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The legal status of polygamy in England and Germany - a comparison

Domicile vs. Nationality

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Contents

Summary

Polygamy is a marriage institution that is practiced in many parts of the world. In most western countries polygamy is prohibited and the legal systems are based on the principle of monogamy. Nevertheless, the pressing question of whether to recognize polygamous marriages as valid must be answered and other factors such as what time is relevant and what law to apply, must be determined.

The purpose of this thesis is to determine the legal status of polygamy in England and Germany in both domestic law and private international law. The legal systems provide both similarities and differences that can be compared and analyzed. The legal dogmatic approach determines the legal status of polygamy in the respective country and later on the method of comparative law outlines the similarities and differences.

Firstly, this thesis researches the legal status of polygamy in England. Concluding that polygamous marriages in England and polygamous marriages concluded abroad by a person domiciled in England will constitute a bigamous marriage and therefore be invalid. Polygamous marriages concluded abroad by foreigners will generally be recognized, unless public policy is induced. Secondly, this thesis researches the legal status of polygamy in Germany where the key determinant is the nationality instead of domicile. However, when that link is established the regulation of polygamy is generally similar. Thirdly, domicile and nationality as key determinants are compared to each other and it is outlined why each country has chosen its solution. There is no determinant that generally is more desirable. The social and political goals of the country will determine which factor is applied and how polygamous marriages are recognized, although breaching the principle of monogamy.

Sammanfattning

Polygami är en äktenskapsform som ingås i många delar av världen. I de flesta länderna i västvärlden är polygami förbjudet och rättsordningarna baseras på monogami som den önskvärda äktenskapsformen. Rättsordningen måste emellertid svara på frågan om polygama äktenskap ska erkännas och räknas som giltiga i landet. För att besvara denna fråga måste det undersökas vilken lag som är tillämplig vid prövningen av äktenskapets giltighet och även vilken tidsperiod som är avgörande.

Syftet med denna uppsats är att utreda den rättsliga regleringen av polygami i England och Tyskland, både inom nationell rätt och internationell privaträtt. Inom dessa rättsordningar finns det både likheter samt skillnader som kan jämföras och analyseras. Den rättsdogmatiska metoden utreder rättsläget i respektive land och sedan används en komparativ metod för att framhäva likheter och skillnader.

I England räknas polygama äktenskap som ingås i England samt äktenskap som ingås utomlands av en person som har sitt domicil i England som tvegifte och är därmed ogiltiga. Polygama äktenskap som ingås utomlands erkänns om personen har sitt domicil i ett land som tillåter polygami. Dock kan ordre public tillämpas. I Tyskland är medborgarskap avgörande istället för domicil. Om en person är tysk medborgare fungerar kopplingen till Tyskland i princip på motsvarande sätt som domicil i England. Rättsläget är följaktligen likt det i England. Det finns olika anledningar till varför ett land väljer medborgarskap eller domicil, dock finns det ingen lösning som är allmänt lämpligare. Landets politiska och sociala målsättningar avgör vilken faktor som är relevant och hur landet väljer att erkänna polygama äktenskap som inte stämmer överens med den önskvärda monogama äktenskapsformen.

Abbreviations

BeckRS	Beck Rechtsprechung
BFH	Bundesfinanzhof
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgericht
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
FamRZ	Zeitschrift für das gesamte Familienrecht
FPR	Familie, Partnerschaft Recht Zeitschrift
GG	Grundgesetz
HC	House of Commons
MüKoBGB	Münchner Kommentar zum Bürgerlichen Gesetzbuch
MüKoStGB	Münchner Kommentar zum Strafgesetzbuch
MCA 1973	Matrimonial Causes Act 1973
MPA 1972	Matrimonial Proceedings (Polygamous Marriages) Act 1972
NJW	Neue Juristische Wochenschrift
NVwZ – RR	Neue Zeitschrift für Verwaltungsrecht – Rechtsprechung-Report
OaPA 1861	Offences against the Person Act 1861
OLG	Oberlandesgericht
OVG	Oberverwaltungsgericht
PIL(MP)A 1995	Private International Law (Miscellaneous Provisions) Act 1995
Rn	Randnummer
StGB	Strafgesetzbuch
VG	Verwaltungsgericht
VGH	Verwaltungsgerichtshof

1 Introduction

1.1 Background

In the western world monogamy is often laid down to be the foundation for legislation and the legal status of a marriage. Polygamy is thus a marriage institution that is still practiced in several countries and legal systems of the world and therefore the concept of marriage is not uniform.[1] This means that countries that in their own legislation penalize polygamous marriages must still discuss the question if and how to recognize polygamous marriages concluded in a country where it is commonplace. This question has become more pressing through the high number of immigrants arriving from countries that accept polygamy as a legal marriage institution. Consequently, a jurist must answer several questions regarding the recognition of marriage in private international law. It must be determined which law controls the nature of the marriage, at what time the validity shall be questioned but also which effects are to be given to the marriage.

1.2 Purpose

The purpose of this thesis is to outline the legal status of polygamous marriages in England and Germany and how these countries have decided to treat polygamy in the sense of both domestic law and private international law. This thesis focuses on two countries that geographically are very close to each other. At the time of writing both countries are part of the European Union, concluding that there are similarities in these countries legislation. European countries share a bond through the European Union which build the illusion of a similar legal system. However, England is a common law country whereas Germany is a civil law country. Therefore, there is a common core that can be compared, but also differences that are exceptional to the specific legal system.

[1] Staudinger (2015), § 1306 BGB Rn 1.

1.3 Research questions

- How is polygamy regulated in England and Germany in domestic and private international law?
- Does public policy circumscribe the recognition?
- What are the similarities and differences regarding the regulation of the validity of polygamous marriages?
- What are the advantages and disadvantages of the chosen key determinant?

1.4 Delimitations

This thesis concerns a very complex legal area and must therefore be limited. Marriage as a legal institution presumes that there in fact has been established a marriage. How a marriage is concluded will entirely be excluded. Furthermore, bigamy will only be discussed as it is relevant in connection to polygamous marriages, focusing on the civil effect but the criminal effect will also be mentioned shortly.

Moreover, the recognition or non-recognition of polygamous marriages will affect several other rights and obligations in the legal system. However, those effects lie outside the scope of this thesis.

1.5 Perspective and method

Firstly, this thesis will use a legal dogmatic approach to outline the legal status of polygamy in England and Germany. The approach concerns the research of current law laid down in written and unwritten national rules. The rules own sources are used as a basis for the study.[2] Secondly, this thesis will use the method of comparative law to outline similarities and differences in the recognition of polygamous marriages concluded in foreign countries. The method will determine differences and similarities in two different legal

[2] Kleineman (2013), p. 21.

systems regarding a specific problem, the recognition of polygamous marriages.[3] For the method to be used correctly the thesis must be concluded with a critical evaluation of what has been discovered.[4]

The thesis will use a comparative theory as it strives to see differences and similarities between the regulation of polygamous marriages, outlining reasons for and against that specific regulation. Meaning, that based on the geographical bond and the bond to the European Union the illusion is that the legal systems are similar. However, by comparison the differences will be outlined and analyzed.

1.6 Research status

The research status of the recognition of polygamous marriages differs between the countries. Nevertheless, there are articles discussing whether to recognize or reject polygamous marriages. The articles often concern the effect of the recognition or the rejection, but in regards of the recognition itself and its legal grounds there is not much research. The few relevant articles will be used as a base in the comparison and analysis.

1.7 Material

The material is combined of every country's national legal sources. The sources are as follows: legislation, cases, journal articles as well as legal doctrine. For Germany, an important source is the legal commentary. In England, judge made law is the primary source of law. Hence, the material for the legal analysis of a country's recognition of polygamous marriages varies.

[3] Zweigert & Kötz (1998), p. 44–45.
[4] Ibid, p. 46.

1.8 Outline

Firstly, this thesis will determine the legal status of polygamy in England. Starting with marriages concluded in England, followed by marriages concluded abroad by or with a person domiciled in England, lastly marriages concluded abroad without connection to England. Public policy will be presented on its own. Secondly, this thesis will determine the legal status of polygamy in Germany. The section is separated into three similar sections as the first part, although focusing on nationality instead of domicile. German ordre public, will be presented in connection to the three different scenarios as the inducement differs. Thirdly, the two different key determinants domicile and nationality are compared. Finally, this thesis will be concluded by a critical analysis and comparison of how the two different countries regulate polygamous marriages and the reasons for it.

2 England and polygamy

2.1 Marriage concluded in England

Polygamy is a marriage institution to more than one spouse at a time, which is legal and recognized in several countries of the world.[5] A polygamous marriage can occur to constitute a bigamous marriage which is the unlawful act of a marriage to or by a person that is already lawfully married to another person.[6]

Bigamy is a statutory offence in England, according to *section 57* of the *Offences against the Person Act 1861* (OaPA 1861). Furthermore, it is also a void marriage according to *section 11 (b)* of the *Matrimonial Causes Act 1973* (MCA 1973). Both sections are applicable on cases concerning marriages concluded in England or Ireland and cases concerning a British subject.[7] Consequently, a polygamous marriage concluded in England under English law will always constitute a bigamous marriage and be civilly invalid *ab initio*[8] as well as a criminal offence.[9]

2.2 Marriage concluded abroad by or with spouse domiciled in England

Hyde v. Hyde[10] is normally seen as the defining case for the institution of marriage as it established the modern understanding and legal definition of marriage. In the case, Lord Penzance stated as the view of Christendom, that marriage is the union for life of one man and one woman, any other forms are excluded.[11] Monogamy is a fundamental principle in the English legal system. Lord Penzance concluded that a polygamous marriage, although a valid

[5] 'Polygamy', Encyclopaedia Britannica.
[6] 'Bigamy', Encyclopaedia Britannica.
[7] Section 57 OaPA 1861; section 11(b) MCA 1973.
[8] See appendix.
[9] Section 57 OaPA 1861; section 11(b) MCA 1973.
[10] Hyde v. Hyde (1866) LR 1 P & D 130.
[11] Ibid at 132.

marriage in respect of the principle of *lex loci celebrationis*[12], will not be recognized as a valid marriage in England.[13]

The attitude towards polygamous marriages changed, which led to statutory reforms. The *Matrimonial Proceedings (Polygamous Marriages) Act 1972* (MPA 1972) altered the law of polygamous marriages. Prior to this act the law was based on the decision in *Hyde v. Hyde*.[14] The relevant section 4 in MPA 1972 was later repealed by the MCA 1973, which is the relevant act in force today, stating the civil effect of a polygamous marriage. According to section 11(d) MCA 1973 a polygamous marriage is void if one of the parties is domiciled in England and lawfully married at the time of the second marriage. In other words, if one spouse is domiciled in England but concludes a polygamous marriage abroad, that marriage will be void in England. Domicile is therefore the key determinant, as others are free to conduct polygamous marriages in accordance with their personal or religious laws, if the marriage takes place outside of England. The Law Commission stated that they do not recommend changing the law as to recognizing actually polygamous marriages concluded abroad by an English domiciliary as this would purport differential treatment and not be generally approved, in comparison to persons entering into marriages in England.[15]

According to section 11, the effect of a void marriage as stated in section 11 (d) will only apply to marriages entered into after the 31st July 1971. The view at common law on marriages concluded before or on the 31st July 1971 is that a person domiciled in England cannot conduct a valid potential or actual polygamous marriage.[16]

[12] See appendix.
[13] Hyde v. Hyde at 138.
[14] Hussain v. Hussain (1983) Fam. 26 at 31.
[15] LCCP83, p. 84.
[16] LC146, p. 10, 26; see Radwan v. Radwan (1973) Fam. 35 for a case permitting a person domiciled in England to conclude an actually polygamous marriage based on the law of the intended matrimonial home.

There are several cases stating that polygamous marriages are invalid if one of the spouses at the time of the marriage is domiciled in England. In *R. v Audley*[17] a marriage was concluded abroad by a British subject. The court determined that the second marriage, concluded in Gibraltar during the lifetime of the first wife, would constitute a bigamous marriage under English law. Accordingly, a polygamous marriage entered into in Gibraltar by a British subject will be void and constitute a criminal offence.[18]

2.3 Marriage concluded abroad without connection to England

When it comes to spouses in polygamous marriages where none of the parties were domiciled in England when entering the marriage, the legal view is outstandingly different. For a marriage to be valid in England two aspects of validity must be considered: form and capacity.[19]

Form is about living up to the formal conditions concerned with the ceremony and other required procedures laid out in the country of celebration, lex loci celebrationis.[20] Consequently, if a marriage is formally valid in the country where it was celebrated it is formally valid all over the world. If the marriage lacks validity in the country where it was celebrated, it is generally invalid anywhere else. These propositions where already laid down in England in the case of *Dalrymple v. Dalrymple*[21] in 1811 where a marriage concluded in Scotland, without a religious ceremony, was held valid in England based on the principle of lex loci celebrationis.[22]

Capacity, also called essential validity, covers all questions about the capacity to marry, meaning age limits, consent and rules prohibiting marriages between relatives.[23] Essential validity is governed by the personal law,

[17] R. v. Audley (1907) 1 K.B. 383.
[18] Ibid, at 387.
[19] Brook v. Brook (1861) 9 HLC 193 at 706-708; LCCP89 p. 7, 56.
[20] Brook v. Brook at 708; LCCP89 p. 9.
[21] Dalrymple v. Dalrymple (1811) 161 E.R. 665.
[22] Ibid at 127-129.
[23] LCCP89 p. 56; Brook v Brook at 708; X City Council v. MB (2006) 2 FLR 968 at 33.

meaning the *lex domicilii*[24] of every individual, constituting the dual domicile test.[25] The dual domicile test has been subject of judicial debate as it is not generally accepted that it is the only relevant factor. The intended matrimonial home has been seen as an important factor.[26] Nonetheless, the most widely accepted principle is the one of dual domicile, meaning the domicile of every individual in the marriage.[27] In *X City Council v. MB*[28] the marriage of an English domiciliary, concluded in Pakistan, could not be recognized because the domiciliary lacked capacity according to English law and therefore no marriage entered into abroad could be recognized as valid.[29]

Different countries have different rules regarding essential validity and polygamy falls within the scope of that. In the case where the personal law and the lex loci celebrationis coincide, there is only one relevant law that will determine both the formal and essential validity of the marriage.[30] If the marriage has both formal validity and essential validity it will be recognized as a valid marriage in England.[31] Consequently, polygamous marriages contracted abroad where neither party is domiciled in England, will generally be recognized in England if it is legal according to the personal law and country of celebration.[32] Notwithstanding, the recognition does not expand to all areas. The recognition only covers welfare benefits but not pension, immigration or citizenship purposes.[33]

2.4 Effects on a subsequent monogamous marriage

A recognized polygamous marriage will render void a subsequent monogamous marriage. In the case of *Bandail v. Bandail*[34] an Indian

[24] See appendix.
[25] LCCP89 p 56; Brook v. Brook at 708, 714-715; X City Council v. MB at 33.
[26] Radwan v. Radwan (1973) Fam 35.at 38; LCCP83 p. 23.
[27] X City Council v. MB at 34.
[28] X City Council v. MB (2006) 2 FLR 968.
[29] Ibid, at 35.
[30] Brook v. Brook at 714-715.
[31] LCCP83 p. 21.
[32] Fairbairn (2016), p. 4-5; Brook v. Brook at 714-715.
[33] Ibid, p. 5-14.
[34] Bandail (Otherwise Lawson) v. Bandail (1946) P. 122.

domiciliary, who had previously contracted a legal and valid polygamous marriage in India, concluded a monogamous marriage in England with an English domiciliary. The second marriage was annulled because it was bigamous, as the man had the status of a married man in accordance with his lex domicilii. The "imported" polygamous marriage, will not constitute the right to conduct other marriages in England. The validity of the first marriage will however still stand and be recognized.[35]

2.5 Potentially polygamous marriages

The pure ability to marry several spouses does not constitute a polygamous marriage.[36] This was stated in the case of *Hussain v. Hussain* concerning a single marriage between a man domiciled in England bound by English law and a woman domiciled in Pakistan bound by Pakistani law. The marriage was celebrated in Pakistan in accordance with Pakistani law. There was no actual polygamy and the marriage was therefore not invalid only because the husband was domiciled in England. The marriage counted as a monogamous marriage and was therefore valid under English law. It was stated as an *obiter dictum*[37] that the effects on the Muslim community in England would be profound if every marriage that in some way permitted polygamy, and one spouse was domiciled in England, would be invalid.[38]

The Private International Law (Miscellaneous Provisions) Act 1995 re-establishes this view as its section 5 states that potentially polygamous marriages conducted outside of England will not be void only because a spouse is domiciled in England.[39]

[35] Ibid, at 129-130.
[36] Section 11 paragraph 2 MCA 1973.
[37] See appendix.
[38] Hussain v. Hussain at 33.
[39] Section 5 of the Private International Law (Miscellaneous Provisions) Act 1995.

2.6 Public policy and polygamy

Public policy can often be mentioned as a reason for the non-recognition of a marriage.[40] Public policy is a general principle of the conflict of laws, which states that if the application of a foreign rule would be contrary to the *lex foris*[41] public policy, it may be disregarded. For a rule to be disregarded it must be immensely contrary or repugnant to the English standards of justice, decency and morality.[42] Generally, the tolerance for foreign legal systems is the base for all recognition.[43] Hence, the doctrine of public policy must be used with great circumspection. The effect of the induction of public policy in regards of the recognition of a marriage is either that the marriage, valid under foreign law, will be invalid under English law or on the contrary that a marriage, invalid under foreign law, will be treated as a valid marriage in England.[44]

In the case of *Cheni v. Cheni*[45] an uncle and a niece, domiciled in Egypt, were married in Cairo in 1924 into a potentially polygamous marriage. The marriage was valid under foreign law and the question was raised whether the marriage should be rejected based on English public policy.[46] Lord Simons held that the relevant question is whether a specific marriage is so offensive to the English court that it should be rejected and the court thus should refuse to recognize and give full effect to the applicable foreign law, by which the marriage is valid. Furthermore, he stated that one should have recourse to "common sense, good manners and a reasonable degree of tolerance"[47]. What that specifically means is not explained further in the context. However, the marriage did not reach that threshold and the rejection of the marriage would perpetrate injustice and therefore the petition for nullity was rejected. He held that the validity of the marriage under religious law and the lex domicilii of

[40] Cheni v. Cheni at 99; Westminster City Council v. C at 208; Mohamed v Knott at 13-14.
[41] See appendix.
[42] Cheni v. Cheni at 98-99; LCCP89 p. 64-66.
[43] LCCP89 p. 65-66.
[44] Cheni v. Cheni at 99-100.
[45] Cheni (otherwise Rodriguez) v. Cheni (1965) P. 85.
[46] Ibid, at 93.
[47] Ibid, at 99.

the parties, as well as the fact that the marriage had stood unquestioned for 35 years, must overweigh public policy.[48]

It can be argued that polygamy does not stand in accordance with English morality and therefore public policy. Nevertheless, priority is often given to the spouses' interests and therefore the foreign law will still be applicable in most cases, as *"*a polygamous marriage will be recognized in England as a valid marriage unless there is some strong reason to the contrary"[49].[50]

In *Westminster City Council v. C*[51] the court induced public policy in regards of the consent needed for the validity of a marriage and thus recognition was neglected. The man was domiciled in England, therefore bound by English law, but the marriage took place in Bangladesh. The man had the ability to conclude a marriage, but it was discovered that the man suffered from a severe intellectual sickness, which meant that he had the abilities of a three-year-old. The court therefore stated that the validity of such a marriage must be rejected on the grounds of public policy. The court based this judgement on *Cheni v. Cheni*, although deciding to induce public policy.[52]

[48] Ibid.
[49] Mohamed v. Knott (1969) 1 QB 1. at 13-14.
[50] Ibid.
[51] Westminster City Council v. C (2009) 2 W.L.R. 185.
[52] Ibid, at 208-209.

3 Germany and polygamy

3.1 The view on marriage in Germany

Germany is a civil law country, with a detailed civil code, *Bürgerliches Gesetzbuch (BGB).* The most important rights are laid down in the *Grundgesetz (GG).* Art. 6 GG establishes the German view on marriage and family. The *BVerfG* has in the *"Spanierentscheidung"* stated that art. 6 GG constitutes a fundamental right for every person to marry somebody they have chosen freely themselves.[53] Monogamy is seen as the appropriate form based on moral concepts and therefore, generally, only monogamous marriages will be completely covered by art. 6 GG.[54] The question whether other marriage institutions are covered by this fundamental right has been debated several times in German courts.[55]

3.2 Marriage concluded in Germany

3.2.1 General regulation

The material ability to enter into a marriage in Germany is according to art. 13 *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB) determined by the personal law based on the nationality as the *lex patriae*[56] at the time of celebration. If a person has several nationalities in compliance with art. 5 EGBGB, other factors will determine the personal law.[57] The personal law will also ascertain the consequences of the breach which can lead to a void, voidable or healable marriage.[58] If two spouses have different nationalities, the personal law will only determine the material validity of the spouse

[53] NJW 1971, 2121.
[54] Art. 6 GG; see also Hohloch (2011) and NJW 2001, 2394.
[55] See NVwZ – RR 2009, 539 and NJW 2007, 3453.
[56] See appendix.
[57] MüKoBGB (2017), art. 5 EGBGB, Rn 2-12.
[58] Staudinger (2011), art. 13 EGBGB Rn 438; see also FamRZ 2001, 991.

holding the nationality.[59] If both personal laws are breached the harsher consequence will be applied, *"ärgere Recht"*.[60]

The formal requirements are regulated by the lex loci celebrationis, art. 11 EGBGB. Marriages contracted abroad are therefore subject to foreign law, whilst marriages concluded in Germany will be subject to German law in compliance with art. 13 paragraph 3 EGBGB, stating that marriages in Germany only can be concluded in conformity with the national laws and regulations.[61] Consequently, foreigners who want to marry a German national in Germany will have to follow the German rules, marriage before the civil registry office, as is the case if the option laid down in art. 13 paragraph 3 subsection 2 EGBGB is not applicable.[62] If the formal requirements of the country are breached, the lex loci celebrationis will also determine the consequences of the breach.[63]

German law will determine the ability as well as the formal requirements when a German national contracts a marriage in Germany. If a foreigner wants to acquire a marriage in Germany, two different legal systems will be relevant, the German law as the lex loci celebrationis and the personal law, the foreign law.[64]

Bigamy is prohibited according to § 1306 BGB. Consequently, a person bound by German law is prohibited to conclude another marriage, if that person is already lawfully married and the first marriage has not been dissolved.[65] The prohibition of bigamy protects the principle of monogamy that is established in art. 6 GG.[66] This means that an actually polygamous marriage never can be entered into in Germany under German law.[67] A

[59] Münch, FamR § 20 Rn 3-8.
[60] Staudinger (2011), art. 13 EGBGB Rn 443.
[61] Ibid, Rn 546.
[62] Ibid, Rn 555.
[63] Ibid, Rn 760.
[64] MüKoBGB (2015), art. 13 EGBGB Rn 11-13.
[65] § 1306 BGB; MüKoBGB (2017), § 1306 BGB Rn 2.
[66] Staudinger (2015), § 1306 BGB Rn 1.
[67] MüKoBGB (2015), art. 13 EGBGB Rn 66-69.

marriage that is bigamous according to § 1306 BGB is voidable according to §1314 BGB. This means that the marriage is effective until the marriage is declared void. The declaration of a void marriage is only applicable *ex nunc*[68], legally there are two valid marriages until the abolishment of the second marriage.[69] The petition for the annulment of the second marriage can be made by both parties of the second marriage, the administrative authority, as well as the spouse in the first marriage, § 1316 paragraph 1 BGB. Furthermore, the second marriage cannot be healed if declared void under § 1314 BGB.[70]

The fundamental principle of monogamy is further established in § 172 *Strafgesetzbuch* (StGB) as bigamy there is stated as a criminal offence. For § 172 StGB to be applicable the marriage must have taken place in Germany or a German subject must be involved. If the marriage was celebrated abroad by foreigners, it will not constitute a criminal offence in Germany as Germany lacks jurisdiction according to § 7 StGB.[71]

3.2.2 Ordre public

The *ordre public*[72] clause is only applicable as a last step in the judicial process.[73] Art. 6 EGBGB states the preconditions for the use of ordre public. Ordre public is not to be used as a general determination for the acceptance of a foreign rule. Indeed, tolerance for other legal systems shall be the base for all application of foreign law. The result of the application must be unbearable, "*untragbar"*. Furthermore, the German ordre public can only be relevant if there is a sufficient link to the country, which usually is established by either residence or nationality.[74] If the ordre public clause is induced in a

[68] See appendix.
[69] Staudinger (2015), § 1306 BGB Rn 16.
[70] MüKoBGB (2017), § 1314 BGB Rn 2-5.
[71] MüKoStGB (2016), § 172 StGB Rn 8.
[72] See appendix.
[73] Staudinger (2013), art. 6 EGBGB Rn 22.
[74] MüKoBGB (2015), art. 6 EGBGB Rn 182-192.

specific case, the result will be the elimination of the applicable rule in foreign law.[75]

The general clause of ordre public in art. 6 EGBGB is most often pertinent with reference to family law, as the cultural and social traditions and differences become apparent.[76] In addition to the clause in art. 6 EGBGB, another ordre public clause is established in art. 13 paragraph 2 EGBGB specifically for marriages, although not applicable on polygamous marriages.[77]

A marriage concluded in Germany between German subjects will not raise the question of ordre public because foreign law is not relevant.[78] A polygamous marriage entered into by foreigners under foreign law in Germany, will constitute an unbearable breach of ordre public in accordance with art. 6 EGBGB, as the German courts and civil registry offices are bound by the German public policy and the principle of monogamy through art. 6 GG.[79]

3.3 Marriage established by or with German national abroad

3.3.1 General regulation

The prohibition of bigamy is applicable on all marriages taking place in Germany or where a German subject is involved, without regard to the place of celebration.[80] The prohibition has a double effect as a German national cannot conclude multiple marriages. Furthermore, a national cannot enter into a polygamous marriage with a married foreigner.[81] If a woman of German nationality wants to marry a man of foreign nationality abroad, the wife is still

[75] Staudinger (2013), art. 6 EGBGB, Rn 204-210.
[76] Ibid, Rn 170.
[77] MüKoBGB (2015), art. 13 EGBGB Rn 24-35.
[78] Staudinger (2013), art. 6 EGBGB Rn 23.
[79] Ibid, Rn 172; Staudinger (2011), art. 13 EGBGB Rn 252; see also NJW 1986, 2209.
[80] MüKoBGB (2015), Art. 13 EGBGB Rn 61-65.
[81] MüKoBGB (2017), § 1306 BGB Rn 3.

bound by the preconditions for a marriage under German law. In other words, a polygamous marriage will constitute a bigamous marriage under § 1306 BGB, based on the connection to Germany.[82] Marriages where one country recognizes the marriage and other countries will not, are defined as limping marriages, *"hinkende Ehen",* which is a complex problem appearing in private international law.[83]

In bigamous marriages where both spouses are bound by the principle of monogamy, both personal laws will be breached. Consequently, if a German subject marries an English subject, constituting a bigamous marriage, the marriage will automatically be declared void in accordance with section 11(b) MCA 1973 as it is the harsher consequence, a declaration in compliance with § 1314 will therefore not be necessary.[84]

3.3.2 Ordre public

Marriages concluded abroad under foreign law by a German national will constitute a bigamous marriage. Nevertheless, ordre public can still become relevant as the formal validity of the marriage is determined by the foreign law. If that law prohibits dissolving the bigamous marriage ordre public can be induced as the ability to dissolve a bigamous marriage and the principle of monogamy is fundamental in the German legal system.[85]

3.4 Marriage concluded abroad without connection to Germany

3.4.1 General regulation

Firstly, it must be mentioned that there is no general process of recognizing marriages taken place abroad.[86] Art. 13 paragraph 1 EGBGB states that the material validity of a marriage is determined by the personal law. This is also

[82] Ibid; MüKoBGB (2015), art. 13 EGBGB Rn 66-69.
[83] Staudinger (2011), art 13 EGBGB Rn 259.
[84] Ibid, Rn 257.
[85] NJW – RR 2015, 1349.
[86] Hohloch (2011), p. 426.

the case for the determination of the material validity of a marriage between foreigners concluded in a foreign country.[87] The formal validity will, as previously stated, be determined by the lex loci celebrationis and therefore formally valid polygamous marriages concluded abroad will be formally valid in Germany.[88]

Polygamous marriages taken place in a country where it is legal will generally be recognized. If both personal laws permit polygamy, there is no breach in the material validity.[89] Provided, that the formal requirements have been followed the marriage will be given full effect, unless ordre public is induced, which will be researched in the next section.[90]

If the polygamous marriage is "imported" to the country, it will not constitute the right to marry another spouse in Germany. The polygamous marriage is limited to its outline when entering the country. This means that a spouse only can conduct another marriage in Germany after a divorce from the polygamous marriage. Furthermore, the marriage to further persons is not permitted in Germany, based on the prohibition of bigamy applicable as the lex loci celebrationis, although the marriage itself is polygamous.[91]

3.4.2 Ordre public

A polygamous marriage that was concluded abroad by foreigners under foreign law, will generally be recognized as a valid marriage. The personal law as well as the lex loci celebrationis permit polygamy and therefore, there is no breach that would hinder the recognition.[92] On the contrary, there have been cases stating that polygamous marriages concluded abroad by foreigners under foreign law could induce ordre public. In the case of *VG Berlin, Urteil*

[87] Staudinger (2011), art. 13 EGBGB Rn 438, see also BeckRS 2011, 22393; NJW 1986, 2209.
[88] Ibid, Rn 761; Hohloch (2011), p. 426.
[89] Staudinger (2011), art. 13 EGBGB Rn 48.
[90] MüKoBGB (2015), art. 13 EGBGB Rn 3-9.
[91] Ibid, Rn 66-69.
[92] Staudinger (2013), art. 6 EGBGB Rn 172.

vom 16.02.2009 – 24 A 273/08[93] the court stated that there are differing opinions whether polygamous marriages are covered by the protection established in art. 6 GG. The court concluded that, however the opinion may be, the marriage in question must stand in conflict with the ordre public as it was a marriage where the husband chose to live with different wives at different times, sending them back and forth between Germany and Iran. Even if polygamous marriages could be covered by art. 6 GG in some cases, in others they cannot as that would legitimate polygamy as such and breach the principle of monogamy established in art. 6 GG.[94] Thereupon, ordre public can be induced in cases without connection to Germany at the time of celebration, but that must be determined in every specific case with regards to the connection to Germany established at that point.[95]

3.5 Potentially polygamous marriages

Potentially polygamous marriages are not treated as actually polygamous marriages. A potentially polygamous marriage will be recognized as a valid marriage in Germany based on the right to marriage established in art. 6 GG. Following, a woman of German nationality may marry a man of foreign nationality, even if the man's personal law permits polygamy.[96] Problems occur when someone who is potentially polygamous married to a German national in Germany, enters a second marriage abroad according to the personal law that permits polygamy. The second marriage will not be bigamous based on the lacking connection to Germany, but the first marriage is still valid and as long as the second couple lives abroad that marriage will be valid abroad.[97]

[93] BeckRS 2009, 33043.
[94] Ibid.
[95] Staudinger (2013), art. 6 EGBGB Rn 172.
[96] MüKoBGB (2015), art. 13 EGBGB, Rn 66-69.
[97] Staudinger (2011), art. 13 EGBGB Rn 254.

4 Domicile vs. Nationality

England and Germany both apply the personal law when determining the material/essential validity of a marriage. Nevertheless, in England the personal law is based on domicile whilst in Germany on nationality. Consequently, in England more cases must be determined under domestic law as the lex fori and in Germany more cases must be decided upon foreign law.[98] Hence, the inducement of public policy is rather restricted in England in comparison to Germany.[99]

This section will focus on the reasons why the respective country has chosen its solution regarding the personal law, bringing forward both advantages and disadvantages.

4.1 Personal law based on domicile

In England, the principle of lex domicilii lies within the history of the common law system since the middle of the nineteenth century as the House of Lords in the decision of *Brook v. Brook*[100] decided that domicile shall determine the essential validity.[101] This is tied to the colonial history, where people would hold an UK nationality, without having a substantial connection to the UK.[102] Domicile is, according to the Law Commission, the choice of law rule that establishes the closest tie and should therefore determine the essential validity.[103] Furthermore, every persons status is of public concern and therefore everybody who "belongs" in a country shall be covered by English law.[104] Domicile provides some advantages in comparison to

[98] Staudinger (2013), art 6 EGBGB Rn 231-232.
[99] Ibid.
[100] Brook v. Brook (1861) 9 HLC 193.
[101] LCCP89, p. 56-57.
[102] Ibid, p.79.
[103] Ibid, p. 80.
[104] Ibid.

nationality as nobody can have more than one domicile at a time and nobody can lack a domicile.[105]

On the other hand, domicile provides disadvantages as it is complex and not the same as residence and therefore not easily ascertainable. A change in domicile is even harder to prove as no official document is involved.[106] Furthermore, if one domicile is abandoned and a new one is not established, the *domicile of origin*[107] comes into play and therefore the person might be considered domiciled in a country with which he does not have a connection.[108] Additionally, the dual domicile test leans towards invalidity of a marriage in comparison to the intended matrimonial home test.[109]

Generally, using domicile as the key determinant for the personal law is a way to control all persons domiciled in a country. A Muslim man domiciled in England will not be able to conclude further marriages abroad as English law will control that situation entirely as well as his future freedoms.[110]

4.2 Personal law based on nationality

Most civil law countries use nationality to determine the personal law, as is the case in Germany.[111] Even if there is a stronger connection to another country Germany will not allow the nationality to be disregarded.[112] Nationality is a stable determinant because it is hard to change and therefore predictable.[113] A change in nationality usually involves a complex process which indicates that if a person changes nationality that person agrees that the new nationality will determine the personal law.[114] An official document is involved when changing nationality which leads to the fact that it is easier to

[105] LCCP89, p. 81.
[106] Ibid, p. 82.
[107] See appendix.
[108] LCCP89 p. 82.
[109] Ibid, p 93.
[110] Shah (2003), at 379.
[111] LCCP89 p 78.
[112] MüKoBGB (2017), art. 5 EGBGB, Rn 28.
[113] Ibid, Rn 29-33; LCCP89 p. 78.
[114] MüKoBGB (2017), art 5 EGBGB Rn 38.

prove than habitual residence or domicile.[115] Furthermore, people are generally familiar with the term nationality whereas domicile is a legal term which many are unfamiliar with.[116] Lastly, the fact that there is a smaller risk for manipulation is often mentioned as an advantage, but one needs to keep in mind that some nationalities can be bought.[117]

Nevertheless, nationality also provides some disadvantages. Firstly, in many cases the nationality no longer establishes a sufficient link to the country as a person born and raised in Germany is not less connected to Germany than anybody else only because of the nationality.[118] Secondly, the personal law based on nationality can withhold the full social integration into the country of residence and immigrants will not be able to fully escape the laws and the country of nationality.[119] Finally, the amount of migration today will lead to the application of foreign law in the courts, which is a factor of instability.[120]

[115] Ibid, Rn 31.
[116] LCCP89 p. 78.
[117] MüKoBGB (2017), art 5 EGBGB Rn 32.
[118] Ibid, Rn 36.
[119] Ibid, Rn 33; LCCP89 p. 79.
[120] MüKoBGB (2017), art 5 EGBGB Rn 34.

5 Analysis and comparison

England and Germany, two countries with different legal systems, have still come to the general similar conclusion regarding the recognition of polygamous marriages. The first research question can therefore be answered as follows. Polygamous marriages concluded in the country will not be recognized and will constitute a bigamous marriage according to the domestic legal system. The same applies to marriages concluded abroad by or with a person who has a sufficient link to the country. Nevertheless, the consequences of the non-recognition vary. In England, the marriage will be void whereas in Germany the marriage will be voidable meaning that if nobody hands in the petition to declare the marriage void, the marriage will still be effective. Lastly, polygamous marriages concluded abroad by foreigners will generally be recognized, but not for all purposes.

Potentially polygamous marriages are generally treated as monogamous marriages and are therefore valid. This is not unproblematic as it can occur that the partner concludes a second valid marriage abroad. This shows the complicated aspect of recognizing potentially polygamous marriages in a society based on the principle of monogamy as a spouse can be in a position where the partner marries abroad into a valid marriage without the second marriage constituting a bigamous marriage.

Additionally, in both countries public policy can be induced when finally deciding whether a marriage should be recognized as valid and throughout circumscribe the recognition of polygamous marriages. Nevertheless, the threshold for public policy to be induced is rather high in both countries as the application of the foreign law must constitute an evident and unbearable result.

Notwithstanding, public policy as such is subject to judicial and political debate as it can be questioned whether there is a general public policy which

represents a dominant and accepted ideology in a country with cultural pluralism like Germany or England. Public policy can be a way to control the society in a country and thereby fail to acknowledge cultural values.[121] Public policy is a way for the state to decide which marriage institutions are desirable although that might not coincide with the view in society. The acceptance of other marriage institutions has been rising, thus it can be discussed whether polygamous marriages also should be able to be protected.[122]

Furthermore, the induction of public policy stands in conflict with the desire in private international law that different countries should tolerate and respect other legal systems. The inducement of public policy when foreign law is applicable can be offensive to that foreign country, which should be avoided.

Regarding the similarities and differences between the legal status of polygamous marriages in England and Germany it has been discovered that there are numerous similarities in the general regulation. Nevertheless, there is one important difference. When determining which law to apply regarding the capacity to marry, Germany applies the lex patriae, whereas England uses the principle of lex domicilii. In both countries, it has been debated whether the choice of law applicable in the relevant country is the right law to apply.

Other solutions such as the lex loci celebrationis have been researched but the countries chose to go another way. Therefore, the interesting question is why those other solutions have been chosen. In England, domicile lies within its history and it is generally a way to control the people in one country and uphold the standards and principles that are the base in the society. The disadvantage of domicile is that it is hard to understand as well as it can involve a long review before concluding which country constitutes the country of domicile. In Germany, nationality is used because it provides stability and it is a way to control people that hold the German nationality, without regard to the place of residence. Nationality is seen as the strongest

[121] Murphy (2000), at 647.
[122] Diedrichsen (2007), p. 225.

tie and the most predictable factor. However, the disadvantage of being hard to change must not be forgotten as it can block the person's right to choose freely and prevent social integration.

From the argumentation that is brought forward in the legal sources of both countries it can be analysed that the social and political goals vary and therefore different determinants are applied. Hence, there is not one right solution for every country as the history differs as well as the society itself.

There is a need for regulation concerning the recognition of marriages, specifically marriage institutions that are foreign to the national legal system. It appears that the countries try to tie a person to its legal system, covering people who no longer live in that country and may have established a closer link to another country. Therefore, it can be questioned why there is not a key determinant that is more flexible, which is more in compliance with peoples' future freedoms. I would advocate a different key determinant in compliance with what has been established here. On the contrary, the key determinant cannot be to flexible as that would purport people being covered by new legal systems repeatedly, meaning a lack in stability and predictability.

6 Conslusion

To conclude, in both countries the material/essential validity is determined by the personal law whilst the formal validity is determined by the lex loci celebrationis. However, they have decided to use different key determinants regarding the material/essential validity of a marriage. Domicile used in England is a way to control the person in a country and the society there. Nationality, as used in German law, is rather a way to control people's behaviour of a specific nationality. There is not a solution that in general is better than the other, as both provide advantages and disadvantages in comparison to each other. Notwithstanding, it can be concluded that depending on which political and social goals the country wants to achieve, the personal law can be used as a mechanism for that goal. The question whether domicile or nationality should predict peoples' future freedoms is of another nature and stands unanswered in this thesis.

Nevertheless, when this determinant is fulfilled the polygamous marriage will be bigamous in both countries. When the connection to the country lacks, polygamous marriages will generally be recognized, constituting a valid marriage under domestic law. When a marriage is concluded abroad by foreigners under foreign law, the connection later established to another country will not be able to circumscribe the validity unless public policy is induced, which is uncommon.

The practical effects of a recognized polygamous marriage concluded abroad have not been researched in this thesis. It would be interesting to see how polygamous marriages work in a society based on monogamy.

Appendix

Glossary

ab initio	from the beginning
domicile of origin	the home of an individual's parents
ex nunc	from now on
lex domicilii	law of the country of domicile
lex fori	the laws of the jurisdiction in which a legal action is brought
lex loci celebrationis	law of the country of celebration
lex patriae	law of the country of nationality
obiter dictum	a judge's expression of opinion in a judgement, but not essential to the decision and therefore not legally binding as a precedent
ordre public	term used in many legal systems, public policy in French

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