529 618 with reference to the old authorities.

 [ISSN 0257 – 7747]

1996 (discrimination on the basis of gender).[12] A possible solution is the application of the law of domicile of the child at the time of birth.[13] In terms of the Domicile Act 3 of 1992, a child is domiciled "at the place where [s]he is most closely connected".[14] If a child, in the normal course of events, has her/his home with one or both of its parents, a rebuttable presumption applies that the parental home constitutes the child's domicile.[15] But this suggestion is only viable in cases where the child is born on or after 1 August 1992 (the date on which the Domicile Act entered into force), as the common law provided that an intra-marital child follows the domicile of the father and an extra-marital child the domicile of the mother.[16] In cases where the child was born before 1 August 1992, Forsyth's proposal should be considered that legitimacy "be determined by the domicile of the parent whose relationship to the child is presently in question".[17]

## 4 *Proposed solutions to the incidental question*

Most authors seem to ignore the possibility of applying options (a) and (c) listed in par 2 and merely discuss the choice between approaches (b) and (d). Option (b) is then called the *lex fori* approach and option (d) is known as the *lex causae* approach.[18]

[12] The common-law rule that the law of the domicile of the husband at the time of the conclusion of the marriage governs the proprietary consequences of the marriage (see *Frankel's Estate v The Master* 1950 1 SA 220 (A); and *Sperling v Sperling* 1975 3 SA 707 (A)) will almost certainly be declared unconstitutional in future on the same basis (see, already, *Sadiku v Sadiku* case no 30498/06 (26 Jan 2007) (T) (unreported) per www.saflii.org, as discussed in Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*" 2008 *TSAR* 587). The rule is in conflict with the equality principle in s 9 of the constitution, as it discriminates on the basis of gender. See Neels "The revocation of wills in South African private international law" 2007 *ICLQ* 613 619-620; Schoeman "The connecting factor for proprietary consequences of marriage" 2001 *TSAR* 72, "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 *TSAR* 115 and "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 *IPRax* 65; and Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 330. The common-law rule also does not provide for same-sex marriages: *Fourie v Minister of Home Affairs* 2005 1 All SA 273 (SCA), 2005 3 BCLR 241 (SCA) par 124-125; *Minister of Home Affairs v Fourie (Doctors for Life International and other* amici curiae); *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) par 29 n 24 (also see par 70 n 80). (The decision of the supreme court of appeal changed the common-law definition of marriage to include same-sex relationships; this was confirmed by the decision of the constitutional court. Today the legal position is regulated by the Civil Union Act 17 of 2006.)

[13] See Neels (n 9 (1993)) 762-763.

[14] s 2(1). A child is a person under the age of 18 years, excluding persons who by law have the status of a major (s 2(3) *sv* "child").

[15] s 2(2).

[16] For the common-law rule, see Forsyth (n 7) 152

[17] Forsyth (n 7) 143-144.

[18] The *lex fori* approach is also known as independent reference or the conflicts theory and the *lex causae* approach as dependent reference or the incidental theory (Schmidt "The incidental question in private international law" in Académie de droit international CCXXXIII *Recueil des Cours Collected Courses of the Hague Academy of International Law* (1993) 305 320-321; Kropholler (n 4) 224-228; Siehr (n 1) 580-585; Strikwerda (n 4) 50-51; and Sykes and Pryles (n 5) 231). Schoeman and Roodt (n 7) par 64 further refer to the independent determination approach and the narrow reference approach (the *lex fori* approach) and the dependent application approach and the wide reference approach (the *lex causae* approach)

The authors in favour of the *lex fori* approach emphasize the public policy of the forum and the internal coherence of the law of the forum, while authors in favour of the *lex causae* believe that the legal system governing the main question should also apply to the incidental question, as it is most closely connected to the particular case and because international harmony of decision is the paramount consideration in this regard.[19] However, most contemporary common-law authors are of the opinion "that there can be no general or prior solution to the problem of the incidental question and each case or category of case must be considered in light of relevant policy objectives and practicalities of outcomes".[20]

Commonwealth case law on the topic is scarce and inconclusive.[21] Although not identified as such by the court,[22] the South African case *Seedat's Executors v The Master*[23] involved an incidental question. In effect, the court applied the *lex causae* to the preliminary question, namely the inherent validity of the marriage of the parents (the main question was the legitimacy of the children, which was then relevant for purposes of estate tax), but it is unclear whether the internal *lex causae* was applied or the legal system referred to by the conflicts rules of the *lex causae*, as both

19 For detailed discussions, see Gotlieb (n 9) 751-758, Schmidt (n 18) 368-386; and Wengler "The law applicable to preliminary (incidental) questions" in Lipstein (ed) *International Encyclopedia of Comparative Law* VII *Private International Law* (1987) 16 ff.

20 Tilbury, Devis and Opeskin *Conflict of Laws in Australia* (2002) 1014. See Collins (ed) I *Dicey, Morris and Collins on the Conflict of Laws* (2006) 53-54 and 59; Corbett "The Zambian trust: an opinion revisited" 1993 *TSAR* 1 13; Gotlieb (n 9) 758-760 and 797-798, McClean and Beevers *Morris The Conflict of Laws* (2005) 499; Fawcett, Carruthers and North (n 4) 53-54; Nygh *Conflict of Laws in Australia* (1991) 216; Schuz *A Modern Approach to the Incidental Question* (1997) especially ch 3; Walker I *Castel and Walker Canadian Conflict of Laws* (2005) par 3.4; and Walker *Halsbury's Laws of Canada Conflict of Laws* (2006) 433. *Cf* Crawford and Carruthers (n 6) 60-61 and Kahn-Freund *General Problems of Private International Law* (1976) 293. Anton and Beaumont *Private International Law. A Treatise from the Standpoint of Scots Law* (1990) 89, Kahn (n 4) 607-609 and Schmidt (n 18) 368-386 and 412 favour application of the *lex causae* with exceptions where the *lex fori* should be utilised. However, Schmidt admits that both approaches may lead to results that are absurd or unfair ((n 18) 318 and 381). *Cf* a 8 of the Inter-American Convention on General Rules of Private International Law (Montevideo 1979): "Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue." Clarkson and Hill *The Conflict of Laws* (2006) 481 and Sykes and Pryles (n 5) 228-234 favour application of the *lex fori* with exceptions where the *lex causae* should be employed. According to Siehr, if the *lex fori* and the *lex causae* approach lead to different answers, the incidental question must be governed by the legal system with which it has the closest connection – (n 1) 584-585. Also see Einhorn *Private International Law in Israel* (2009) 59-60; Strikwerda (n 4) 51 with reference to *Hoge Raad* 28 May 1965 NJ 1966 119, and Kropholler (n 4) 226-227. Another solution with the same effect as that found in the text, is the alternative application of certain legal systems: see Wengler (n 19) 11-14; *cf* Neels "Substantiewe geregtigheid, herverdeling en begunstiging in die internasionale familiereg" 2001 *TSAR* 692 704-709. The Australian Marriage Act, 1961, contains a provision (s 88F) which has the effect that the conflicts rule of the *lex fori* must be applied when the validity of a marriage features as an incidental question. The subsection is partially based on a 12 of the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978) (see Nygh (n 20) 346; and Sykes and Pryles (n 5) 228, 449 and 505). *Cf* Schmidt (n 18) 393-395. Some authors favour a general rule that status issues in the context of incidental questions must be governed by the *lex fori*: see Kropholler (n 4) 228-229; and Siehr (n 1) 583-584 and 585; *cf* Forsyth (n 7) 94-95.

21 See *eg* the discussions by Dicey, Morris and Collins (n 20) 52-59; Schmidt (n 18) 402-406 and 410-411, and Sykes and Pryles (n 5) 231-232. The same applies in respect of continental decisions. See Schmidt (n 18) 396-402, 407-412 for a discussion of German, Swiss and French case law.

22 The incidental question is often not identified by counsel and the courts. See *eg* Schuz (n 20) 4 on this phenomenon.

23 1917 AD 302.

 [ISSN 0257 - 7747]

were the law of India.[24] Application of the conflicts rule of the *lex fori* would have led to the same result.[25]

### 5 *The incidental question not properly so-called*

The incidental question not properly so-called differs from the incidental question discussed above (the incidental question properly so-called),[26] in that the choice is merely between the internal *lex fori* and the legal system referred to by the conflicts law of the forum. The incidental question not properly so-called features where the main question is governed by the law of the forum *qua lex causae*.[27] The same example as that in par 2 may be used, except that Ms X now left immovable property situated in South Africa. According to the applicable South African conflicts rule, the main question is governed by the *lex situs* (*in casu* South African law).[28]

According to Corbett CJ, in an academic contribution, the conflicts law of the forum must be applied in respect of the incidental question not properly so-called, "unless there are cogent considerations arising from the interpretation of the rule of law governing the main question or from policy which impel a reference to the domestic law".[29] However, the court in the South African decision *Dhansay v Davids*,[30] which was not aware of the underlying phenomenon of the incidental question,[31] applied the internal *lex fori*, while the relevant policy considerations

[24] See Bennett "Cumulation and gap: are they systemic defects in the conflict of laws?" 1988 *SALJ* 444 454-456; and Neels ((n 9 (1993)) 762-763). Indian private international law seems to apply the *lex loci celebrationis* (the law of the country where the marriage was concluded) to both material and formal validity of marriage: see Diwan and Diwan *Private International Law: Indian and English* (1998) 265-266 and 274. The marriage *in casu* was concluded in India. Internal Indian law has different rules in this regard for the various religious groups, as Hindus, Muslims, Christians and Jews, but there is also the possibility of concluding a "civil marriage" between any two persons (of opposite sex) irrespective of religious affiliation

[25] South African private international law also refers both substantive and formal validity of a marriage to the *lex loci celebrationis*. See *eg* Forsyth (n 7) 263-265; Kahn (n 11) 585-589; and Schoeman and Roodt (n 7) par 168-170.

[26] Fawcett, Carruthers and North (n 4) 52 use the term "an incidental question properly so-called" and Corbett (n 20) 14, in response, coined the term "an incidental question not properly so-called". The incidental question properly so-called is also known as "a true incidental question" (Gotlieb (n 9) 764) or "the incidental question proper" (Sykes and Pryles (n 5) 230). The present author proposed the use in Afrikaans of the terms "egte insidentele vraag" and "onegte insidentele vraag" respectively – Neels (n 9 (1993)) 760-761.

[27] See Corbett (n 20) 14; Forsyth (n 7) 94 n 141; Gotlieb (n 9) 764-769; and Neels (n 9 (1993)) 761. Wengler (n 19) makes the same distinction without using this terminology: see 10-14 and 16-28.

[28] See the sources in n 7

[29] Corbett (n 20) 14. Also see Neels (n 9 (1993)) 763-765

[30] 1991 4 SA 200 (C). The deceased died intestate and left a half undivided share in immovable property in South Africa. The other half share was held by his brother. At the time of the birth of his children, the deceased was probably domiciled in India. He was married according to Islamic rites; the marriage was valid in terms of Indian law but not in terms of South African law. The children were therefore intra-marital in terms of Indian law; in terms of internal South African law at that stage, the children were extra-marital and could not inherit intestate from their father but, as South African private international law referred to the law of the domicile of the father at the time of birth (see n 11), they would have been held to be intra-marital if the South African reference rule were applied.

[31] See n 22.

clearly indicated application of the legal system referred to by the private international law rule.[32] The South African authors are therefore unanimous in their criticism of the decision.[33]

### 6 *The role of public policy (part 1)*

Of course, it is possible that (part of) the content of the legal system indicated to govern either the main or the incidental question may be excluded on the basis of public policy. Constitutional values will play an important role in this regard.

In the examples in paragraphs 2 and 5, the legal system governing the *main question* provided that only the intra-marital children of the intestate deceased would inherit. But for the purposes of internal South African law, it was decided by the constitutional court that the indigenous-law succession rule in favour of first-born males (legitimate male primogeniture) is unconstitutional as it discriminates on the

[32] The main question was governed by the *lex situs* (see the sources in n 7) and the court had to exercise a choice between internal South African law and the law referred to by South African private international law (the law of India) to govern the incidental question of the legitimacy of the deceased's children. It is submitted that Indian law should have been applied and the children held to be intra-marital and able to inherit. The following reasons may be advanced: (1) If a choice is available, a court should decide that children are intra-marital rather than extra-marital. (2) The choice of the court *in casu* led to the situation that the deceased's children were extra-marital for the purposes of the deceased's immovable property but could have been intra-marital for the purposes of the movables owned by the deceased (as the relevant legal system would then be the *lex ultimi domicilii* (see the text at n 7) which might have been the law of India – this is not clear on the facts as reported). (3) Although not yet applicable to the situation at hand, internal South African law had at the time of the decision already been changed to make provision for the unrestricted intestate succession by extra-marital children (see n 43). (4) The effect of the decision was that the deceased's own children would not inherit, as they were born of an Islamic marriage and therefore extra-marital, but the wife and children of his brother would inherit notwithstanding the fact that (a) the deceased and his brother were also born of an Islamic marriage (and therefore both extra-marital) and (b) the deceased's brother was likewise married in terms of Islamic law only (and his children therefore extra-marital). (The brother died 13 years later. It seems that the first deceased's estate was never properly finalized till after the death of his brother.) The deceased's brother could inherit intestate from him, as they had the same mother (extra-marital children could inherit intestate from their mothers and their relatives but not from their fathers and their relatives). The brother's wife and children inherited due to the testamentary bequest of the immovable property to them by their husband and father. See Neels (n 9 (1993)) 764-765

[33] See Forsyth (n 7) 93-94 n 141 and 367 (with n 180); Kahn "Conflict of laws" 1991 *Annual Survey of South African Law* 580 590; and Neels (n 9 (1993)). The court merely refers to *Doe d Birtwhistle v Vardill* (1835) 2 Cl & Fin 571 and *Doe d Birtwhistle v Vardill* (1840) 7 Cl & Fin 895 as authority for the decision. This prompts Kahn to exclaim: "What Berman J in fact held in finding that the children of [the deceased] were illegitimate was that South African domestic law applied, not South African conflict of laws. Why should that be? Because of some indefensible and outmoded decisions of the courts of England?" (590). The rule in the *Birtwhistle* case "gradually whittled away" and then ceased to have any effect in the UK as from 1976 (see Collins (ed) II *Dicey, Morris and Collins on the Conflict of Laws* (2006) 1068-1069), whilst the *Dhansay* case was decided only in 1991 (although the deceased died in 1964). The court in the *Dhansay* case also refers to the *Seedat* decision (n 23) but Innes CJ, in an *obiter dictum*, leaves the relevant question open and seems to suggest that legitimacy must be determined by the law of domicile of origin in respect of both movables and immovables (see the *Seedat* decision 311)

 [ISSN 0257 – 7747]

basis of gender and birth (legitimacy) and infringes on the right to dignity.[34] Intestate succession of all individuals (irrespective of ethnic origin or religion)[35] is today governed by the Intestate Succession Act 81 of 1987,[36] which is primarily based on Roman-Dutch law.[37]

However, for the purposes of private international law, one has to distinguish between rules of foreign law that are merely in conflict with internal public policy and those that patently or manifestly infringe public policy: only the latter will be regarded as being in conflict with external public policy and as such excluded in the context of private international law.[38] The South African courts still have to decide whether the non-justifiable[39] violation of a fundamental right in the South African constitution[40] would automatically infringe public policy in the private-international sphere.[41] *Prima facie* the bill of rights is also applicable to foreign law that must be

34 *Bhe v Magistrate Khayelitsha (Commission for Gender Equality as* amicus curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC). S 9(3) of the constitution prohibits unfair discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. S 10 reads as follows: "Everyone has inherent dignity and the right to have their dignity respected and protected." The court did not express an opinion on the question whether the rule also discriminates on the basis of order of birth (par 94) or age, but this seems to be self-evident. The court also found that s 23 of the Black Administration Act 38 of 1927 and the regulations issued thereunder, together with s 1(4)(*b*) of the Intestate Succession Act 81 of 1987, were unconstitutional as they discriminated on the basis of race and infringed the right to dignity (a person's race indicated which succession regime was applicable). The order should only have found the phrase "or in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply" unconstitutional, as the remainder of s 1(4)(b) deals with partial intestate succession. The schedule to the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 revives that part of s 1(4)(*b*) which was declared unconstitutional by mistake.

35 But see n 97.

36 The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 confirms the decision in the *Bhe* case (n 34) and clarifies the legal position of persons otherwise subject to customary family law.

37 Spousal inheritance, which did not form part of Roman-Dutch law, was first introduced by the Succession Act 13 of 1934. See Corbett, Hahlo, Hofmeyr and Kahn (n 4) 563-566 on the history of Western intestate succession law in South Africa.

38 See Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 161-162; and Neels "Geoorloofdheid van 'n kontrak en openbare beleid in die internasionale privaatreg" 1991 *TSAR* 694 696; Institute of International Law (rapporteur Gannage) *Equality of Treatment of the Law of the Forum and of Foreign Law* (Santiago de Compostella 1989) *per* www.idi-iil.org (23.8.2010) par II(d): "It is recommended that the applicable foreign law shall only be set aside if its effects are manifestly contrary to public policy"; *cf* Mills "The dimensions of public policy in private international law" 2008 *Journal of Private International Law* 201 213.

39 in terms of s 36(1) of the constitution: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . ."

40 in ch 2 of the constitution (the bill of rights).

41 The content of the foreign legal system *per se* must manifestly be in conflict with public policy. The foreign law should not be compared with the arrangement in the internal *lex fori*. It would, for instance, not be relevant that a surviving spouse inherits the whole estate (in terms of the foreign law) and not the spouse and the children (which would be the case in terms of the *lex fori*) or *vice versa*. Likewise, it would not be relevant that one must be at least 18 years old to execute a will in terms of the foreign legal system but only 16 in terms of South African law (s 4 of the Wills Act 7 of 1953) (but it may be relevant that there exists a distinction between females and males in the foreign legal system in this regard). This has to be the position lest the whole norm complex of private international law be unconstitutional. It is suggested that a system of conflict of laws is a necessity in "an open and democratic society based on human dignity, equality and freedom" (s 36(1) of the constitution). See Neels (n 20) 702 and "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 336 344, and *Bell v Bell* 1991 4 SA 195 (W) 198-199

applied in terms of South African private international law, as section 8(1) of the constitution determines that "[t]he Bill of Rights applies to all law".[42] An affirmative answer to the question posed would automatically exclude the full application of the (intestate) succession arrangements in many foreign legal systems which are based on, for instance, indigenous African or traditional Islamic law.[43] However, if it were to be found that no *direct* link exists between constitutional values and external public policy, the exclusion or application of the foreign law may depend on the circumstances of the individual case.

In this regard it may be useful to refer to Mills' model of the role of public policy in private international law.[44] The author identifies three guidelines or principles that may influence the decision on whether foreign law must be excluded on the basis of external public policy. These are: the degree of proximity between the dispute and the forum;[45] the degree of relativity or absoluteness of the forum's policy norm[46] that is being infringed by the foreign law; and the seriousness of the breach of that norm by the foreign law.[47]

These principles could be applied as follows in the current context. If (in a South African case) all the intestate beneficiaries are habitually resident in country A (weak proximity to the forum) and the law of A[48] differentiates between the sexes

[42] The constitution elsewhere indeed refers to international and foreign law (s 39(1) and s 231-233). Although foreign law is only referred to in a comparative sense (s 39(1)), it may be assumed that the constitutional assembly also had foreign law that is applicable in terms of South African private international law in mind when it accepted the formulation in s 8(1). See, in general, Thomashausen "Private international law and human rights" (paper presented at the University of Johannesburg on 18 January 2005, unpublished).

[43] Indigenous African law of succession discriminates on the basis of *eg* gender, birth (legitimacy and order of birth) and perhaps age, and traditional Islamic law of succession discriminates on the basis of *eg* gender, birth (legitimacy) and religion. Traditional Hindu and Jewish law of succession also discriminated on various bases. See, in general, Bekker, Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 91-111, 155-173 and 269-308. For more detail on the indigenous South African law of succession, see Bennett *Customary Law in South Africa* (2004) 332-369 (also see the text at n 37). For further detail on the Islamic law of succession, see Bakhtiar *Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools* (1996) 285-350; Hallaq *Sharī'a: Theory, Practice, Transformations* (2009) 289-295; Hussain *Islamic Law and Society: An Introduction* (1999) 103-113; Khan *et al Encyclopaedia of Islamic Law* IV *Civil Law in Islam* (2006) 1-125; Nasir *The Islamic Law of Personal Status* (2002) 197-242; Omar *The Islamic Law of Succession and its Application in South Africa* (1988) 27-100, and Pearl and Menski *Muslim Family Law* (1998) 439-487. Roman-Dutch law discriminated on the basis of legitimacy, as extramarital children could not inherit from their fathers. The situation was rectified in South Africa by s 1(2) of the Intestate Succession Act 81 of 1987 and for Namibia in *Frans v Paschke* PI 1548/2005 2007 NAHC 49 (11 July 2007) per www.saflii.org (23.8.2010), where the high court declared the common-law rule unconstitutional.

[44] Mills (n 38).

[45] Also see Lagarde "Public policy" in Lipstein (ed) *International Encyclopedia of Comparative Law* XI *Private International Law* (1994) 22-38.

[46] including locally accepted norms based on *eg* international human rights law.

[47] See especially Mills (n 38) 210-218: "Public policy should be more likely to be invoked if there is a strong connection with the forum, the norm is shared or absolute, and the breach is serious. Public policy should be less likely to be invoked if the forum has little interest in the dispute, the norm is more relative, and the breach is minor" (219). Also see De Boer "Unwelcome foreign law: public policy and other means to protect the fundamental values and public interests of the European Community" in Malatesta, Bariatti and Pocar (eds) *The External Dimension of EC Private International Law in Family and Succession Matters* (2008) 295 298-299, 315-316 and 327.

[48] for instance, any of the Muslim countries of the Middle East (excluding Turkey). According to the traditional Islamic law rule that is applicable in these countries, a son inherits double the intestate share that a daughter would acquire. See *eg* Mallat *Introduction to Middle Eastern Law* (2007) 399-400.

in this regard on the basis of, for example, Islamic legal principles (serious breach of the equality principle in section 9 of the constitution) but this differentiation is partly justifiable in terms of section 36 of the constitution (relativity of the norm) by the duty of males in Islamic law to provide for the maintenance of the female members of the family[49] (if enforceable in terms of the law of A), it could perhaps be argued that the law of A must be applied.[50]

If at least one female beneficiary is resident in South Africa[51] (higher degree of proximity to the forum), the relevant rule in the law of A cannot be applied, as the fundamental breach of section 9 of the constitution cannot be justified by the male duty of maintenance in Islamic law, especially[52] as that duty would not be enforceable in South Africa (the provision of maintenance is governed by the *lex fori*,[53] which does not provide for Islamic legal principles in this regard). It could be added here that a similar argument based on the maintenance obligation of the traditional successor in indigenous law *vis-à-vis* the dependants and family members of the deceased was in any event expressly rejected by the constitutional court for the purposes of (internal) customary law,[54] even though indigenous maintenance obligations are, at least in theory,[55] enforceable in terms of the *lex fori*.

Even where none of the beneficiaries is domiciled in South Africa (weak proximity to the forum) but the foreign discrimination is not partially justifiable by, for instance, a maintenance duty, the (relevant rule of the) foreign law cannot be applied (for instance, where the foreign law discriminates on the basis of religion),[56] as this would be a serious or fundamental breach of the strict (although never absolute) constitutional norm of equality.[57]

It is submitted that where the foreign law cannot be applied in its totality, it should be applied as far as possible but without giving effect to its discriminatory provisions.[58] If the relevant foreign intestate succession law, for instance, determines that the deceased's husband must inherit 40% of the estate, the son 30% and the two daughters 15% each (one of which is resident and domiciled in South Africa), the estate must be divided as follows: 40% to the husband and 20% to each of the children.

In similar vein, the content of a foreign law (or parts thereof) chosen to govern the *incidental* question may be excluded, for instance the rules relating to the inherent

[49] Contrast Bekker, Rautenbach and Goolam (eds) (n 43) 169-170 with 305-306.

[50] But see Institute of International Law (rapporteur Lagarde) "Cultural Differences and *ordre public*" in *Family Private International Law* (2005) *per* www.idi-iil.org (23.8.2010) par E, according to which the location of assets in the forum state may be a sufficient indication of proximity: "States may invoke public policy against foreign succession laws containing discrimination based on gender or religion when assets part of the deceased's estate were located in the forum State at the time of death"; and De Boer (n 47) 298-299 and 315.

[51] The same should apply if at least one female beneficiary is resident in a country the law of which adheres to the equality principle.

[52] but not exclusively: see Bekker, Rautenbach and Goolam (eds) (n 43) 169-170.

[53] See the references in Neels "Classification as an argumentative device in international family law" 2003 *SALJ* 883 887.

[54] the *Bhe* case (n 34) par 80 and 96.

[55] See the *Bhe* case (n 34) par 80 and 96

[56] *eg* through the Islamic-law rule that a non-Muslim cannot inherit on an intestate basis from a Muslim and *vice versa*. See *eg* Nasir (n 43) 206.

[57] s 9 of the constitution.

[58] If this is not feasible in the particular case, the *lex fori* will have to be applied or perhaps the law of the state which "has the next greatest interest in governing the dispute" (Mills (n 38) 212, see also 208).

validity of a marriage in a succession dispute.[59] A court could in many instances avoid this scenario by choosing one of the other legal systems that are available to govern the incidental question,[60] for example the internal *lex causae* rather than the legal system referred to by the conflicts law of the *lex causae*, or the legal system referred to by the forum's private international law rule rather than the legal system referred to by the conflicts law of the *lex causae*.

But public policy not only has a mere negative function (the exclusion of foreign law); it may also play a positive role, both in respect of the main and the incidental question – this will be discussed in paragraph 9 below.

## 7 *The* Phelan *decision*

In the example of the incidental question properly so-called in paragraph 2 above, the choice is between four different legal systems. However, where the incidental question properly so-called involves the recognition of a foreign court order, the choice is between the conflicts rule (more specifically, the recognition rule) of the *lex fori* and the private-international rule (the recognition rule) of the *lex causae*.[61] This was the scenario in the *Phelan* case.[62]

The plaintiff (Ms Karen Therese Phelan) instituted action against the defendant (Mr Paschal Mary Phelan) for divorce, custody of three children and maintenance for herself and the children,[63] but the defendant denied that the parties were legally married.[64] Cleaver J helpfully set out the relevant facts as follows:

> "The plaintiff was previously married to Paul Sweeney in Italy and the defendant was previously married to Marie Phelan, also in Italy. Defendant and Marie Phelan were Irish citizens and domiciled in Ireland. In August 1993 the plaintiff obtained a divorce from Paul Sweeney in the Dominican Republic. The relationship between the defendant and Marie Phelan broke down and the defendant and plaintiff began a relationship. At the time divorce was not recognised in Ireland. The defendant then commenced proceedings against his wife Marie Phelan in the Dominican Republic and obtained a divorce from her in that country on 16 April 1996. Thereafter the plaintiff and the defendant underwent a ceremony of marriage in Australia on 29 June 1996 and three boys, now aged eight and six, were born from this union. The youngest two are twins. The ordinary residence of the plaintiff and the defendant at the time of the commencement of their relationship, the time of their seeking divorces in the Dominican Republic and at the time of the ceremony of marriage which the parties underwent in Australia, was the Republic of Ireland."[65]

The inherent validity of the Australian marriage had to be determined with reference to the *lex loci celebrationis* (the law of the place where the marriage was concluded): the law of New South Wales, Australia.[66] The validity of the marriage, naturally, depended on the validity of the Dominican divorce orders.[67] No finding was made in

[59] In the *Seedat* case (n 23), the inherent validity of the marriage was the incidental question in a dispute about estate duty. See the text at n 22-25.
[60] See the legal systems listed in par 2 above.
[61] In the case of the incidental question not properly so-called, the choice is also between two legal systems rather than four; see par 5 above.
[62] (n 2).
[63] (n 2) par 1.
[64] (n 2) par 2.
[65] (n 2) par 4-5.
[66] (n 2) par 6. The parties agreed that the law of New South Wales applied and the judge does not refer to any authority but this is indeed the Roman-Dutch conflicts rule for both the formal and the inherent validity of a marriage. See the sources in n 25.
[67] See (n 2) par 8.

 [ISSN 0257 – 7747]

respect of the plaintiff's Dominican divorce.[68] The validity of the defendant's divorce in the Dominican Republic had to be determined, so the court decided, with reference to Australian private international law.[69] The judge did not identify the underlying problem as an incidental question,[70] but in deciding that the substantive validity of the marriage was to be determined by the Australian rules on the recognition of foreign divorces he in fact chose the approach listed under (d) in paragraph 2: application of the legal system indicated by the reference rules of the *lex causae*.

The court continued to apply the recognition rules of Australian private international law[71] and found that the Dominican divorce of the defendant was not recognisable under Australian law. The divorce did not comply with the requirements for recognition in section 104(3) of the Australian Family Law Act, 1975: the parties were at no relevant stage ordinarily resident or domiciled in the Dominican Republic and they were citizens of Ireland. The divorce also did not comply with the common-law criteria of reciprocity or a real and substantial connection.[72] The court therefore found that the subsequent marriage in Australia was invalid.[73]

## 8 *The recognition of foreign divorce orders in South African private international law*

What would the position have been if the judge had *in casu* chosen the *lex fori* approach? Section 13 of the South African Divorce Act 70 of 1979 makes provision for the recognition of a divorce order by a foreign court if either party to the marriage was domiciled in the foreign jurisdiction at the time of the divorce (whether according to South African law or according to the law of that country);[74] if one of the parties was ordinarily resident in the foreign jurisdiction at the time of the divorce; or if one of the parties was a national of the foreign state at the time of the divorce.

The divorce in the Dominican Republic could clearly not have been recognised in terms of section 13 of the Divorce Act, as the parties were neither domiciled nor resident there in terms of South African law, nor was either party a citizen of that country; and, as the parties never set foot in the Dominican Republic,[75] it is also highly unlikely that they were domiciled there in terms of Dominican law.

[68] This was not necessary, as the marriage concluded in New South Wales would also have been invalid in terms of Australian law if one of the parties was still married at the time.

[69] See (n 2) par 9-19.

[70] See n 22.

[71] See, in general, Nygh (n 20) 365-379; Sykes and Pryles (n 5) 460-485

[72] S 104(5) of the act retains the common-law grounds. There was no substantial connection of the parties to the Dominican Republic: "[N]either the defendant nor Marie Phelan ever set foot in the Dominican Republic" ((n 2) par 9). See the discussion of English and Australian case law in par 11-18 of the decision (n 2).

[73] (n 2) par 19. If South African law were to be applicable to the main question, the court may have found that the parties concluded a putative marriage. See on the proprietary and other consequences of a putative marriage Hahlo *The South African Law of Husband and Wife* (1985) 111-116 and Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 328-329 n 5

[74] This is an exception to the rule that the content of a connecting factor must be determined by the *lex fori* (see *Ex parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); and *Chinatex Oriental Trading Co v Erskine* 1998 4 SA 1087 (C) 1093H). The other exception is citizenship, which has to be determined by the law of the alleged nationality: see Forsyth (n 7) 11, and Schoeman and Roodt (n 7) par 24.

[75] (n 2) par 9.

Unlike in Australia[76] and Canada,[77] the South African legislature did not expressly retain the common-law grounds for the recognition of foreign divorce orders.[78] But in terms of the South African law of interpretation, if an act does not expressly or by necessary implication revoke the common law, it is still available for application.[79] The only grounds for recognition previously accepted by the South African courts were (a) domicile; and (b) the fact that the divorce order would have been recognized by the court of domicile.[80] The second one of these has not been included in section 13 of the Divorce Act and could still be applicable as a common-law ground.[81] In principle it would also be open for the courts to further develop the common-law grounds,[82] but Forsyth suggests that "given the liberality of s[ection] 13 judicial boldness in this area seems neither necessary nor desirable".[83]

Even application of the test of a real and substantial connection of either of the parties with the country from which the divorce order proceeded,[84] as recognised in Australian[85] and Canadian law,[86] would not have been to the advantage of the plaintiff *in casu* as the parties had no connection whatsoever with the Dominican Republic. The judge in the *Phelan* case indeed reached this conclusion when he applied the real and substantial connection test under Australian private international law.[87]

However, it is submitted that the *prima facie* impossibility of recognising the Dominican divorce in both Australian and South African private international law does not conclude the matter. At this stage, it is necessary to return to the issue of public policy, more specifically its positive function.

## 9 *The role of public policy (part 2)*

Public policy has both a negative and a positive function in private international law.[88] For instance, a contract, although inherently valid in terms of its proper law,

76 See Nygh (n 20) 370.

77 See Walker (n 20 (2005)) par 17.2.a, Walker (n 20 (2006)) 595.

78 In the United Kingdom, the common-law grounds were expressly abolished. See Dicey, Morris and Collins (n 33) 891.

79 Steyn and Van Tonder *Die Uitleg van Wette* (1981) 97-100.

80 *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 31G-32H. *Cf* the position in the Irish conflict of laws: Shatter *Shatter's Family Law* (2000) 411-412.

81 unless this is today perhaps excluded as a form of *renvoi* under s 4 of the Domicile Act (see n 9).

82 Also see s 173 of the constitution

83 Forsyth (n 7) 419. But see the proposal in par 11 below

84 Acceptance of this test may lead to a great deal of uncertainty, which may be unacceptable in a commercial context. See, for instance, the discussion of Canadian case law in Blom "Private international law in a globalizing age: the quiet Canadian revolution" 2002 *Yearbook of Private International Law* (2002) 83 94-95. Also see Black "Canada and the US contemplate changes to foreign-judgment enforcement" 2007 *Journal of Private International Law* 1; Emanuelli "Recognition and enforcement of foreign judgments in Quebec" 2007 *Yearbook of Private International Law* 343; and Pitel "Enforcement of foreign non-monetary judgments in Canada (and beyond)" 2007 *Journal of Private International Law* 241.

85 See Nygh (n 20) 371-372. For further grounds of common-law jurisdiction, see Sykes and Pryles (n 5) 466-471.

86 In Canada, a foreign divorce order is also recognized if it is so acknowledged in a forum with which one of the parties has a real and substantial connection and, further, if the Canadian courts would have exercised jurisdiction in a similar case. See Walker (n 20 (2005)) par 17.2.a; and Walker (n 20 (2006)) 595.

87 (n 2) par 14 and 15 read together.

88 The positive function of public policy in private international law in the sense discussed hereinafter is not identical with the doctrine of laws of immediate application or overriding mandatory rules; but see De Boer (n 47) 296 and Strikwerda (n 4) 54-55. For instance, the agreement between the parties intended in the text at n 91 would also not have been a valid marriage in terms of the *lex fori*.

will not be enforced if it is manifestly in conflict with the public policy of the forum (negative function). On the other hand, a contract which is invalid in terms of its proper law may still be enforced if its non-enforcement would manifestly infringe the forum's public policy (positive function).[89]

The same applies in international family law. The negative function of public policy in this context is well known: for instance, a marriage, although substantively valid in terms of the law applicable in this regard (in South Africa: the *lex loci celebrationis*),[90] will not be recognised if it is patently in conflict with the public policy of the forum.

The positive function of public policy in this context is illustrated by the common-law recognition in specific circumstances of a marriage that does not comply with the formal or substantive requirements of the applicable legal system. For instance, if there is, perhaps due to war or natural disaster, no opportunity of getting married before the relevant authorities, or if there is no possibility of concluding a marriage that is not potentially polygamous in terms of the legal system governing substantive validity, the mere agreement by the parties to conclude a marriage may be recognised as such.[91] Informal marriage agreements concluded contrary to the widespread prohibition in the Muslim world against the marriage of a Muslim woman and a non-Muslim man[92] should on the same basis be recognised as marriages. The positive function of public policy may also be traced in a proposal of the South African Law Reform Commission in the context of the proposed recognition of Muslim marriages.

Although internal South African law provides for indigenous polygynous marriages,[93] Muslim marriages *per se* are not (yet) recognized. The same applies to all purely religious marriages that are not concluded in terms of the Marriage Act 25 of 1961.[94] It should be mentioned here that many marriages between Muslims and between Hindus in South Africa are indeed concluded in terms of the Marriage Act but that this act provides only for monogamous marriages. Nevertheless, a spouse under, for example, a Muslim or a Hindu marriage that is not concluded in terms of the Marriage Act still qualifies as the "surviving spouse" and the "survivor" for the purposes of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 respectively. This applies to both *de facto* monogamous

[89] See *eg* Neels (n 38) with reference to UK case law. As Forsyth suggested at the conference at the University of Johannesburg on 8 Sep 2009, where this paper was read, the positive function of public policy could perhaps also provide a justification for the Zimbabwean decision of *Steinberg v Cosmopolitan National Bank of Chicago* 1973 4 SA 564 (RA) (the case of the fugitive from justice in the context of the recognition and enforcement of foreign court orders; also see the *Chinatex* case (n 74) 1095B). The decision was previously criticized by, for instance, Forsyth (n 7) 406-407 and Schulze *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (2005) 24-25.

[90] See n 25.

[91] See Dicey, Morris and Collins (n 33) 797-802; Diwan and Diwan (n 24) 268-270; Forsyth (n 7) 267-269; Kahn (n 11) 593-594; Nygh (n 20) 352-354; Walker (n 20 (2005)) par 16.3.a; and Walker (n 20 (2006)) 577. *Cf* Mills (n 38) 234-235. Contrast *eg* the *koreva* form of marriage in India where a man and woman agree to live as husband and wife and then indeed live together as such (Diwan and Diwan (n 24) 246 n 74 and 272 with n 246). In that case the marriage without any formalities is indeed valid in terms of the *lex loci celebrationis*. *Cf Carolis de Silva v Tim Kim* (1904) 9 SLLR 8 as referred to by Hickling and Wu Min Aun *Conflict of Laws in Malaysia* (1995) 116.

[92] See Alami and Hinchcliffe *Islamic Marriage and Divorce Laws of the Arab World* (1996) 15, 44, 70, 87, 119, 155, 184 and 254; Hussain (n 43) 61 and 63, Mallat (n 48) 357; Nasir (n 43) 69-70; and Pearl and Menski (n 43) 129, 146-147 and 165. *Cf* Diwan and Diwan (n 24) 247-248 (Muslim personal law in India).

[93] Recognition of Customary Marriages Act 120 of 1998.

[94] See *eg* on Hindu marriages *Singh v Ramparsad* 2007 3 SA 445 (D).

and *de facto* polygynous marriages.[95] The issue of full recognition of Muslim marriages is still under investigation by the South African Law Reform Commission.[96]

When perhaps recognised in future,[97] a problem may arise similar to the one discussed above. Assume that the parties conclude an unrecognised Muslim marriage in a foreign country, whether they are domiciled in that country, in South Africa or elsewhere. The marriage would have been valid under internal South African law but can in principle not be recognized because South African private international law refers inherent validity to the *lex loci celebrationis*.[98] The present author made the Law Reform Commission aware of the problem[99] and they came up with clause 20 in the Draft Muslim Marriages Bill of 2003 to address the issue: "In the event of a dispute relating to whether or not a Muslim marriage celebrated[100] in a foreign country is recognised as a valid Muslim marriage under this Act,[101] such dispute shall be determined by the court having regard to all relevant factors, including the principles of conflict of laws."[102]

The clause in effect provides for an exception to the *lex loci celebrationis* rule as manifestation of the positive function of public policy in private international law. A court could probably have reached the same result using the common-law principle in this regard but the clause is helpful as there is no relevant South African case law available.

[95] See *Daniels v Campbell* 2004 5 SA 331 (CC), 2003 9 BCLR 969 (CC) (monogamous Muslim marriage; in respect of both the Intestate Succession Act and the Maintenance of Surviving Spouses Act); *Hassam v Jacobs* 2008 4 All SA 350 (C) (polygynous Muslim marriage; in respect of both the Intestate Succession Act and the Maintenance of Surviving Spouses Act; decision in respect of the Intestate Succession Act referred to the constitutional court for confirmation); *Govender v Ragavayah* 2009 3 SA 178 (D) (monogamous Hindu marriage; in respect of the Intestate Succession Act); *Hassam v Jacobs* 2009 5 SA 572 (CC), 2009 11 BCLR 1148 (CC) (polygynous Muslim marriage; in respect of both the Intestate Succession Act and the Maintenance of Surviving Spouses Act); and Abrahams-Fayker "Polygamous Muslim marriages" 2008/10 *De Rebus* 42. Also see *Rylands v Edros* 1997 2 SA 690 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); and *Kahn v Kahn* 2005 2 SA 272 (T).

[96] See South African Law Reform Commission *Islamic Marriages and Related Matters* (Report, Project 59 RP 210/2003) (2003). Also see the Commission on Gender Equality's Recognition of Religious Marriages Proposed Draft Bill of 2005 (unpublished).

[97] The constitution makes provision for legislation recognising religious personal and family law, which must be consistent with the other provisions of the constitution (s 15(3)). In the *Bhe* case (n 34) par 124 and in the *Hassam* case (n 95) par 35, the constitutional court refrained from expressing an opinion on the constitutionality of polygyny. A future decision in this regard will be relevant for customary, Islamic and Hindu marriages.

[98] See n 25. *Cf* Shatter (n 80) 175-176 on the recognition in Ireland of Roman-Catholic marriages concluded in Lourdes prior to 20 December 1972 and invalid in terms of French law. The town of Lourdes in the South of France is since 1858 a well-known pilgrimage destination for Roman Catholics.

[99] Neels "Kommentaar op die *Islamic Marriages Proposed Draft Bill*" (submission to the South African Law Reform Commission, dated 14 November 2002, unpublished), referred to in South African Law Reform Commission (n 96) 102.

[100] The word "celebrated" should be read as "concluded". The word "celebrated" was probably employed as a consequence of the Latin term in use for the legal system that governs the validity of marriages in terms of South African private international law (the *lex loci celebrationis*). This term is, however, interpreted to refer to the law of the place of the conclusion of the marriage. See the sources in n 25.

[101] The formulation may give the wrong impression that foreign marriages are to be recognised in terms of South African legislation (or in terms of the internal South African common law). Foreign marriages are, of course, recognised in terms of South African private international law.

[102] South African Law Reform Commission (n 96) 130 (italics omitted). The heading of clause 20 reads: "Recognition of foreign Muslim marriages."

 [ISSN 0257 – 7747]

The negative function of public policy in respect of divorce orders is also clear: A court should decline recognition of a foreign divorce order which *prima facie* complies with the requirements for such acknowledgement if the recognition would lead to a result which is manifestly in conflict with the public policy of the forum.[103] The positive function of public policy in this context would then be the *recognition* of a foreign divorce order which *prima facie* does *not* comply with the requirements for such recognition if the non-recognition would lead to a result which is *manifestly* in conflict with the forum's public policy. The author did not find any express authority for this statement but it would seem to flow from general principle of which the situations discussed above are mere examples.

It should be noted here that public policy may have a positive function both in respect of main and incidental questions. It will be argued in paragraph 10 that the court in the *Phelan* case should have employed the positive function of public policy in respect of the incidental question that featured in that decision (the recognition or non-recognition of a foreign divorce order).

## 10 *A critique of the* Phelan *decision*

It is suggested that the non-recognition of the Dominican divorce and consequently the Australian marriage in the *Phelan* case led to a result (namely: the plaintiff and the defendant were never married: the defendant is probably still married to his first wife) that is patently in conflict with public policy. The positive function of public policy should have been employed here (the recognition of a foreign divorce order that *prima facie* does not comply with the requirements for such recognition). The Dominican divorce should therefore have been held to be effective and the Australian marriage to be valid.[104]

Four arguments of policy in this context will be advanced. Some are formulated from the perspective of South African law, others from a comparative perspective as they may be considered by a South African court; but it seems plausible that similar arguments may play a role in, at least, other mixed jurisdictions and in common-law legal systems (including that of Australia). In any event, the judge could have chosen South African private international law to govern the incidental question of the recognition of the Dominican divorce.[105]

### (a) Freedom of association

The defendant and his first wife were not able to obtain a divorce order in Ireland, as Irish law, under the influence of Roman Catholic doctrine, did not allow them to get divorced.[106] They would also not have been able to obtain a recognizable divorce order as they were resident in, domiciled in and citizens of Ireland and did not have

[103] See *eg* s 51(3) of the Family Law Act, 1986 (UK); Forsyth (n 7) 419; Schuz (n 20) 64-67; and Sykes and Pryles (n 5) 473-476

[104] unless, of course, the Dominican divorce was not validly obtained in terms of Dominican law, which might have been the position *in casu* (it is, for instance, unclear whether the defendant's first wife consented to the Dominican divorce). The case was, however, decided on the basis that the divorce was valid in terms of that legal system – see par 8 of the decision (n 2).

[105] See the text at n 20.

[106] Counsel for the plaintiff referred to "the hardship which faced the parties at the time, namely that they could not legally be divorced in Ireland" – (n 2) par 15. The position in Ireland was changed by a constitutional amendment and the Family Law (Divorce) Act, 1996. For the historical background, see Shatter (n 80) 369-390.

any close connection to another country.[107] The result is manifestly in conflict with the right to freedom of association in section 18 of the bill of rights,[108] which must certainly include the freedom to marry and to end marriage.[109]

(b) Considerations related to the doctrines of estoppel and *res iudicata*

The Dominican divorce order was obtained by the defendant. He cannot now be heard to argue that the divorce order is ineffective.[110]

[107] The parties obviously intended to evade Irish law by obtaining a divorce in the Dominican Republic. But, writes Schuz (n 20) 54, the wide grounds generally accepted for the recognition of divorce orders themselves allow evasion and the forum only has a real interest in preventing evasion of its own law. *Cf* on the parallel debate in the international law of contract: Chong "The public policy and mandatory rules of third countries in international contracts" 2006 *Journal of Private International Law* 27; Dickinson "Third-country mandatory rules in the law applicable to contractual obligations: so long, farewell, *auf wiedersehen, adieu*?" 2007 *Journal of Private International Law* 53; Forsyth (n 7) 320-325; Nygh *Autonomy in International Contracts* (1999) 217-226; and Van Rooyen (n 38) 164-166, 175 and 218-219.

[108] "Everyone has the right to freedom of association."

[109] *Cf* Currie and De Waal *The Bill of Rights Handbook* (2005) 423, 431-433 and 443-445; and Rautenbach "Introduction to the bill of rights" in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (service issue 22 May 2008) par 1A66.1 and 1A66.3: "In South Africa, the right to freedom of association also protects the entering into and maintaining of intimate private relations ..." (Rautenbach par 1A66.1). One could also refer to a 16(1) of the Universal Declaration of Human Rights (1948) and a 23(2) of the International Covenant on Civil and Political Rights (1966) on the right to marry and to found a family. Also see a 16(3) and a 23(1) respectively on the right to protection of the family. On the status of these conventions in South African law, see Dugard *International Law: A South African Perspective* (2005) ch 4 and 14. *Cf* BVerfGE 31 58 (4 May 1971) 1972 *RabelsZ* 145. *Contra Johnston v Ireland* 1987 9 EHRR 203, where the European court of human rights in Strasbourg held that the right to marry in art 12 and the right to respect for private and family life in art 8 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 1950) did not oblige a member state to provide for divorce and remarriage (but see the dissenting opinion of De Meyer J).

[110] See Gotlieb (n 9) 792-793; Schuz (n 20) 36-38; and Wengler (n 19) 6-7 and 25-28. Par 73 of the Restatement Second reads as follows: "A spouse who was personally subject to the judicial jurisdiction of the divorce state, and those in privity with him, may be precluded by application of the rules of *res judicata* of the divorce state from thereafter attacking the decree collaterally." Par 74 reads: "A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him to do so." Also see the commentary on par 74: "The rule is not limited to situations of what might be termed 'true estoppel' where one party induces another to rely to his damage upon certain representations as to the facts of the case. The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party" (American Law Institute 1 *Restatement of the Law Second. Conflict of Laws 2d* (1971) 225). See, further, Wengler (n 19) 6: "The fact that a person has been instrumental in creating a legal situation abroad, which is not recognized according to the conflict rules of the country of the forum, may estop that person in the latter country from denying its existence when it comes up as a preliminary question, although it is not always clear at present in what circumstances such an estoppel may be pleaded"; and *W v W* 1993 2 IR 476 (SC) 495: "The defendant in this case participated in a solemn ceremony with the plaintiff which clearly they treated as being a valid marriage and the consequence of which four children were born. He ought not, now, in any event, be entitled to argue that it was a nullity" (quoted by Shatter (n 80) 415). *Cf* Nygh (n 20) 372; Sykes and Pryles (n 5) 480-482; Walker (n 20 (2005)) par 17.2.e; and Walker (n 20 (2006)) 596. *Contra* Shatter (n 80) 416: estoppel cannot influence a person's status and "cannot confer a jurisdiction on a foreign court that, according to Irish law, it does not possess" (referring to the majority opinion in Irish case law: 413-416). See, in general, Barnett *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (2001).

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### (c) Reasonable expectations of the parties[111]

The plaintiff and the defendant went through a *prima facie* valid marriage ceremony in Australia, they lived together as husband and wife for almost ten years, at all times being under the impression that they were legally married, and they raised three children together. The defendant probably did not have contact with his first wife for many years. The parties therefore had a reasonable expectation that both the Dominican divorce and the Australian marriage were valid.[112]

### (d) "Bury dead marriages" and "looking to the future" policies

Schuz argues convincingly

> "that, where the first marriage has in fact broken down and a second marriage has been entered into after dissolution ... it is the second marriage (the 'alive' marriage) which should be recognized in preference to the first (the 'dead' marriage). Whilst it is more than possible that by the time the issue reaches court, the second marriage may also be 'dead', policy would seem to indicate that the one which has been 'dead' the longest should be buried first."[113]

The relevant policies are closely related to the protection of the reasonable or legitimate expectations of the parties[114] but also to the need for publicity[115] in private-international legal relationships.[116]

It is suggested that the constitutional value of freedom of association is a sufficient justification for the application of the positive function of public policy. *In casu* the conclusion is further justified by the other listed policy considerations.

## 11 *A proposal for legal development in respect of the recognition of foreign divorce orders*

It is further suggested, as a general rule, that if there is no possibility of obtaining a divorce in the country of habitual residence, domicile or nationality of the parties, any foreign divorce order should be recognised if it was obtained by the consent of both parties. This comes down to the development of a new conflicts rule to be applied in the particular circumstances, namely the application of the *lex loci*

111 See Schuz (n 20) 34. See for other instances in private international law where the reasonable or legitimate expectations of the parties should be taken into account, *eg* Neels (n 9 (1992)) 742-743, Neels (n 9 (1993)) 765; Fredericks and Neels "The proper law of a documentary letter of credit" (part 2) 2003 *SA Merc LJ* 207 222-223; Neels and Wethmar-Lemmer (n 12) 595-596, and Neels "Falconbridge in Africa. *Via media* classification (characterisation) and liberative (extinctive) prescription (limitation of actions) in private international law – a Canadian doctrine on safari in Southern Africa (*hic sunt leones*'); or, *semper aliquid novi Africam adferre*" 2008 *Journal of Private International Law* 167 193.

112 *Cf* Siehr (n 1) 584-585 on a "gelebten Dauerbeziehung" or "Dauerrechtsverhältnis". Also see Kropholler (n 4) 226-227.

113 Schuz (n 20) 103. Also see at 100-101 and 202.

114 See (c) directly above.

115 Also see Neels "Die *lex causae* vir eiendomsoordrag van *res in transitu*" 1991 *TSAR* 309 315-317 on the publicity principle in international property law.

116 If any court orders in this regard have been made previously, more weight will generally be given to a local than to a foreign court order. *Cf* Forsyth (n 7) 94-95; Kahn (n 4) 608-609; Kropholler (n 4) 228-229; Schuz (n 20) 97-98; and Siehr (n 1) 583 and 585. This consideration did not play a role *in casu*.

*divortii*[117] (the law of the place of the divorce).[118] The necessity of the application of the positive role of public policy in this type of scenario points towards the proposed legal development.[119] If the proposed rule sounds far-reaching, it must be remembered that South African private international law also accepts the law of the place of the conclusion of a marriage to govern both the formal and the inherent validity thereof,[120] and that the parties are in principle free to get married in any country. Should not the same principle apply to consensual divorce, at least in the circumstances as contemplated? It is suggested that the constitutional value of freedom of association points towards the development of the proposed rule in terms of sections 8(3)(a), 39(2) and 173 of the constitution.[121] The *lex loci divortii* should in appropriate cases also be applied irrespective of the lack of the consent of one of the parties, *eg* where that party withholds such consent on an unreasonable basis.[122]


## SAMEVATTING

### EKSTERNE OPENBARE BELEID, DIE EGTE INSIDENTELE VRAAG EN DIE ERKENNING VAN BUITELANDSE EGSKEIDINGSBEVELE

Die uitspraak in *Phelan v Phelan* 2007 1 SA 483 (K) word in hierdie artikel gebruik as referensiekader om die invloed van die eksterne openbare beleid op die egte insidentele vraag te bespreek waar laasgenoemde die erkenning al dan nie van 'n buitelandse egskeidingsbevel behels. Eers word bespreek wat 'n insidentele vraag in die internasionale privaatreg is en hoe dit onderskei word in egte en onegte preliminêre vrae; daarna word moontlike oplossings aangereik. Die invloed van die eksterne openbare beleid op beide hoofvrae en insidentele vrae word bespreek. Veral die rol van grondwetlike waardes kom ter sprake. Daar word onderskei tussen 'n negatiewe en 'n positiewe rol vir die eksterne openbare beleid. Daar word geargumenteer dat die hof in die *Phelan*-saak die tersake buitelandse egskeidingsbevel moes erken het en wel uit hoofde van die positiewe funksie van die openbare beleid, in besonder met verwysing na die grondwetlike reg op vryheid van assosiasie. Daar word verder aan die hand gedoen dat die *lex loci divortii* voortaan in sekere omstandighede die erkenning van buitelandse egskeidingsbevele behoort te beheers wanneer daar vir die partye geen moontlikheid bestaan om 'n egskeidingsbevel in hulle land van gewoonlike woonagtigheid, domisilie of burgerskap te verkry nie. In die loop van die argument word ook opmerkings gemaak oor die erkenning van religieuse regstelsels in Suid-Afrika, die erkenning van buitelandse (erf)reg in stryd met grondwetlike waardes, legitimiteit van kinders in die internasionale privaatreg en die erkenning van buitelandse egskeidingsbevele in die algemeen.


[117] My thanks to Wethmar-Lemmer of the University of South Africa for coining the Latin term in this regard.

[118] *Cf* art 2(2) of the Dutch *Wet Conflictenrecht Echtscheiding* of 1981 as discussed by Strikwerda (n 4) 272. For an application in respect of a Nepalese divorce order, see Hof 's-Gravenhage (1 February 2006) 2006 *Nederlands IPR* no 102.

[119] See Neels "Regsekerheid en die korrigerende werking van redelikheid en billikheid" (part 2) 1999 *TSAR* 256 259-274, and "Die voorlopige regsoordeel in die internasionale privaatreg" 1994 *Stell LR* 288 292.

[120] See n 25. *Cf Board of Executors v Vitt* 1989 4 SA 480 (C) where the *lex loci adoptionis* was accepted to govern the validity of a foreign adoption order. For today, also see a 23-27 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) as incorporated in the Children's Act 38 of 2005.

[121] s 8(3)(*a*): "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right ..."; s 39(2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights"; and s 173: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to ... develop the common law, taking into account the interests of justice." It was indicated in par 8 above that the common law in this regard is still available for application.

[122] But, generally speaking, it will be unfair to the respondent to allow the petitioner to litigate in a forum with which neither spouse has a real connection – see Schuz (n 20) 54.