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COURSE: CONFLICT OF LAW

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LECTURER: FABAMISE SESAN T. ESQ.

QUESTION:

1. Explain the term limping marriage. Identify the ways, at common law, by which the incidents of limping marriage have been reduced.
2. Explain succinctly, mutation or conversion of marriage in conflict of laws.

**LIMPING MARRIAGE**

Taking an examination on limping marriage, you would firstly observe that it is a situation where a foreign decree is not being recognized by the forum so a party cannot validly contract another marriage. if a party goes ahead to contract another marriage, the first marriage is viewed as subsisting and neither party has capacity to contract another marriage. The issue of recognition of foreign decree is closely related to that to capacity to marry.

The case of padolechia V. padolechia illustrate further where the husband was domiciled in Italy and got married in 1943 but later obtained a divorce in Mexico. The decree was not recognized in Italy. He however proceeded to contract another marriage in England. He later petitioned for nullity decree with regards on the second marriage on the grounds that he was still married no his first wife since the Mexican decree was not recognized by the law of his domicile. The court held that he lacked capacity to contract the second marriage since his first marriage was still subsisting.

However, a limping marriage could be described as a situation where a domestic court does not recognize the decree of annulment or dissolution whereas it is recognized in a foreign country where the decree was obtained. This situation I what constitute what Is termed as a limping marriage. This legal issue has been clarified 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.

There were however measures put in place by the common law to curb the incident otherwise known as limping marriage. There were some steps put in place to reduce the incidence of limping marriage.

The case of Indyka V. Indyka gave birth to one of these measures employed by the common law, where the house of lords came up with the test 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.

(2) Under the succinctly, mutation or conversion of marriage under conflict of law, we will talk about,

Religion

Custom

Common law

Age of marriage

consent

**Religion**

Where worshippers wish to marry according to the tenets of their religion, the state must decide whether that ceremony will be effective to create a valid marriage. For example, the government may decide whether a clergy has sufficient authority to declare marriage or whether a civil ceremony will be required. Alternatively, certain governments only consider a civil marriage celebration as legally binding and regard the religious ceremony as a "confirmation" of the civil marriage.

In Islam, marriage is a contract between the bride and groom (or their proxies) known as a nikah. Some Islamic couples only go through a nikah ceremony and do not register the marriage with the civil authorities or go through a civil ceremony. When such a relationship breaks down, the wife is left without state protection [citation needed] that would normally be available if the marriage had been registered according to civil law. The situation is exacerbated if the husband refuses to grant a talaq and also refuses to make any provision. In states where there is no Sharia Court, the affected individuals' only recourse would be to the local civil courts, but jurisdiction would be difficult to invoke except under the parents patriate provisions to protect the best interests of any children. As to transnational marriages, there is no reason in principle why religious ceremonies effective under the Lex loci celebrations should not create marriages recognized as valid everywhere.

**Custom**

In many states, culturally separate communities have retained their own traditions. A developing modern state had to determine whether it should recognize such traditions as it was establishing a centralized system of law. In South Africa, for example, the Recognition of Customary Marriages Act 1999 retrospectively recognizes as valid all customary marriages so long as they are registered. Further, s2(3) of the Act provides that, if a person has entered into more than one customary law marriage, all valid marriages entered into before the commencement of the Act, are recognized. The Act similarly recognizes all customary marriages entered into after the commencement of the Act where the High Court approves a written contract regulating the future matrimonial property systems for marriages (both present and prospective spouses must be joined in the application).

Such measure represented a major shift, because custom marriages were often potentially or actually polygamous as against public policy, and were not recognized under the new law. The government reversed the position, as it realized that it was impossible to enforce the prohibition against polygamy and wives usually consented.

Where a state has produced a formal body of law to control recognition, this will establish a general framework under which international recognition can be managed. Where there is no formal rule within the Lex loci celebrations, a forum court could hear expert evidence on whether the marriage would be accepted as effective (see the public policy of favor matrimonii which creates a rebuttable presumption in favor of the validity of any marriage) but it will be difficult for the parties to justify their failure to comply with the local laws that unambiguously would have created a valid marriage.

**Common law**

In some states, the legal acceptability of common law marriage is very limited. Some couples, whether because there are no local formalities relevant to them or because they have strongly held prejudices against compliance with the local forms, decide to create a marriage either by a simple public exchange of vows (per verbis inter praesentes), or by habit and repute. Because the need for conformity between states requires respect for the legal systems, it is now very difficult to identify states with no local system for the celebration and registration of marriages, and even more difficult for the courts of one state to justify a decision to support the prejudices of two of its citizens against the laws of the second state. However, other states permit informal marriages to acquire legal status and, where this happens, there is no reason in principle why international recognition should not follow.

Canada allows married persons to retain multiple spouses in legally recognized family law, but only in one province. Saskatchewan utilizes S.51 of their Family Property Act to "sanction and assist in the creation" of polygamous unions. To date, that province has only allowed married women to become spouses in family property law of single men; however, their Family Law Act and case laws are the only statutes and references in North America where a legal jurisdiction promotes polygamy. Common law marriages in Canada have been referred to for over forty years as a form of marriage or "conjugal union". Since 1999, Saskatchewan has allowed married persons to have more than one "simultaneous" conjugal union in family property law.

**Age of marriage**

Different minimum age requirements also can lead to problems in mutual recognition of marriages. A marriage of young children is in some countries deemed to be against the order public, minimum ages for recognition are sometimes set (which may vary from the minimum ages for marriage itself). For example, in the United Kingdom, the Immigration Rules 1986 were introduced to bar persons under the age of 16 from entering the UK in reliance upon their status as a spouse. Nevertheless, for other purposes, such marriages will be recognized as valid so long as the parties had the relevant capacity under their personal laws and the ceremony was effective under the Lex loci celebrations to create a valid marriage.

**Consent**

In Western cultures, other than the age of consent, the issue of consent is also considered of fundamental importance and, if it is not freely given, it can prevent a valid marriage from ever coming into existence: see nullity. In Canada, "common law marriages" do not require consent to be recognized and often a stipulated "passage of time in eligible cohabitation" is the only requisite to becoming a formally recognized "marriage". The "capacity to marry" includes the fundamental a priori reasoning that both persons must not be married to others (the exception is Saskatchewan Canada). [citation needed] The only stipulation to this rule of thumb is that both partners must be eligible to marry in the first place. In Islamic law, a nikah contract is not valid if the parties do not consent, although there are differences in juristic opinion about exactly how the consent can be manifested. This supposed lack of clarity has led some Western cultures to question the general morality of "arranged marriages", often stigmatizing the system as being open to abuse and sometimes leading to forced marriages. In the English case of Szechter v Szechter, Sir Jocelyn Simon P. said that for duress to vitiate a valid marriage, it must be proved that:

the will of one of the parties had been overborne by a genuine and reasonably held fear;

this fear was caused by a threat of immediate danger for which the party was not himself or herself responsible, usually amounting to a threat of physical or fatal injury, or false imprisonment.

The test requiring an immediate danger never matched the practical realities facing individuals where the consequences of a refusal to marry might not be immediate, but nevertheless serious. In Hirani v Hirani (1982) 4 FLR 332, the Court of Appeal considered the case of a nineteen-year-old Hindu woman who was dating a Muslim man. Her parents told the petitioner that unless she married a Hindu of their choosing, she would be ostracized socially from her family and left to fend for herself. Under the circumstances, the Court agreed that the petitioner had acted without full consent in marrying her parents' choice of husband. Thus, it is for the courts of all countries to strike a balance between well-intentioned parental authority to arrange marriages in the face of a reluctant child, and unreasonable threats that would overbear the will of any reasonable person, while maintaining the trust of local communities whose cultures have included arranged marriages for centuries. As to transnational recognition, it will be difficult to disturb the validity of the marriage if no complaint of coercion was made around the time the ceremony was performed in the Lex loci celebrationis or immediately the parties entered the state where proceedings were commenced. It would be more usual to use the local divorce system to terminate the relationship.