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MATRIC NO: 16/LAW01/141

LEVEL: 400

COURSE: CONFLICT OF LAWS

ASSIGNMENT:

- 1. Explain the term "limping marriage". Identify the ways, at common law, by which the incidence of limping marriage have been reduced.**
- 2. Explain succinctly, Mutation or Conversion of Marriage in Conflict of Laws.**

LIMPING MARRIAGE

The issue of recognition of foreign decree is closely related to that of capacity to marry. This is because where a foreign decree has been recognized in a forum; a party can validly contract another marriage there. On the other hand where the decree has not been recognized, the marriage is viewed as substituting and neither party has capacity to contract another marriage in that country. As people live increasingly mobile lives, the conflict of laws and its choice of law rules are highly relevant to determine:

- The circumstances in which people may obtain divorces in states in which they have no permanent or habitual residence; and
- When one state will recognize and enforce a divorce granted in another state

A situation where the forum court does not recognize the decree of annulment or dissolution, whereas it is recognized in the foreign country where it was granted, creates what has been referred to as a LIMPING MARRIAGE. The phenomenon has been described as the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another.

Avoiding "limping marriages" wherever possible, there should be international uniformity in defining a person's marital status so that people will not be treated as married under the law of one state, but not married under the law of another.

In *Idyka v Idyka* the court was asked whether, and if so when, it should recognize a decree of divorce granted in a foreign jurisdiction.

Diplock LJ said: 'It is, I apprehend, a well-established principle of public policy applied by English Courts that so far as it applies within their part to ensure, the status of a person as married or single should be the same in every country which he visits, that is, that there should not be 'limping marriages'; and if marriages are to be dissoluble at all, this involves deciding what courts we should recognize as having jurisdiction to dissolve them.'

'It follows, therefore, that to the extent that the inhibition is removed by the extension of the jurisdiction of the English Courts themselves to decree dissolution of marriages, the public policy requires English Courts to recognize the effectiveness of decrees of dissolution of marriages pronounced by Courts in exercising their jurisdiction in circumstances which mutatis mutandis would entitle an English Court to exercise its

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extended jurisdiction to dissolve a marriage.'

In order to avoid this problem, the House of Lords in the case of *Indyka v. Indyka* came up with a test of 'REAL' and 'SUBSTANTIAL' connection. Thus for a foreign decree to be recognized the parties were only required to show a real and substantial connection with the foreign country in question and the strict rules on domicile were relaxed.

THE MUTATION AND CONVERSION OF MARRIAGE IN CONFLICT OF LAWS

Ever since the decision in *Hyde v. Hyde* (now more than a century old) English Courts have declined to grant matrimonial relief in respect of a polygamous marriage. The underlying reason for the rule in *Hyde v. Hyde* is the view that our matrimonial law is designed to deal only with monogamous marriages and that polygamous marriages cannot fit into our existing matrimonial system. This view has been followed consistently. "It has even been said that to apply our matrimonial law to a polygamous marriage, even though there was in fact only one wife, would "be attended by many obvious innumerable and difficulties.

Until recently it was generally thought that the nature or character of a marriage is immutably determined by the law of the place of celebration. It has also been conceded that the character of a marriage may be changed from polygamous to monogamous. A potentially polygamous marriage may become monogamous by reason of subsequent events for instance where parties change their religion from one which permits polygamy to one which does not as in the case of *Parkasho v. Singh* or where the parties having gone through a polygamous form of marriage in a country whose law permits polygamy, subsequently go through a monogamous MARRIAGES.

In the leading case of *Cheni v Cheni* on conversion of a potentially polygamous marriage into a monogamous marriage. Sir Jocelyn Simon P remarked

"Two spouses may contract a valid polygamous Union and subsequently join a monogamous sect or go through a second ceremony in a place where monogamy is the law. Again a marriage at its inception potentially polygamous may be rendered monogamous for all time by legislative action prescribing polygamy"

In *Ali v. Ali* Cumming Bruce J held that by changing his domicile from Indian to England, an Indian Muslim had converted his marriage from a potentially polygamous one into a monogamous one. The learned Judge opined that since the husband had made England
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his country of domicile he had subjected himself to monogamy as *lex domicilli* and had thus converted his potentially polygamous marriage to a monogamous one.

The change in nature of a marriage from polygamous to monogamous involves some practical difficulties. The judge in *Ali v. Ali* held that he had no jurisdiction to dissolve the marriage on any ground which arose before the marriage became monogamous by the acquisition of an English domicile, which happened in the middle of 1961. Because of this, the husband's petition for divorce on the ground of desertion was dismissed, since the desertion had commenced at a time when the marriage was potentially polygamous and less than three years had elapsed between the date of conversion of the polygamous marriage into a monogamous marriage and the date when the petition was presented ; the wife's cross-petition for divorce for cruelty was dismissed, because the cruelty occurred before the date of conversion ; but the wife's cross-petition for divorce for adultery was granted, because the adultery took place after the marriage had become monogamous by virtue of the change of domicile. It is obvious that a court is not in a position to do justice to married persons if it has to shut its eyes to a substantial part of their married history. The position will be equally anomalous under the Divorce Reform Act 1969: even if the marriage has in fact broken down irretrievably presumably the court will not be able to grant a decree on this ground if the facts which must be proved by the petitioner under section 2(1) occurred at a time when the marriage was potentially polygamous

Ali v. Ali raises a number of questions.

1. Whether a law other than the law of the place of celebration can alter the character of the marriage.

In *Ali v. Ali*, the law of a subsequently acquired domicile was held to be relevant in deciding the nature of a marriage at the time of divorce proceedings and in displacing the effect of the *lex loci celebrationis* rule. Also In *Parkasho v. Singh*, it was stated there that a change in the *loci celebrationis* which could not have been in the contemplation of the parties at the time of the marriage, was held to affect the nature of that marriage.

2. An intention on the part of the husband alone sufficient to alter the character of a union by change of domicile? Or must the change be the result of some bilateral decision before a change will be recognized as effected?

It is implicit in his Lordship's reasoning in *Ali v. Ali* that intention on the part of the husband alone to acquire a domicile may be sufficient to alter the nature of the union.

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Conclusions

It is respectfully submitted that the following conclusions may be drawn from *Ali v. Ali*. The concept of change of domicile affecting the status of parties to a marriage is simply one example of the general principle that the nature of a marriage may be altered by change of circumstances. Other examples are change by religious conversion to monogamous faith and by act of state proscribing polygamy.