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Limping Marriages: Race, Class, and the Rise of Domicile-Based Divorce Jurisdiction in the British Empire

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ABSTRACT

In this article, I trace the development of domicile as the basis of divorce jurisdiction in English private international law. The maintenance of English domicile became closely related to the retention of 'white' identity, with white British subjects who became domiciled in non-white colonies such as India being relegated to racially ambiguous statuses. The domicile rule limited the remedy of divorce to those who were financially well-off and able to travel to the courts of the metropole since English courts refused to recognize divorce decrees granted by British Indian courts based on residence. As a result, innumerable British subjects who obtained a divorce in India remained married in Britain, i.e. were stuck in so-called 'limping marriages'. To remedy this situation, a separate divorce regime was enacted for British subjects residing in India but domiciled in England and Scotland, but it replicated the class barriers of the original domicile rule. Law, therefore, played a significant role in the creation of the mutually constitutive but unstable categories of class and race.

In June 1919, Reginald Keyes filed a petition before the Probate, Divorce, and Admiralty Division of the High Court in London seeking to dissolve his marriage with Annie Keyes on the ground of her adultery.[1] This was not any ordinary petition since Reginald and Annie already had a divorce decree in hand. They had been married in Calcutta in November 1916 and had spent their entire married life in various corners of British India where Reginald was posted as a British army officer. In October 1917, Reginald petitioned for divorce before the Punjab Chief Court in Lahore, which granted a decree nisi in February 1918, made absolute in November of the same year.[2]

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[1] A copy of the proceedings can be found in the divorce court file J/77/1479/5648 in the National Archives, Kew. In this article, I also use material from the India Office Records (hereafter IOR), Asia, Pacific, and Africa Collections, British Library, London, and the Lincoln's Inn Archives, London.

[2] *Keyes v Keyes*, [1921] P 204, 210–11.

If Reginald and Annie Keyes were already divorced, why did Reginald file another petition in London? The main purpose, it appears, was 'to determine the validity, at any rate in England, of the decree made at his instance in India'.[3] As per the Indian Divorce Act 1869 (the Act or the IDA), Indian courts could exercise matrimonial jurisdiction 'in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition',[4] both conditions that Reginald Keyes satisfied. The key sticking point was Reginald's domicile, a concept that is usually 'regarded as the equivalent of a person's permanent home' at common law; changing one's domicile requires both the fact of residence and an intention 'to remain there permanently'.[5] Despite Reginald's long residence in British India, he did not intend to stay there permanently and therefore retained his English domicile. The presiding judge of the Probate Division, Henry Duke, was dismayed at the thought of British Indian legislators making laws 'to interfere with the status of subjects not domiciled in India' and concluded that the IDA could not 'empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction'. The Indian divorce decree was, therefore, invalid and Reginald and Annie Keyes remained married in the eyes of English law.[6]

Since the decree continued to be binding in India, Reginald and Annie Keyes had a classic 'limping marriage', that is 'a marriage which is valid in one country but not in another'.[7] In the contemporary context, limping marriages often arise because of the uneven international landscape on the legality of same-sex marriage or the lack of recognition of extrajudicial religious divorces such as the Islamic *talaq*.[8] As the *Keyes* decision demonstrates, this phenomenon has a long history, with states refusing to recognize overseas divorce decrees granted by courts exercising matrimonial jurisdiction on a different basis to the one used by courts in the state in question. Since conflicts of law may be linked to conflicts of state authority and sovereignty,[9] cases involving overseas divorces raise questions about how and why states adopt specific rules relating to the exercise of jurisdiction and the recognition of foreign decrees. In his *Keyes* opinion, Henry Duke insisted on associating matrimonial jurisdiction with domicile, implying that it was, perhaps, a universally accepted rule. However, courts in other European countries at the time usually relied on nationality to exercise matrimonial jurisdiction.[10] So how and when did English law decide to adopt the domicile rule when it came to the exercise of divorce jurisdiction? How did ideas about race and class contribute to or challenge the framing of domicile as the basis of matrimonial jurisdiction? What were the consequences of relying solely on domicile for the ability of people to marry and divorce

[3] ibid 211.
[4] Indian Divorce Act 1869, s 2.
[5] Paul Torremans and others, *Cheshire, North and Fawcett: Private International Law* (15th edn, OUP, Oxford 2017) 146. Although I use the modern spelling 'domicile' throughout this article, I have retained the archaic spelling 'domicil' when quoting from texts that have used the older version.
[6] *Keyes* (n 2) 211, 216–17.
[7] Sofia Gondal, 'Limping Marriages: A Problem Cured or Hidden?' (2021) 51 Family Law 1180.
[8] See Frances Hamilton and Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3 JICL 1; Gondal (n 7). A limping marriage may also arise in municipal law if a civil divorce is not recognized by religious authorities, thereby leaving a couple married under religious law while divorced under civil law. See Pascale Fournier, Pascal McDougall, and Merissa Lichtsztral, 'Secular Rights and Religious Wrongs—Family Law, Religion and Women in Israel' (2012) 18 William & Mary Journal of Women and the Law 333; Anisa Buckley, *Not 'Completely Divorced': Muslim Women in Australia Navigating Muslim Family Laws* (Melbourne University Publishing, Melbourne 2019).
[9] Despite the allegedly 'private' nature of private international law, scholars have challenged the discipline's claims of neutrality and instead argued for a more state-centred approach to reconnect it with public international law. See Alex Mills, 'The Private History of International Law' (2006) 55 ICLQ 1; Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 Transnational Legal Theory 347.
[10] Gordon Bale, 'Divorce Jurisdiction: The Need for Reform' (1968) 18 UTLJ 73, 74; William Cornish, 'Foreign Elements in Family Disputes' in William Cornish and others (eds), *The Oxford History of the Laws of England*, vol 13, *1820–1914: Fields of Development* (OUP, Oxford 2010) 841.

across the British Empire? What can debates about limping marriages in British India tell us about the nature of legal concepts such as domicile more broadly?

Focusing on the position of foreign-domiciled persons in British India, I trace the development of the domicile rule in English private international law. As I will elucidate later in this article, permitting colonial officials who travelled to the far reaches of the British Empire to retain their ability to be governed by English law formed the background for cementing domicile as the basis of divorce jurisdiction. The choice of domicile was, therefore, a political one, and it was made at the expense of other bases of jurisdiction such as residence or nationality. As Henry Duke's decision in *Keyes* hints, alleged racial distinctions between 'white' Europeans and Indians structured the rationale for limiting divorce jurisdiction to courts of the domicile. Colonial concerns about race, religion, and class thus played a key role in choices made by English courts relating to doctrines of private international law. However, the adoption of the domicile rule also had unwelcome consequences for the European community in British India, forcing them to travel to the metropole for relief in matrimonial matters, and thereby restricting such remedies to the most well-off. The concept of domicile was, therefore, a useful legal tool in colonial efforts to arbitrarily relegate those who were unable to return to Britain to being 'less white' in some way. Although the element of intention in the definition of domicile enabled the creation of sprawling networks of British communities across the world by allowing the maintenance of a legal link with Britain, it also destabilized colonial classifications by deliberately introducing an element of class into the construction of racial distinctions.

Scholars of empire have long focused on the complications surrounding the creation of colonial categories. Based on research on the Dutch Empire in Sumatra, Ann Laura Stoler argues that 'competing colonial agendas, based on distinct class and gender interests, shaped the politics of race and tensions of rule'. Controlling the sexuality of white women and regulating the behaviour of poor whites were both critical to the project of maintaining European prestige and political control.[11] A similar argument can be made for British India, where Elizabeth Kolsky shows how the privileges enjoyed by white Britons in criminal law were enshrined through official efforts to contain the everyday violence unleashed by allegedly lower-class non-official Britons (ie those who did not work for the colonial state) on the Indian population.[12]

Defining who was eligible for the prerogatives of Britishness was essential to the exercise of policing racial boundaries since 'whiteness was always unstable' with 'poor whites across the Empire . . .. provid[ing] the clearest examples of those who were in danger of not being quite white enough'.[13] Scholars have described how maintaining a link with the metropole became key to white British identity. In the South Asian context, for instance, Elizabeth Buettner argues that sending children to Britain for their education allowed people to maintain 'a white bourgeois identity' since it implied a family's 'comfortable socio-economic standing and status as temporary sojourners in the subcontinent who maintained a secure foothold in the metropole'.[14] As Satoshi Mizutani contends, '[s]ocial status, cultural refinement, and level of education' all became important for defining 'whiteness', with those who were financially unable to return to Britain contradicting the 'almost axiomatic notion that

[11] Ann Laura Stoler, 'Rethinking Colonial Categories: European Communities and the Boundaries of Rule' (1989) 31 CSSH 134, 138–9.
[12] Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (CUP, Cambridge 2010).
[13] Catherine Hall, 'Of Gender and Empire: Reflections on the Nineteenth Century' in Philippa Levine (ed), *Gender and Empire* (OUP, Oxford 2007) 49.
[14] Elizabeth Buettner, *Empire Families: Britons and Late Imperial India* (OUP, Oxford 2004) 9.

white people resided in India only *temporarily*'.[15] In the words of Nurfadzilah Yahaya, therefore, class often 'tended to unsettle notions of "whiteness"'.[16]

These problems relating to the creation of clear racial categories were particularly complex when it came to the enactment of matrimonial law. By the middle of the nineteenth century, colonial thought had narrowed the application of religious laws in British India to issues relating to the family; people of different faiths were therefore governed by their personal laws when it came to marriage, divorce, adoption, and succession.[17] Such personal laws were deeply influenced by the choices of the colonial state; for instance, on account of the heavy reliance on scripture and the influence of the upper castes, colonial Hindu law did not recognize the right of divorce at all even though divorce had been acceptable among many castes and tribes in the precolonial period.[18]

In the case of the law applicable to the Christian community, the government of India enacted statutes, but this was a complicated and fraught process. Nandini Chatterjee discusses how British Indian legislation on Christian marriage originally dealt with concerns about the marital relations of white British subjects who resided in India; however, distinctions between the British and the 'natives' gave way after Indian Christians lobbied for changes, with the government being 'forced to repeatedly legislate in order to "fix" problems which were of its own creation'.[19] In this article, I focus on the lesser-studied British side of this constantly shifting racial binary to make a parallel argument in relation to the exercise of divorce jurisdiction for Christians in British India. Initial attempts to enact a divorce law for Christians in British India were framed entirely by British concerns but these later proved inadequate even for white British subjects, with the government having to continually amend the law to deal with difficulties arising out of the conflicting bases of divorce jurisdiction adopted in England and India. By the 1920s, the government of India decided to enact separate laws for Christians who were domiciled in England or Scotland and Christians who were domiciled in India, whatever their racial status. Consequently, white British subjects who were financially incapable of following the specialized regime for English- or Scottish-domiciled couples had to either remain trapped in unhappy marriages or declare themselves to be domiciled in India and thereby lose their 'whiteness'. By focusing on the concept of domicile in historical context, I aim to provide fresh perspectives on the critical role of law in the creation of the mutually constitutive but unstable categories of class and race as well as the significance of colonial networks for the development of legal doctrines in Britain.

This article is divided into four parts. First, I discuss the drafting process of the Indian Divorce Act within the broader context of the development of private international law in the nineteenth century and the specific struggles of British jurists to come up with a coherent understanding of the exercise of matrimonial jurisdiction. I then explore how and why domicile was cemented as the rule for divorce jurisdiction in English private international law in the last decade of the nineteenth century. I then move to analyse the *Keyes* decision and its effect on the exercise of divorce jurisdiction by British Indian courts, as well as the British government's legislative response for the validation of British Indian divorce decrees. Finally,

[15] Satoshi Mizutani, *The Meaning of White: Race, Class, and the 'Domiciled Community' in British India, 1858–1930* (OUP, Oxford 2011) 2.

[16] Nurfadzilah Yahaya, 'Class, White Women, and Elite Asian Men in British Courts during the Late Nineteenth Century' (2019) 31 Journal of Women's History 101.

[17] For some of the extensive scholarship on Hindu, Parsi, and Muslim personal laws in British India, see Rachel Sturman, 'Marriage and Family in Colonial Hindu Law' in Timothy Lubin, Donald R Davis Jr, and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (CUP, Cambridge 2010) 89–104; Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (CUP, Cambridge 2014); Julia Stephens, *Governing Islam: Law, Empire, and Secularism in Modern South Asia* (CUP, Cambridge 2018).

[18] Flavia Agnes, *Law and Gender Equality: The Politics of Women's Rights in India* (OUP, Oxford 1999) 11–28.

[19] Nandini Chatterjee, 'Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India' (2010) 44 Modern Asian Studies 1147, 1181.

I review the complications resulting from these colonial attempts at validation to delve into the use of the legal concept of domicile to create clear racial categories in British India. In the conclusion, I reflect on how this history of limping marriages in the imperial context can inform our understanding of modern parallels.

I. MATRIMONIAL JURISDICTION AND THE INDIAN DIVORCE ACT

In May 1862, the secretary of state for India, Charles Wood, instructed the government of India to draft a bill to confer matrimonial jurisdiction on the newly established High Courts in India, advising them that 'the High Court should have the same Jurisdiction as the Court for Divorce and Matrimonial Causes in England'.[20] At the time, civil divorce had only recently been adopted in England. Until the mid-nineteenth century, ecclesiastical law allowed for divorce *a mensa et thoro* (usually translated as 'from bed and board', making it akin to modern judicial separation), while divorce *a vinculo matrimonii* (full severance of marriage that permitted both spouses to remarry) was only possible through an Act of Parliament.[21] Judicial divorce was finally recognized by the Divorce and Matrimonial Causes Act 1857, which established a new Court for Divorce and Matrimonial Causes that had jurisdiction over both judicial separation and divorce.[22] After feverish debate, parliament voted to enact differing grounds for divorce for men and women: a husband could obtain a divorce based on adultery alone while a wife had to prove adultery along with incest, bigamy, cruelty, or desertion, or that her husband was guilty of rape, sodomy, or bestiality.[23] The statute did not, however, directly address the basis on which the Divorce Court would exercise jurisdiction;[24] although ecclesiastical courts had usually acted if the claimant was a local resident, it was unclear whether the same test would apply to divorces *a vinculo* after 1857.[25]

English courts had long struggled with the question of jurisdiction when it came to the recognition of foreign divorces *a vinculo*, with conservative critics claiming that people moved across borders simply to exploit lax divorce laws.[26] Unhappily married English couples, for instance, often went to Scotland to take advantage of its relatively liberal divorce regime, which permitted the judicial dissolution of marriages instead of limiting it to the more expensive parliamentary process.[27] However, the recognition of these divorces by English courts, which were coloured by 'national feeling',[28] was an altogether different affair. A particularly infamous 1812 case involved William Martin Lolley, a Liverpool distiller who was convicted of bigamy for remarrying after having obtained a divorce in Scotland. According to the rather scanty report of the decision, the judges opined that 'no sentence or Act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vincula matrimonii* in England'.[29] Given that divorce *a vinculo*

[20] Letter from the Secretary of State for India to the Government of India, Judicial, no 24, 14 May 1862, IOR/L/PJ/5/11.
[21] Lawrence Stone, *Road to Divorce: England, 1530–1987* (OUP, Oxford 1990) 46–7.
[22] Henry Kha, *A History of Divorce Law: Reform in England from the Victorian to the Interwar Years* (Routledge, New York 2021) 66–8.
[23] Divorce and Matrimonial Causes Act 1857, s 27. On this 'double standard', see Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850–1895* (Princeton UP, Princeton 1989) 39–44; Ann Sumner Holmes, 'The Double Standard in the English Divorce Laws, 1857–1923' (1995) 20 Law & Social Inquiry 601; Rebecca Probert, 'The Controversy of Equality and the Matrimonial Causes Act 1923' (1999) 11 CFLQ 33; Frances Hamilton, 'Equality Arguments, Contemporary Feminist Voices and the Matrimonial Causes Act 1923' (2022) 43 JLH 210.
[24] A clause in the draft bill that related to the jurisdiction of the court was removed during parliamentary debates, likely to ensure that the statute would not apply to Ireland, where the introduction of an English tribunal for divorce was considered to be subject to practical impediments. See Diane Urquhart, 'Ireland and the Divorce and Matrimonial Causes Act of 1857' (2013) 38 Journal of Family History 301, 303–6.
[25] Cornish (n 10) 840.
[26] Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (CUP, Cambridge 1988) 473–4.
[27] Leah Leneman, 'English Marriages and Scottish Divorces in the Early Nineteenth Century' (1996) 17 JLH 225.
[28] John Westlake, *A Treatise on Private International Law or the Conflict of Laws* (William Maxwell, London 1858) 342.
[29] *R v William Martin Lolley*, (1812) Russ & Ry 237, 239.

was only possible through a private Act of Parliament at the time, some later cases cited *Lolley* to uphold the absolute indissolubility of marriages that had been contracted in England, regardless of the parties' nationality or domicile.[30] Others argued that Lolley had been convicted of bigamy as he was 'really domiciled in England', implying that if he was domiciled in Scotland, English courts would have readily recognized his divorce.[31]

Although English courts claimed that the basis of jurisdiction was key to the recognition of overseas divorces, they provided conflicting opinions on whether domicile was a necessary requirement. In 1861, a man domiciled in Australia successfully petitioned for a divorce in London since he 'was bona fide resident here, not casually, or as a traveller'.[32] Seven years later, the sufficiency of residence alone was treated with scepticism in *Shaw v Gould*. A majority of the House of Lords noted that a divorce decree 'cannot claim extra-territorial authority unless it be pronounced in accordance with rules of international public law', which required that the parties be domiciled in the country in question. In his dissent, Lord Colonsay implied that courts would recognize overseas divorce decrees if the parties were 'resident there for a considerable time, though not so as to change the domicile for all purposes'.[33]

The question of the appropriate basis of matrimonial jurisdiction acquired new political significance in the late nineteenth century, with the large-scale movement of peoples across the rapidly expanding British Empire. The matter was particularly pressing in the case of British India, where many European British subjects only stayed temporarily, thereby never acquiring Indian domicile. Henry Maine, the Law Member of the Council of the Governor-General of India, admitted that issue was 'one of considerable difficulty as well as of great importance',[34] and requested the secretary of state for India to seek advice from the law officers of the Crown.[35] A Royal Commission was appointed to enquire into matrimonial law in India and the other colonies but the final report ruled out specific recommendations.[36]

Given the lack of clarity in Britain, British Indian jurists also emerged deeply divided on whether domicile was a necessary requirement for the exercise of matrimonial jurisdiction. During debates over the drafting of the IDA, Barnes Peacock, the chief justice of the Calcutta High Court, and Charles Boulnois, a judge of the Punjab Chief Court, remained circumspect about whether Indian decrees would be recognized if the parties were not domiciled in India.[37] On the other hand, John Paxton Norman of the Calcutta High Court, along with judges of the Allahabad High Court, argued that English courts would recognize Indian decrees relating to couples who were '*bona fide* residents' of India even if they did not have Indian domicile.[38]

An August 1868 report of the Select Committee of the Home Department recommended domicile as the basis of jurisdiction,[39] but revised its view six months later.[40] As Henry Maine, the principal drafter of the IDA, explained, domicile was 'proverbially difficult to establish' since it depended 'partly on length of residence in the foreign country' and 'partly on

[30] *M'Carthy v Decaix*, (1831) 2 Russ & M 614.
[31] *Warrender v Warrender*, (1835) II Clark & Finnelly 488, 541.
[32] *Brodie v Brodie*, (1861) 2 Sw & Tr 259, 263.
[33] *Shaw v Gould*, (1868) LR 3 HL 55, 81, 76, 96.
[34] Henry Maine, Statement of Objects and Reasons for the Indian Divorce Bill, 1 January 1863, IOR/L/PJ/5/11.
[35] Henry Maine, 'Divorce' in Montstuart Elphinstone Grant Duff, *Sir Henry Maine: A Brief Memoir of His Life, with Some of His Indian Speeches and Minutes* (John Murray, London 1892) 94–5.
[36] *Report of the Royal Commission on the Laws of Marriage* (1868) xxvi.
[37] Minute by the Chief Justice of the High Court at Calcutta, 15 December 1868, IOR/L/PJ/5/11; Letter from the Judge of the Chief Court to the Secretary of the Government of Punjab, 7 December 1868, IOR/L/PJ/5/11.
[38] Minute by JP Norman, 26 December 1868, IOR/L/PJ/5/11; Letter from the Registrar, High Court to the Secretary to the Government of the North-Western Provinces, no 2604, 10 December 1868, IOR/L/PJ/5/11.
[39] Report of the Select Committee of the Home Department, 7 August 1868, IOR/L/PJ/5/11.
[40] Report of the Select Committee of the Home Department, 30 January 1869, IOR/L/PJ/5/11.

intention to stay there'. Although Europeans in India 'are resident here . . . their residence falls somewhat short of domicile: their duties keep them here'. Since their position was exactly what Lord Colonsay had described in his judgment in *Shaw v Gould*, Maine had 'much confidence that the English courts will recognise Indian adjudications under this measure'.[41]

Although Indian officials largely followed the Divorce and Matrimonial Causes Act 1857 when it came to the grounds for divorce,[42] they made an explicit departure on jurisdiction as a result of Maine's influence. The final text of the Indian Divorce Act authorized Indian courts to grant relief 'in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition'; if the petition was for divorce it also required that 'the marriage shall have been solemnized in India' or that 'the adultery, rape or unnatural crime complained of shall have been committed in India',[43] thereby limiting the ability of passing travellers to approach Indian courts for relief. Matrimonial jurisdiction could be exercised both by the High Courts and the district courts, which were required to 'act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief'.[44]

In the decades after the IDA was drafted, English courts continued to provide contradictory opinions on the appropriate basis for matrimonial jurisdiction. Much as Maine had hoped, the courts obliquely recognized the validity of Indian divorce decrees while deciding cases involving the restitution of conjugal rights and the legitimacy of children.[45] None of the cases, however, directly held that residence was a sufficient basis for the exercise of divorce jurisdiction. A trio of decisions from the 1870s demonstrates the incoherent state of the law. In *Shaw v Her Majesty's Attorney General*, the Divorce Court concluded that 'in no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted'.[46] In *Wilson v Wilson*, on the other hand, the Divorce Court recognized that the legal question remained open, noting that 'whether any residence in this country short of domicile, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent'.[47] Towards the end of the decade, in *Niboyet v Niboyet*, a majority of the Court of Appeal decided to follow old ecclesiastical law, under which courts had granted remedies based on '[r]esidence, as distinct from casual presence on a visit or in itinere', with domicile or nationality being irrelevant.[48]

These wildly differing conclusions made it difficult for legal scholars to generate a coherent rule, as demonstrated by the works of the two most well-respected English private international law scholars of the late nineteenth century, John Westlake and AV Dicey. Westlake, for instance, stated that '[a] divorce pronounced by a foreign court is treated as valid in England only when the parties were domiciled within the jurisdiction of that court at the time of the suit in it', but acknowledged that '[t]he doctrine here stated is far from certain' because of cases like *Niboyet*.[49] Dicey was more strongly in favour of the domicile rule, stating that jurisdiction in divorce cases depended 'in general, upon the domicil of the parties to

[41] Maine (n 35) 101, 103.
[42] Indian Divorce Act 1869, s 10. The only addition to the grounds of divorce present in English law was that a wife could petition for a dissolution of the marriage if 'since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and has gone through a form of marriage with another woman'.
[43] Indian Divorce Act 1869, s 2.
[44] ibid s 7.
[45] See *Thornton v Thornton*, (1886) 11 PD 176; *Warter v Warter*, (1890) 15 PD 152.
[46] *Shaw v Her Majesty's Attorney General*, (1869–72) LR 2 P & D 156, 161–2.
[47] *Wilson v Wilson*, (1869–72) LR 2 P & D 435, 441–2.
[48] *Niboyet v Niboyet*, (1878) 4 PD 1, 4–5.
[49] John Westlake, *A Treatise on Private International Law* (2nd edn, William Maxwell & Son, London 1880) 79, 73.

a marriage at the time of the commencement of proceedings for divorce', with 'no court of any other country [having] jurisdiction to dissolve their marriage'. Although he admitted that *Niboyet* made it 'difficult to determine what is the exact principle adopted by our courts', he concluded that it was 'opposed to other dicta of weight, and cannot be taken as absolutely authoritative'; it was, therefore, only applicable in 'exceptional circumstances'.[50]

As these cases and texts demonstrate, both English courts and treatise writers remained divided about the basis of the exercise of divorce jurisdiction throughout the nineteenth century. In some instances, *bona fide* residence within a court's jurisdiction appeared sufficient for the grant of a divorce decree that would be recognized by other states; in others, only the domicile of the parties provided enough connection for courts to grant divorce decrees that would be recognized extraterritorially. Most English judges implied that their approach to the recognition of foreign divorce decrees was shaped by concerns relating to individuals forum shopping for lax divorce laws. However, as British subjects continued to travel to far-flung places in the empire, racial distinctions soon became a flashpoint, with the first hint towards a definitive rule on divorce jurisdiction arising out of the breakdown of a marriage in the British colony of Ceylon.

II. LE MESURIER AND THE PLACE OF DOMICILE IN ENGLISH PRIVATE INTERNATIONAL LAW

In July 1892, Cecil Le Mesurier filed a petition in a Ceylon district court seeking a divorce from his French wife, Juliette.[51] Juliette denied his allegations of adultery and disputed the court's jurisdiction as none of her supposed lovers, who had been named co-defendants, resided in Ceylon.[52] The district judge concluded that Cecil's residence in the colony was sufficient,[53] and granted a decree for divorce.[54] Juliette appealed to the Supreme Court of Ceylon,[55] which set aside the decree.[56] Although much of the reasoning related to the lack of evidence of adultery, the chief justice, Archibald Campbell Laurie, also concluded that Ceylon courts only had jurisdiction to grant decrees of divorce *a vinculo matrimonii* to those who were married in Ceylon; Cecil and Juliette, however, had been married in England.[57] Cecil took the matter to the Privy Council,[58] where he admitted that he 'retained, and still continues to retain his English domicile of origin' but argued that Ceylon courts had jurisdiction as he resided in the colony with a 'degree of permanence' on account of his position as an officer in the Ceylon Civil Service.[59]

Writing for the Privy Council, Lord Watson concluded that only a decree granted by a court 'according to the rules of international law, as in the case where the parties have their domicil within its forum' would be 'respected by the tribunals of every civilized country'. To do so, he adopted three main strategies. First, he read precedents to minimize or dismiss

[50] AV Dicey, *The Law of Domicil* (Stevens & Sons, London 1879) 225–7, 232.
[51] Plaint, 12 July 1892, Record of Proceedings, 5–6, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[52] Answer of first defendant, 30 August 1892, Record of Proceedings, 7–8, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[53] Proceedings on application for a commission for examination of third and fourth defendants, 20 January 1893, Record of Proceedings, 16–17, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[54] Judgment of District Judge, 31 January 1893, Record of Proceedings, 41–4, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[55] Petition of appeal of first defendant, 13 February 1893, Record of Proceedings, 45, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[56] Order and Decree of Supreme Court, 20 October 1893, Record of Proceedings, 47, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[57] Reasons for Judgment of the Supreme Court, 20 October 1893, Record of Proceedings, 47–55, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[58] Case for the Appellent, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.
[59] *Le Mesurier v Le Mesurier*, [1895] AC 517, 523, 520.

dissenting views. He set aside Lord Colonsay's separate opinion in *Shaw v Gould* and the open-ended nature of the decision in *Wilson v Wilson* to conclude that both were strong authorities in favour of the domicile rule. He also dismissed the support for the residence rule in *Niboyet* since it relied on pre-1857 ecclesiastical courts' precedents on the restitution of conjugal rights and judicial separation, which were different from divorce *a vinculo matrimonii*. Second, he claimed that relying on residence would not be 'very definite'.[60] In doing so, he glossed over uncertainties in the definition of domicile itself, with judges having previously admitted that 'if the Courts of every country adhered to domicile as the rule of jurisdiction, there would still remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question might be very different in one country to what it might be in another'.[61] Finally, he selectively read textbooks from continental authors[62] to claim universal support for the domicile rule, concluding that 'according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage'.[63]

The late nineteenth-century 'age of empire'[64] provides the background for the rise of domicile as the sole basis of divorce jurisdiction recognized by English law. The modern characteristics of domicile were crystallized during this period, with jurists agreeing that each person had a domicile at birth, which they retained until they acquired a different domicile.[65] Women automatically acquired the domicile of their husbands on marriage and all adults could obtain a domicile of choice 'by taking up residence in a new jurisdiction with an *animus manendi*—a fixed and settled intention to remain there for good'.[66] This element of intention made domicile a crucial tool at a time when thousands of British officials, army officers, clergymen, traders, and members of other professions were moving to the colonies. Without clear evidence of the intention to remain in those territories permanently, such persons could retain their English domicile and be governed by English law in matrimonial matters.[67] Even when such evidence existed, English courts sometimes refused to accept that a person had abandoned their English domicile for the domicile of an 'uncivilized' country,[68] arguing that '[t]he difference between the religion, laws, manners and customs ... is so great as to raise every presumption against such a domicil'.[69] The acquisition of a new domicile, therefore, became encoded with ideas of 'civilizational differences' between Europeans and non-Europeans.[70]

Although domicile-based jurisdiction was intended to benefit Englishmen in the colonies by allowing them to retain a connection with the metropole, it could also have harsh consequences. Since married women could not have a separate domicile from their husbands, the domicile-only rule compelled women to approach foreign courts for relief if their husbands moved abroad after deserting them,[71] a problem that was remedied by statute to a limited

[60] ibid 527, 540, 531, 538.
[61] *Wilson* (n 47) 442.
[62] Lord Watson cited the German jurist, Ludwig von Bar, as noting '[a] decree of divorce, therefore, pronounced by any other judge than a judge of the domicil or nationality, is to be regarded in all other countries as inoperative', but went on to ignore the reference to nationality. See *Le Mesurier* (n 59) 538.
[63] ibid 540.
[64] I borrow this term from Eric Hobsbawm, *The Age of Empire: 1875–1914* (Pantheon Books, New York 1987).
[65] Cornish (n 10) 836.
[66] William Cornish, Michael Lobban, and Keith Smith, 'Private International Law' in Cornish and others (n 10) vol 11, 286.
[67] Cornish (n 10) 836–7.
[68] Cornish and others (n 66) 287.
[69] *In re Tootal's Trust*, (1883) 23 ChD 532, 534. This decision was reversed by the House of Lords several decades later in *Casdagli v Casdagli*, [1919] AC 145.
[70] Late nineteenth-century private international law was infused with differences between 'civilized' Europe and 'uncivilized' non-Europeans. See Geoffrey Wilson Bartholomew, 'Dicey and the Development of English Private International Law' (1959) 1 Tasmanian University LR 240, 247–8.
[71] AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons, London 1896) 275–6.

extent.[72] The rule could also result in limping marriages since overseas divorce decrees obtained by English-domiciled persons in colonial courts remained unrecognized by English courts. Cecil Le Mesurier, for instance, remained married to Juliette under English law and was forced to approach English courts to obtain a recognized divorce, an ironic result for a man who had done exactly that in the beginning but was instead advised by his English solicitors to file his petition in Ceylon.[73]

The problem of limping marriages was particularly acute when it came to British India, where courts were bound by the IDA to grant divorce decrees based on residence, thereby ensuring that a person could 'have a valid divorce in British India, but his marriage will be valid in every other civilized State of the world'.[74] To remedy this situation, Henry Rattigan, a Punjab lawyer who later became the chief justice of the Lahore High Court, proposed reading the term 'resident' in the IDA as 'domiciled', thereby aligning Indian and English law on jurisdiction.[75] The colonial official and imperial constitutional lawyer AB Keith considered this interpretation to be 'extremely strained' and argued that making domicile the basis of divorce jurisdiction in British India would make the statute 'almost useless as regards the mass of Anglo-Indians'.[76] His friend and intellectual sparring partner AV Dicey agreed that Rattigan's conclusions were 'absurd'.[77] Instead, he argued that 'the better opinion is . . . that a divorce under the Indian Divorce Act [sic] valid in India, is valid in England, and, indeed, throughout the British dominions'. Dicey did not believe *Le Mesurier* to be conclusive for the British Indian situation as it related to Ceylon, which had no local law on divorce jurisdiction. India, on the other hand, provided for residence-based jurisdiction in a statute, 'the authority whereof depends on an Act of Parliament', and it was 'in the highest degree improbable that Parliament intended a divorce which was effective in India should be invalid in England'. In his view, recognizing Indian divorce decrees, even if they were granted based on residence, was the only mechanism to avoid limping marriages across the empire.[78]

These concerns led the Royal Commission on Divorce and Matrimonial Causes to advocate residence-based matrimonial jurisdiction. Its 1912 report concluded that the domicile principle presented difficulties for 'numerous persons, whose domicil is English but whose work in professions or businesses requires them to reside for long periods abroad', and who 'have neither the means, nor the time, to leave their place of residence and proceed with their cases in England'. The Commission therefore recommended that 'British subjects should be permitted to have their cases tried in the place of their residence within the British Dominions, and that the decree, when registered in the place of the domicil, be operative as if made there, if made on grounds permitted by the law of the domicil'.[79] Since these recommendations remained confined to paper,[80] the validity of Indian divorce decrees continued

[72] Matrimonial Causes Act 1937, s 13 allowed a deserted wife to file for divorce in an English court if her husband had been domiciled in England prior to the desertion even if he had changed his domicile thereafter. However, an Englishwoman who married a foreigner and was then abandoned still had no remedy. For further discussion of the limitations of the statute, see Francis C Coningsby, 'Some International Aspects in Relation to Matrimonial Causes' (1938) 24 Transactions of the Grotius Society 41.

[73] Proceedings at trial, Evidence of Cecil John Reginald Le Mesurier, 20 January 1893, Record of Proceedings, 19, *Le Mesurier v Le Mesurier*, Lincoln's Inn Archives.

[74] *Giordano v Giordano* (1913) ILR 40 Cal 215.

[75] HAB Rattigan, *The Law of Divorce Applicable to Christians in India* (Wildy & Sons, London 1897) 7–12.

[76] Letter from AB Keith to AV Dicey, 22 September 1906, in Ridgway F Shinn, Jr and Richard A Cosgrove (eds), *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith* (UP of America, Lanham 1996) 14.

[77] Letter from AV Dicey to AB Keith, 3 August 1906, ibid 5.

[78] AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (2nd edn, London, Stevens & Sons 1908) 803–5.

[79] *Report of the Royal Commission on Divorce and Matrimonial Causes* (1912) 114–15.

[80] Cornish (n 10) 842.

to be an open question that was finally addressed by Henry Duke in the *Keyes* case, sparking an empire-wide crisis.

III. KEYES AND ITS IMPERIAL AFTERMATH

When news of Reginald Keyes's proposal to approach an English court to determine the validity of his Indian divorce decree first reached the India Office, the British government department responsible for managing the affairs of British India, officials reacted with a mixture of alarm and resignation. The legal adviser, Edward Chamier, feared a declaration that an Indian divorce obtained by a person domiciled in England 'was of no value at all',[81] but also considered it 'a suitable opportunity for obtaining a definite decision on the point by a competent court in this country'.[82] The India Office, therefore, decided to ask the court for permission to be heard as amicus curiae.[83]

Officials instructed Erle Richards, an Oxford professor and a former Law Member of the viceroy's India Council, to appear for the India Office. Richards relied on *Niboyet* to argue that the domicile rule was not well established when the IDA was passed, implying that parliament had legislated to permit Indian courts to exercise jurisdiction based on residence. In addition, he contended that the residence test was essential for the 'very special conditions' in British India as 'hardly any Englishmen are domiciled in India'. Declaring Indian divorce decrees invalid would also affect subsequent re-marriages and the legitimacy of children, which could have devastating consequences. Richards, however, found that the government itself opposed the India Office view. The attorney-general, Gordon Hewart, representing the King's Proctor, cited *Le Mesurier* to argue that 'permanent domicil is essential to the exercise of that kind of jurisdiction to dissolve a marriage which has extraterritorial effect . . . and that is so because of the principles of private international law which prescribe it'.[84] Henry Duke, the president of the Probate, Divorce, and Admiralty Division of the High Court, found this latter view persuasive. He dismissed *Niboyet* and claimed that the decisions in *Warrender* and *Shaw v Gould* meant that '[i]n 1861, the law of nations with regard to the power of communities to deal with the status of marriage between strangers resident among them had long been declared by jurists to be that afterwards laid down in *Le Mesurier* v. *Le Mesurier*'.[85] The domicile rule was, according to Duke, a generally accepted principle of international law at the time when the IDA was passed.

Even if international law did not necessitate the domicile rule, Duke maintained that Indian legislators could not permit courts to exercise residence-based jurisdiction over people domiciled in England. He held that the Indian Councils Act 1861, which granted legislative power to the Council of the Governor-General of India, 'could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India' since '[t]he laws to be made are to be of local operation' and '[t]he status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations'.[86] Consequently, Indian legislators had acted outside the scope of their authority when they made residence the basis of divorce jurisdiction in the IDA since it affected

[81] Minute by Edward Chamier, 30 June 2020, IOR/L/PJ/6/1746.
[82] Letter from Edward Chamier, Legal Advisor to the Secretary of State for India, to John P Mallor, King's Proctor, 17 January 1921, IOR/L/PJ/6/1746.
[83] Letter from the Assistant Solicitor to the India Office to Chancellor and Ridley, 19 October 1920, IOR/L/PJ/6/1746; Letter from Boyce and Evans to Edward Chamier, Legal Advisor to the Secretary of State for India, 5 January 1921, IOR/L/PJ/6/1746.
[84] *Keyes v Keyes and Gray*, Transcript of Proceedings before the Probate, Divorce and Admiralty Division of the High Court of Justice, 23 February 1921, 36, 32–4, 17–18, IOR/L/PJ/6/1746.
[85] *Keyes* (n 2) 215.
[86] ibid 216.

individuals who were domiciled outside India. For Duke, therefore, not only did English courts not have to recognize residence-based divorce decrees granted by Indian courts but Indian courts themselves could not rely on the explicit language of the IDA to exercise divorce jurisdiction based on residence.[87]

The *Keyes* judgment raised concerns in the press[88] and in parliament[89] since it affected not only the marriage of Reginald and Annie Keyes but every divorce decree that had been granted by Indian courts under the IDA.[90] The India Office was inundated with anxious letters from people enquiring about the validity of divorces that they had obtained in British India.[91] One possible response would have been to affirm the power of Indian courts to grant divorce decrees based on residence, but India Office officials deemed that such a course of action 'would raise a large question of principle and might invite opposition'.[92] Instead, they asked parliament to pass legislation to validate existing decrees, subsequent marriages, and the legitimacy of children born of such marriages, to avoid causing hardship to innocent individuals, while scrupulously defending the propriety of the decision in *Keyes*.[93] The Indian Divorces (Validity) Act 1921 (the Validity Act) received royal assent on 1 July 1921 and declared any decree made by an Indian court 'for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom' as valid 'as though the parties to the marriage had been domiciled in India' so long as 'the proceedings were commenced before the passing of this Act'.[94]

Since the Validity Act was limited to proceedings prior to its passage, problems persisted as persons domiciled in England continued to seek divorces in India, reasoning '[n]ever mind about England let us get a divorce in India at all events'.[95] Such petitions faced a mixed reception in Indian courts. A majority of the Bombay High Court decided that local courts did not have the jurisdiction to grant divorce decrees to couples domiciled in England, with the chief justice, Norman Macleod, determining that domicile had been the accepted private international law rule when the IDA was passed.[96] A full bench of the Lahore High Court, on the other hand, declared that Indian courts did have jurisdiction over foreign-domiciled couples. Shadi Lal, the first Indian to be appointed a permanent chief justice of a High Court, considered Henry Duke's comments on the authority of Indian legislators to be 'no more than obiter dicta' and instead concluded that the Indian legislature had acted within its powers while granting residence-based jurisdiction to Indian courts. He also challenged Duke's insistence that the domicile rule was generally accepted in international law, instead arguing that 'there is really no such thing as the common law of nations or of Europe on the subject of extraterritorial operation of rights, and that each country has its own rules on that subject'. Indian courts were, therefore, bound to give effect to the terms of the IDA since it

[87] Some scholars considered this conclusion to be a 'rather strained view' and argued that the decision ought to have been made solely on the domicile rule. See AB Keith, 'Notes on Imperial Constitutional Law' (1921) 3 JCL & IL 306, 312.

[88] 'Divorce Laws of the Empire' *The Times* (London, 11 March 1921) 11; 'Dubiety in Divorce' *The Pioneer* (Allahabad, 8 April 1921) 4; 'English Law Notes: The Divorce Tangle' *The Times of India* (Bombay, 29 April 1921) 8.

[89] Question by William Davison, 14 March 1921, IOR/L/PJ/6/1746; Question by JD Rees, 14 March 1921, IOR/L/PJ/6/1746.

[90] Minute by Edward Chamier, 11 March 1921, IOR/L/PJ/6/1746.

[91] See Letter from AA Gibbs to the Under Secretary of State for India, Military Department, India Office, 13 May 1921, IOR/L/PJ/6/1746; Letter from E Aston-Shepherd to the Secretary of State for India, 5 November 1921, IOR/L/PJ/6/1746; Letter from F Chandler to the Secretary of State for India, 29 December 1923, IOR/L/PJ/6/1869.

[92] Memorandum by Edward Chamier, 30 March 1921, IOR/L/PJ/6/1746.

[93] Memorandum by Edwin Montagu, the Secretary of State for India, 11 April 1921, IOR/L/PJ/6/1746; HL Deb 7 June 1921, vol 45, col 457; HC Deb 22 June 1921, vol 143, cols 1469–73.

[94] Indian Divorces (Validity) Act 1921, s 1.

[95] Minute by Edward Chamier, 14 August 1922, IOR/L/PJ/6/1834.

[96] *Wilkinson v Wilkinson*, AIR 1923 Bom 321, paras 16–17, 20–3.

'provides a rule for determining jurisdiction in divorce cases'.[97] Two single-judge benches of the Calcutta High Court followed Shadi Lal's lead.[98]

With the exception of two Bombay judges, all others simply went ahead with granting divorce decrees to foreign-domiciled couples even after the knowledge that they might be considered invalid in other parts of the world. Their written opinions indicate that they considered themselves bound by Indian rather than English law and they often took strong exception to an English judge declaring the invalidity of an Indian statute. Parallels can be drawn with Scottish judges from a century prior, who continued to hand down divorce decrees to English couples even after English courts had refused to recognize them in *Lolley*, with Leah Leneman arguing that this appeared to indicate that 'the judges of the Court of Session may have felt a certain pleasure in defying them [the English judges] and asserting the independence of the Scottish legal system'.[99]

The net result of these decisions was to ensure that foreign-domiciled couples managed to obtain divorce decrees in India but remained married in other parts of the world where such decrees were not recognized. Faced with this 'highly undesirable' situation, and despite their earlier disavowals, the India Office decided to consider plans to authorize Indian courts to exercise jurisdiction over foreign-domiciled couples who lived in British India.[100] These efforts led to considerable debate over the ambit of the proposed legislation, raising questions over the scope of categories such as 'European' and 'white' as well as role played by the concept of domicile in policing the boundaries of these classifications.

IV. EUROPEANS, CLASS, AND THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT

Despite being regarded as monolithic, both self-reflexively by the colonial state and by later scholarship, the European population in British India was immensely diverse. Apart from elite civil servants, businessmen, planters, and army officers, there was also a shifting category of 'poor whites' working in the railways, factories, and public works, or as domestic servants, nurses, teachers, and shop assistants, with vagrants and sex workers constituting the lowest tier.[101] In the face of such heterogeneity, scholars such as Ann Laura Stoler have noted that European-ness in colonial contexts had to be 'consciously created and fashioned to overcome the economic and social disparities that would in other contexts separate and often set their members in conflict'.[102] In British India, boundaries within the broader European community were marked by the ability to travel to the metropole, with privileged British families 'maintaining a presence [in India] over several generations ... without formally emigrating'.[103] This 'peculiar rootlessness of colonizers' and 'their calculated aloofness from Indian society [as well as] their positive connection to the "civilization" of the metropole' became the basis of colonial rule.[104] Schooling and education were particularly 'crucial spaces in which interdependent racial and class identities were brought to the surface and often reconstituted'. As Elizabeth Buettner argues, '[l]eaving India for a metropolitan education became a rite of passage that positioned an individual within the transient, sojourner, better-off

[97] *Lee v Lee*, AIR 1924 Lah 513, paras 16, 20, 33–4.
[98] *Miller v Miller*, AIR 1925 Cal 874; *Isharani Nirupoma Devi v Victor Nitendra Narain*, AIR 1926 Cal 871.
[99] Leneman (n 27) 241.
[100] Letter from JE Ferard, Secretary, Judicial and Public Department, India Office, to the Secretary to the Government of India, Home Department, 28 September 1922, IOR/L/PJ/6/1834.
[101] David Arnold, 'European Orphans and Vagrants in India in the Nineteenth Century' (1979) 7 J Imp & Commonw Hist 104–5.
[102] Stoler (n 11) 137.
[103] Buettner (n 14) 2.
[104] Mizutani (n 15) 26.

community marked as "European", whereas schooling in the subcontinent indicated a domiciled, poorer, and racially ambiguous status'.[105]

The primary example of such racially ambivalent status was the category of 'domiciled Europeans', which included 'those born in India of parents who were of British and/or European descent who had settled permanently in India'.[106] Domiciled Europeans differentiated themselves from Anglo-Indians, who were racially mixed since '[t]here was a prestige value to being "pure European" at even the lowest level'.[107] However, since they lost touch with Britain because of the financial inability to travel, domiciled Europeans were soon 'equated with the racially mixed by colonial elites ... [r]egardless of their actual ancestry' and consequently 'experienced the same disadvantages as the Anglo-Indian community, in effect falling outside the bounds of whiteness with its many attendant privileges'.[108] The uncertain racial position of domiciled Europeans was, therefore, linked with their poverty, which 'challenged the connections between Britishness, its assumed whiteness, and imperial privilege'.[109] In public discourse, the terms 'domiciled European' and 'Anglo-Indian' began to be used interchangeably,[110] often in contrast with Europeans who were not domiciled in India.

In addition to education, employment, and the regulation of sexual relations, the legal concept of domicile itself was critical for attempts to police racial boundaries between white Europeans and mixed-race or racially ambiguous individuals. British Indian law repeatedly encoded differences between domiciled and non-domiciled Europeans. Several criminal law privileges (including the right to be tried by specific judges) were provided to European British subjects, who were contrasted with 'native' British subjects by being defined as '[a]ll subjects of Her Majesty, born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European, American, or Australian Colonies or possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal' together with '[t]he children or grandchildren of any such person'.[111] Despite lobbying by domiciled Europeans, colonial officials refused to extend these prerogatives 'to a class so indefinite as the descendants of Europeans become after the second or third generation' since it 'would result in endless confusion and abuse'.[112] By 1935, racially unmixed Europeans were included in the category of Anglo-Indians if they were born and domiciled in India.[113] By emphasizing the maintenance of connections with the metropole, the concept of domicile ensured that class, in the form of the monetary ability to travel back to Britain, became key to defining a white British identity in contrast to that of the domiciled European or the Anglo-Indian.

Although middle-class British families endeavoured to send their children to Britain to study to cement their class and racial status,[114] frequent travel to the metropole was a difficult proposition even for the most elite parts of the community. These impediments elevated

[105] Buettner (n 14) 74, 80.
[106] Dorothy McMenamin, 'Identifying Domiciled Europeans in Colonial India: Poor Whites or Privileged Community?' (2001) 3 NZJAS 106.
[107] Arnold (n 101) 106.
[108] Buettner (n 14) 81.
[109] Alison Blunt, *Domicile and Diaspora: Anglo-Indian Women and the Spatial Politics of Home* (Wiley-Blackwell, Oxford 2005) 33.
[110] For examples of the slippage between the use of terms 'domiciled European' and 'Anglo-Indian', see *Report of the Calcutta Domiciled Community Enquiry Committee* (1918–19) IOR/L/PJ/6/1724.
[111] Code of Criminal Procedure 1872, s 71.
[112] Memo by [?], 13 August 1886, IOR/L/PJ/6/181.
[113] Government of India Act 1935, sch 1, s 26 defined an Anglo-Indian as 'a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is a native of India' with a 'native of India' including 'any person born and domiciled within the dominions of His Majesty in India or Burma of parents habitually resident in India or Burma and not established there for temporary purposes only'. For additional details, see McMenamin (n 106) 107.
[114] Buettner (n 14) 23.

the significance of procedural questions on matrimonial jurisdiction. Linking divorce jurisdiction with domicile would require English- or Scottish-domiciled petitioners to return to Britain to prosecute matrimonial cases and pay for commissions to take the evidence of witnesses resident in India, placing the remedy of divorce out of the reach of almost the entire British population in India.[115] To some, the answer was obvious: Murray Coutts Trotter, the chief justice of the Madras High Court, argued that such persons could obtain redress by 'honestly claim[ing] an Indian domicile' since 'many refusals to accept an Indian domicile are at best a remote hope and at worst a pretence'.[116] As this solution would result in a loss of their racial identity, which was linked to the claim of temporary residence, members of the European community instead pushed for an alternative that would enable them to retain their non-Indian domicile. European Association branches, trade and commerce associations, European members of provincial legislative assemblies, and British army officers therefore backed efforts to grant jurisdiction to Indian courts to exercise matrimonial jurisdiction over persons who resided in India while being domiciled elsewhere.[117]

In response to these demands, the government of India drafted a two-part proposal in April 1924. The first step involved the enactment of parliamentary legislation to confer jurisdiction on Indian High Courts to grant divorce decrees to couples residing in India but domiciled in England, Wales, or Scotland. Such decrees would 'be as valid as though the parties to the marriage had been domiciled in India' and would be granted based on the grounds of divorce provided in English law. The second step required the amendment of the IDA to limit the jurisdiction of Indian courts to persons who were domiciled in India. In this way, jurisdiction over English or Scottish domiciled couples would only be exercised under parliamentary rather than British Indian legislation. British Indian officials admitted that this proposal would not protect those who were domiciled in other parts of the empire but claimed that such persons were 'trifling' in number compared with those domiciled in England, Wales, and Scotland.[118]

The IDA was amended in March 1926 to limit the divorce jurisdiction of Indian courts to couples who were domiciled in India,[119] but the passage of parliamentary legislation to grant Indian High Courts jurisdiction over couples domiciled in England and Scotland proved more difficult. Although the secretary of state for India, Lord Olivier, claimed that 'no other expedient will provide a satisfactory solution',[120] many officials queried the rationale for placing India in a position different to the other colonies.[121] The proposal also ran into trouble with Scottish jurists, members of parliament, and the press who were all incensed at the

[115] Letter from the Principal, Law College, Madras, 10 March 1922, IOR/L/PJ/6/1834.

[116] Minutes of the Honourable Chief Justice and other Honourable Judges enclosed in Letter from the Registrar, High Court, Madras, 4 April 1922, IOR/L/PJ/6/1834.

[117] See Memorandum from Major (Brevet Lieutenant-Colonel) EW Brighton to the Adjutant, 2 Bedfordshire and Hertfordshire Regiment, 21 February 1922, IOR/L/PJ/6/1834; Letter from JE de Lisle, Member of the Bengal Legislative Council, to the Secretary to the Government of Bengal, Judicial Department, 12 March 1922, IOR/L/PJ/6/1834; Letter from JG Ryan, Honorary Secretary, European Association, United Provinces, to the Secretary to Government, United Provinces, 15 March 1922, IOR/L/PJ/6/1834; Letter from the Secretary, Punjab Trades Association, to the Home Secretary to Government, Punjab, 19 May 1922, IOR/L/PJ/6/1834.

[118] Letter from the Government of India, Department of Education, Health and Lands (Ecclesiastical) to the Secretary of State for India, 24 April 1924, IOR/L/PJ/6/1834. There was also some debate over extending jurisdiction to couples domiciled in Northern Ireland, but this proposal was dismissed after India Office officials were informed that there was no provision for judicial divorce in Northern Ireland at all. See Note by Vernon Dawson, 2 December 1926, IOR/L/PJ/6/1834; Letter from GM Martin-Jones to Vernon Dawson, 3 December 1926, IOR/L/PJ/6/1834; Note by [W?], 3 December 1926, IOR/L/PJ/6/1834.

[119] 'Indian Divorce Law; Mr Tonkinson's Bill Passed by Legislative Assembly; Factories Act and Income Tax Bills' *The Times of India* (Bombay, 18 March 1926) 13; 'Cheaper Postcards; Council of State Rejects Motion; Finance Bill Unanimously Passed' *The Times of India* (Bombay, 23 March 1926) 10.

[120] Memorandum by the Secretary of State for India for the Inter-Departmental Committee, July 1924, IOR/L/PJ/6/1834.

[121] Note of first meeting of the Inter-Departmental Committee on matrimonial jurisdiction of British Indian courts, 23 July 1924, IOR/L/PJ/6/1834.

inability of Scottish-domiciled couples in India to rely on the additional grounds of divorce (such as desertion) that were available in Scots law.[122] An interdepartmental committee concluded that requiring a reference to Scots law for Scottish couples would prove too onerous for Indian courts, which were unfamiliar with it.[123] The other alternative was to exclude couples domiciled in Scotland from the scope of the law altogether, a path that officials considered would be met with 'the greatest indignation' by the 'influential and important' Scottish community in British India.[124]

India Office officials also attempted to win the approval of Henry Duke, who had been elevated to the House of Lords and participated in the debates on the parliamentary legislation. After initially being open to the government proposal,[125] Duke suggested the establishment of an entirely new divorce court in India, which would 'be deemed . . . to be part of the High Court of Judicature in England, with Judges appointed by the Crown' and following 'English law and procedure'.[126] This scheme appeared to take inspiration from the separate court systems established by European empires in China, Japan, and the Ottoman Empire by relying on claims of 'civilizational' distinctions between Europeans and non-Europeans.[127] Duke framed the situation in British India likewise, professing to be concerned about 'the possibility of contested divorce cases between English Christians being tried before Indian non-Christian judges',[128] a claim made more fraught within the background of a strengthening anticolonial movement. However, the secretary of state for India, Lord Birkenhead, rejected Duke's proposal, arguing that the establishment of a special divorce court for Europeans was 'open to grave constitutional objection in that it runs counter to the whole system of judicial administration in India and might interfere with the status and prestige of the existing High Courts the maintenance of which is a matter of great importance'.[129]

Although Birkenhead championed Indian courts, the ultimate solution to the jurisdictional question effectively created a separate judicial order for couples domiciled in England and Scotland. The Indian and Colonial Divorce Jurisdiction Act 1926 (the 1926 Act) provided that Indian High Courts 'shall have jurisdiction to make a decree for the dissolution of a marriage . . . where the parties to the marriage are British subjects domiciled in England or in Scotland' if 'the petitioner resides in India at the time of presenting the petition and the place where the parties to the marriage last resided together was in India' and 'either the marriage was solemnized in India or the adultery or crime complained of was committed in India', with the grounds of divorce required to be in accordance with 'the law for the time being in force in England'. Such petitions were required to be heard by 'a judge . . . nominated for the purpose by the chief justice of the court with the approval of the Lord Chancellor', with decrees only having effect (both in India and abroad) when they were registered with either the High Court in England or the Court of Session in Scotland, depending on the domicile of the parties.[130] As a result of these legislative changes, Christian petitioners domiciled in

[122] See 'Indian Courts; Scope of New Bill; Scottish Grievances' *The Scotsman* (Edinburgh, 17 July 1926) IOR/L/PJ/6/1834; 'Colonial Divorce Bill; Scottish Lawyers' Criticisms' *Glasgow Herald* (Glasgow, 28 July 1926) IOR/L/PJ/6/1834; HC Deb 1 December 1926, vol 200, col 1220; HC Deb 1 December 1926, vol 200 cols 1224–5.

[123] Report of Inter-Departmental Committee on Matrimonial Jurisdiction of British Indian Courts in respect of persons resident, but not domiciled, in India, 14 March 1925, IOR/L/PJ/6/1834.

[124] HC Deb 1 December 1926, vol 200, col 1214.

[125] Letter from Claud Schuster to Vernon Dawson, 15 October 1924, IOR/L/PJ/6/1834.

[126] Note by William Vincent, 10 February 1925, IOR/L/PJ/6/1834.

[127] For discussions of consular jurisdiction, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (CUP, Cambridge 2001) 201–52; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (CUP, Cambridge 2010); Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (OUP, Oxford 2012).

[128] Note by William Vincent, 10 February 1925, IOR/L/PJ/6/1834.

[129] Letter from the Secretary of State for India to the President of the Probate, Divorce, and Admiralty Division, High Court of Justice, 26 February 1925, IOR/L/PJ/6/1834.

[130] Indian and Colonial Divorce Jurisdiction Act 1926, s 1.

England or Scotland were governed by English law under the 1926 Act and had to approach the relevant High Court while Christian petitioners domiciled in India could approach district courts and were governed by the IDA. Christians domiciled in other parts of the world were left without a remedy before Indian courts altogether.[131]

Since divorce petitions filed by persons domiciled in England or Scotland were governed by English law on grounds of divorce, women were able to benefit from more liberal stipulations when it came to divorce on the ground of adultery. Amendments to English law in 1923 removed the requirement for women to prove cruelty, incest, bigamy, or desertion in addition to adultery while maintaining the provision for divorce based on rape, sodomy, or bestiality.[132] However, no such changes were made to the Indian statute, which retained the aggravating factor requirement for women trying to obtain a divorce based on adultery.[133] British Indian courts, therefore, granted divorce decrees to Christian women domiciled in England or Scotland on the ground of adultery alone,[134] but were unable to do so in the case of Christian women domiciled in India.[135]

Persons domiciled in England or Scotland were also subject to different procedural rules. India Office bureaucrats had inserted the provision limiting jurisdiction over English- and Scottish-domiciled couples to specific judges to ensure Henry Duke's support,[136] since the nomination process 'would ensure that the jurisdiction is exercised by English judges'.[137] This intention was carried out in most cases although officials admitted that it 'could not be averred or now disclosed'.[138] For instance, the initial nominations from the chief justice of the Allahabad High Court, Edward Grimwood Mears, included Lalit Mohan Banerji,[139] but after discreet opposition from the India Office,[140] Banerji's name was removed.[141] The only Indian to make it to the final list of nominations was Shadi Lal of the Lahore High Court, who was included since he was the chief justice and would 'in accordance with Indian Court practice normally form part of any bench which sat to hear an appeal from a judge of the same Court sitting singly'.[142] It was only in the two years running up to independence that Indian judges were finally nominated to be the judges to exercise jurisdiction under the 1926 Act.[143] Despite assertions about the unified judiciary in British India, therefore, the nomination process came close to establishing the separate court for persons of English or Scottish domicile that Duke had demanded.

Although these legislative moves were supposed to resolve the difficulties created by the domicile rule for Europeans in British India, they ultimately created two separate divorce regimes for Christians depending on their place of domicile and replicated the original problems with domicile-only jurisdiction. An example is provided by the consequence of the political choice to limit jurisdiction over those domiciled in England and Scotland to specific judges in the High Courts in order to ensure that such petitions would be heard by British

[131] Although the numbers were small, the census records the British Indian presence of individuals born in countries as varied as the United States of America, France, Italy, Australia, Canada, Spain, Portugal, and Russia. See JT Martin, *Census of India, 1921*, vol I, pt II: tables (Superintendent Government Printing, India 1923) 111.
[132] Matrimonial Causes Act 1923, s 2.
[133] The requirement was finally removed by Indian Divorce (Amendment) Act 2001, s 5.
[134] *Barnard v Barnard*, AIR 1928 Cal 657.
[135] *Stroud v Stroud*, AIR 1932 Cal 161; *Monk v Monk*, AIR 1933 Cal 388.
[136] Letter from Lord Merrivale to the Secretary of State for India, 27 February 1925, IOR/L/PJ/6/1834.
[137] Letter from the Secretary of State for India to the President of the Probate, Divorce, and Admiralty Division, High Court of Justice, 26 February 1925, IOR/L/PJ/6/1834.
[138] Letter from Claud Schuster to Edward Chamier, 28 March 1927, IOR/L/PJ/6/1933.
[139] Letter from Edward Grimwood Mears to Claud Schuster, 4 March 1927, IOR/L/PJ/6/1933.
[140] Letter from Vernon Dawson to Claud Schuster, 1 April 1927, IOR/L/PJ/6/1933.
[141] Telegram from the Viceroy, Home Department, to the Secretary of State for India, 27 July 1927, IOR/L/PJ/6/1933.
[142] Letter from Vernon Dawson to Claud Schuster, 28 July 1927, IOR/L/PJ/6/1933.
[143] See Letter from the Home Secretary to Government, Punjab, to the Secretary to the Government of India, Legislative Department, 6 July 1946, IOR/L/PJ/8/707; Letter from the Additional Under Secretary to Government, United Provinces, to the Secretary to the Government of India, Home Department, 30 April 1947, IOR/L/PJ/8/707.

rather than Indian judges. Since the High Courts were located in provincial capitals, petitioners (and their witnesses) who lived in the countryside had to travel—sometimes fairly long distances—in order to obtain relief, making it an expensive proposition that was often out of reach for less well-off persons. Officials had recognized these problems both when the IDA was first drafted in the 1860s[144] and during the long discussions that had preceded the passage of the 1926 Act,[145] but went ahead with the decision to restrict jurisdiction.[146] While reifying racial distinctions between British and Indian Christians, this move also complicated those divisions through the establishment of class barriers between English- and Scottish-domiciled couples who could afford to travel to the High Courts and those who couldn't. Individuals belonging to the latter group could only obtain the remedy of divorce in district courts if they admitted Indian domicile, a choice that would relegate them to the racially ambiguous status of domiciled Europeans and outside the bounds of 'whiteness'. The question of who could be classified as a European was, as Ann Laura Stoler notes, subject to 'discrepant and *changing* criteria',[147] with class, and particularly the ability to travel, being key to the endeavour. As the debates over domicile and divorce jurisdiction demonstrate, although law played a significant role in efforts to create clear racial categories, it also pointed to the inherent instability of these classifications.

V. CONCLUSION

Although individuals can now petition English courts for divorce based on 'habitual residence', English law continues to provide for domicile as one of the bases of divorce jurisdiction.[148] As I have argued in in this article, contemporary definitions of private international law concepts such as domicile date to the late nineteenth century, a time of imperial expansion when colonial officials attempted to deal with the mass movement of peoples through the creation of clear racial categories. Both Lord Watson in *Le Mesurier* and Henry Duke in *Keyes* implied that domicile was the only acceptable basis for the exercise of divorce jurisdiction under both English and international law. However, English courts had provided contradictory answers while dealing with the question of divorce jurisdiction, often alternating between the bases of residence and domicile. The practice of other countries, particularly in continental Europe, also did not support the centrality of domicile.

Even after *Le Mesurier* was decided in 1892, English courts remained hesitant to recognize overseas divorces that were based on religious laws (such as Islamic personal law on *talaq*) although the petitioner was domiciled in a place where such divorces were recognized.[149] The alleged universality of the domicile rule was, therefore, suspect even in English law. Requiring domicile-based matrimonial jurisdiction for couples domiciled in England but residing in the colonies was a conscious political choice that stemmed from the desire to

[144] See Letter from the Secretary to the Government of the North-Western Provinces to the Officiating Secretary to the Government of India, Home Department, no. 213A, 29 December 1868, IOR/L/PJ/5/11; Maine (n 35) 104–5.

[145] Letter from Henry Stanyon to the Deputy Secretary to Government, United Provinces, 16 March 1922, IOR/L/PJ/6/1834.

[146] This choice paralleled the mid-nineteenth-century decision to restrict matrimonial jurisdiction to the Divorce Court in London, which the government admitted was a deliberate move to add 'to the expense and inconvenience of parties from the provinces and their witnesses'. See William Cornish, 'Marital Breakdown: Separation and the Coming of Judicial Divorce' in Cornish and others (n 10) vol 13, 785. This generated resentment and by the early twentieth century, there was a campaign to provide equal access to divorce for the working classes in Britain. See Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 201.

[147] Stoler (n 11) 153.

[148] Domicile and Matrimonial Proceedings Act 1973, s 5(2).

[149] Gail Savage, 'More than One Mrs Mir Anwaruddin: Islamic Divorce and Christian Marriage in Early Twentieth-Century London' (2008) 47 J Brit Stud 348.

ensure that only English judges could adjudicate such matters, reinforcing racial distinctions between white and non-white British subjects.

I have argued in this article that the legal concept of domicile was used to create clear racial distinctions but also had contradictory effects on members of the white European populace in British India. Limiting jurisdiction to courts of the domicile forced them to return to their 'home' countries to obtain matrimonial relief, resulting in both administrative inconvenience and financial burden. However, they also ruled out adopting an Indian domicile since it would effectively result in a loss of their racial identity, which was closely linked to the ability to travel to the metropole and to claims of the temporariness of their residence in British India. Given the depth of feeling on the issue, colonial officials were forced to legislate to create an exception to the domicile rule for what were termed to be the 'special conditions' of British India, where Englishmen resided but rarely obtained domicile, unlike the settler colonies of Australia or Canada. The solution created two separate legal orders for Christians in British India: district courts exercised jurisdiction over persons domiciled in India, following the substance and procedure laid down in the IDA, while nominated judges of the High Courts exercised jurisdiction over those domiciled in England and Scotland, with decrees being made in accordance with English law, and only effective if they were registered in either England or Scotland. While aimed at maintaining racial divisions, these legislative changes also reinforced class distinctions within the white British community by leaving those who were financially unable to travel to the High Courts without any form of remedy.

While imperial networks made it possible for these individuals to meet, move, and marry in places across the world, imperial hierarchies also made it nearly impossible for them to leave their spouses. Allegedly dry jurisdictional questions placed additional burdens on the ability of people to marry who they loved, to live where they wanted, and to escape bad marriages. Such impediments continue even today, albeit in a different form. Individuals often struggle to ensure that their marriages with partners of the same sex are recognized in countries that do not permit such marriages or that their religious divorces are recognized by judicial systems to enable them to remarry.[150] Class continues to play a significant role, with the ability to approach certain courts being dictated by finances.[151] In the colonial context, however, even those who were deliberately excluded from approaching Indian courts, for instance because they were domiciled abroad but not in England or Scotland, tried to obtain relief both through the law and by other means.[152] As this article has demonstrated, people strove to resolve their complicated marital situations by protesting, lobbying against, or simply ignoring the law, even if they could not escape its consequences entirely.[153] This history of the many ways in which people interacted with the concept of domicile continues to remain relevant to inform more contemporary efforts of individuals traversing borders while attempting to manage their marital relationships.

DATA AVAILABILITY

All data underlying the results are available as part of the article and no additional source data are required.

[150] See Hamilton and Clayton-Helm (n 8); Gondal (n 7).

[151] Wealthy individuals often engage in forum shopping to approach courts that they perceive will be most likely to protect their finances after a divorce. See Mark Harper and Mark Ablett, 'Why It Pays for the Wealthy to Divorce in Singapore (and not Hong Kong)' (2016) 22 Trusts & Trustees 525.

[152] Sometimes such persons simply remarried even though they were unable to dissolve their first marriages. See Rohit De, 'The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India' (2010) 28 Law & Hist Rev 1011.

[153] For the American context, see Hendrik Hartog, *Man and Wife in America: A History* (Harvard UP, Cambridge 2000) 286.