VALIDITY OF MARRIAGE AND THE CONFLICT OF LAWS IN THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

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PREFACE

The view of English law, and of Malaysia law as well, is that in order for a marriage to be valid the proper formalities of its place of celebration must be complied with and the parties must possess the requisite capacity to marry each other. The rules of formality and essential validity of marriage are spelt out in the Law Reform (Marriage and Divorce) Act 1976 (LRA). The LRA has also incorporated and preserved the rules of the English conflict of laws which the courts have hitherto received. It was one of the terms of reference of the Royal Commission on non-Muslim marriage and divorce laws appointed by the Yang diPertuan Agung to study and examine the existing laws on marriage and divorce with particular attention to Chinese and Hindu laws as well as to the difficult decisions in the conflict of laws. How effective the LRA in dealing with conflict of laws problem can only be judged from its provision as the courts have yet to be confronted with conflict problems of a proportion that tormented the courts in the pre-reform era. It is sought here to examine the scope of application of the LRA's provisions on formal and essential validity of marriage viz a viz the conflict of laws as well as the choice of law clauses in the LRA. Recent years have seen some judicial developments in the conflict of laws on the issue of validity of marriage. These developments seek to throw off the shakles of rigidity and to eschew the mechanical approach in favour of a degree of flexibility. The law's concern now is to uphold the validity of marriage unless it is clearly repugnant to society's mores and morality. How can a statutorily enacted rule of a the conflict of laws partake in the developments calls for the legislature to keep abreast of the law with a keen eye for reform, where they are due. It may be that a wholesome reform of the LRA is due after twenty years. It's rules of the conflict of laws might be included in consideration for reforms. The writer acknowledges the guidance and advice of Prof Tan Sri Datuk Ahmad Ibrahim under whose supervision this dissertation has been possible. Special thanks are also due to friends Abdul Rahman, Ismail, Azman, Azhari and computer lab assistants for their invaluable assistance; and Mid has been a source of support throughout. Dedication goes to mum, dad and Nani. Above all, Praise be to Allah S.W.T. for the 'ilm, taufik and hidayah to see the completion of this dissertation.

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BACKGROUND

Until recently there were a variety of family laws in Malaysia and this has given rise to some inter-personal conflicts. The Muslims marry according to Islamic law and the various State enactments which deal with the administration of the Muslim law provide that they are applicable only to persons professing the Muslim religion. The Chinese and Hindus could marry according to their own laws or customs as determined by the courts. The natives of East Malaysia may marry according to their customs. In Peninsular Malaysia, anyone, except a person professing the religion of Islam, could have his or her marriage solemnised under the Civil Marriage Ordinance, 1952, which provided for civil monogamous marriages before registrars of marriages. A marriage between Christians or between persons one of whom was a Christian could be solemnised in accordance with the provisions of the Christian Ordinance, 1956. In Sarawak marriages other than marriages contracted according to the usages of Muslims, Hindus, Dayaks or other persons governed by their own laws and customs could be solemnised under the Church and Civil Marriages Ordinance. In Sabah marriages between persons or one or both of whom was or were a Christian or Christians were to be solemnised in accordance with the Christian Marriage Ordinance.[1]

The existence side by side of numerous and heterogenous personal laws - Muslim, Hindu, Chinese, Christians, Jewish etc. - was a source of interpersonal conflicts between persons who may fall under any of them. A conflict situation arises when one party crosses the personal law boundaries when he marries. Chinese customs and the various Indian customs based on religion do not seem to incapacitate their members from marrying outside the group.

Writing in 1968, Hooker identified three kinds of conflict situations.

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[1] Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, 2nd ed., (1989), 1-2.

1. The traditional private international law situation where there is a conflict between two systems of municipal territorial law.
2. The private international law situation between two systems of personal law within one territorial entity.
3. Intermediate situation where the private international law and personal law conflict.[2]

The nature of the conflict of laws problems as it was then is best seen in the plethora of cases and judicial decisions of the courts[3]. The subject itself has received much academic interest and has been documented elsewhere.[4] What has been sketched is the range and complexity of real and possible conflicts of laws situations in Malaysia. In brief, the nature of the conflicts is chiefly in the realm of personal law conflicts, caused by the existence of heterogenous personal laws within the territorial boundaries of a state.

Having now made uniform the law on marriage and divorce and matters incidental thereto, and having replaced the heterogenous personal laws of the non-Muslim population of Malaysia with a diversity of customs and usages observed by them, Malaysia has since abandoned the principle that family matters are governed by personal law, and has brought all non-Muslim residents in the country as well as all citizens of or domiciled in the country residing abroad under a single system that is the Law Reform (Marriage and Divorce) Act, 1976.[5]

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[2]Hooker, *Private International Law and Personal Laws: A Note on the Malaysian Experience*, (1986) 10 Mal. LR 55.

[3]Martin v Umi Kalsom [1986] MLJ 1; *PP v White* [1940] MLJ 214; *R v Davendra* (1920) 1 MC 51; *Chua Mui Nee v Palaniappan [1967]*1 MLJ 270; *Re Ding Do Ca deceased* [1966] 2 MLJ 220; *In re Maria Hertogh* [1951] MLJ 164, *Issac Penhas v Tan Soo Eng*[1953] MLJ 53.

[4]Hooker (1968) 10 MLR 55; Daw, *Some Problems of Conflict of Laws in West Malaysia and Singapore Family Law*, (1972) 14 Mal. LR 179; Ahmad Ibrahim (1984) 1-6.

[5]Act 164, as amended by Act A650: hereinafter referred to as the LRA. The LRA has been bought into force with effect from 1st March 1972: P.U. (B) 73/1982.

Interpersonal conflicts in the nature as exemplified by the earlier cases have now been averted if not effectively stalled. Forceful as the aims of the reforms are, it is essential to remember that the LRA attempts to reduce common standards to which the non-Muslims persons of different ethnic origins are expected to conform, which standards are founded in English legislation such as the Matrimonial Proceedings and Property Act, 1970, the Divorce Reform Act of 1969 and the Recommendations of the English Law Commission's Report on Nullity of Marriage. It was therefore opined that the difficult cases in conflict of laws would continue.[6]

Every legal system deals with such cases of international conflicts by its rules of conflict of laws or what is often otherwise referred to as private international law which are designed to deal with cases which have connections with foreign countries. But principally these rules are developed to deal with problems which arise with the law of a foreign municipal system. This has not, however, prevented the use of such principles, albeit with modifications in dealing with the peculiarity of the conflict problems in Malaysia.

The LRA has incorporated the common law conflict of laws principles. It is the subject of this paper to examine the LRA provisions and to judge the effect of the provisions in dealing with conflict of laws problems (perceived by Hooker to be continuing) with respect to the singularly most vexed question of validity of marriage. It is not without justifications that the question occupies a central place taking into consideration the urgency of the human problems involved (limping marriages, bastardisation of children born out the union, etc.).

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[6]Hooker, *The Personal Law of Malaysia: Introduction,* (1976), 16

Malaysia is now fast developing as a country. This has further heightened the already high degree of social mobility of its people to the rest of the world. The social mobility of the rest of the world relative to the country for that matter too has increased. Foreign marriages are increasingly typical of marriages of the country. The question of validity of these marriages may arise in almost any context. It is clearly desirable that the conflict of laws rules governing the validity of marriage which goes to the issue of a person's status be as certain as possible and readily ascertainable. Beyond that, it is as desirable that the rules be able to promote uniformity of a person's status, i.e. international recognition of a person's status as married or single.

CHAPTER 1
CONFLICT OF LAWS: AN INTRODUCTION[1]

NATURE AND SCOPE OF THE SUBJECT

Legally the world is a divided whole, consisting of a number of independent countries, each possessing its own legal system. Even a politically unified state can be a legally divided whole of separate countries. The United Kingdom is far from being a united kingdom legally. England, Scotland and Northern Ireland each is possessed of a legal system of its own and each is foreign, in that regard, to the other.

That part of the private law of a country which deals with cases having connections with foreign countries is called the Conflict of Laws or Private International Law. The foreign elements in the case might relate to the parties concerned (one or both of whom may be resident or domiciled in or citizens of a foreign country) or the nature of the cause of action (which might have arisen in whole or in part in a foreign state) or to the existence of foreign litigation in point. For example, the case may involve the divorce of a marriage between a Malaysian and a Scottish domiciliary, or a tort case in which a Malaysian citizen injured a French tourist in Spain. The first example involves a preliminary question of jurisdiction, that is the competence of the Malaysian court to act, and the second involves the of choice of law.

Conflict of laws can arise in any branch of the private law and thus the principles of the subject pervades the whole area of private law - contracts, torts, matrimonial law, etc. Conflict of laws is everywhere a branch of, or a legal discipline within, the domestic law of a country and vary from country to country. An alternative terminology

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[1]Dicey & Morris. *The Conflict of laws,* 11th ed., (1987); Cheshire & North, *Private International Law* ,11th ed., (1987); Jaffe, *Introduction to the Conflict of Laws,* (1988); Morris, *The Conflict of Laws* , 3rd ed. (1984); O Kahn-Freud; *General Problems of Private International Law* (1976); Anton *Private International Law,* (1967) Falconbridge, *Essays on the Conflict of Laws,* 2nd ed., (1954).

preferred by some writers is Private International Law. The word "international" is an obvious reference to the existence of an international or foreign element with which the subject is concerned. It is "private" international law as opposed to "public" international law, because it is not concerned with the relations of states with each other, but with disputes of individuals arising out of their marriages, contracts, wills, torts and other private law matters.[2] Public international law is a system of rules which are intended to apply everywhere. Its scope of application is international and its source is international. Rules of conflict of laws are however different from country to country.

Meaning of "country"

A "country" in the conflict of laws is any territorial unit having its own separate law. So, as indicated earlier, England, Scotland and Northern Ireland are separate countries, for they have separate legal systems. On the other hand, Wales is not a country, because its system of law is the same as that of England.

Jurisdiction and Choice of Law

The first, often preliminary question, which may have to be decided in conflict of laws cases is whether the local court has power to deal with the case at all. In the example of a divorce of a marriage between one Malaysian and a Scottish domiciliary, the Malaysian court has to decide whether in the first place it has jurisdiction to deal with the case.

Assuming it has jurisdiction, the next question is what law it will apply. In the above example of a divorce, while it may be thought that there are sufficient grounds for a case of dissolution of marriage to be referred to the foreign law (just as the question of validity of marriage may be governed by a foreign law), the court will, as a

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[2] Jaffe, 4

matter of fact, apply exclusively Malaysian law to determine whether a divorce should be granted. In other instances, however, the rules that direct the court which law to apply in conflict of laws are called the choice of law rules. Examples of such rules are: the capacity to marry is governed by the law of domicile of the parties; the essential validity of contract is governed by the law expressly or impliedly chosen by the parties, or, in the absence of such a choice, by the law of the country with which the contract is most closely connected; the transfer of a movable property is governed by the law of the country where the movable is situated at the time of the alleged transfer.

There may sometimes be a question of recognition and enforcement of a foreign judgement purporting to determine the issue between the parties. The question asked is the extent to which the judgement of the foreign court is given effect to by the local courts. Again taking the example of the Malaysian and Scottish domiciliaries - suppose the Scottish domiciliary has obtained a divorce decree in Scotland. Will the divorce be effective in Malaysia? This third question necessarily arises if, and only if there is a foreign judgement, and thus not in every case.

Justification

Dicey and Morris asked regarding the justification for the existence of the conflict of laws and found it lying in the fulfillment of the reasonable and legitimate expectations of the parties to a transaction or an occurrence. What would happen if the conflict of laws did not exist? Dicey and Morris illustrated the injustice that would be occasioned as such :

> Theoritically, it would be possible for English courts to close their doors to all except English litigants. But if they did so, grave injustice would be inflicted not only on foreigners but also on Englishmen. An Englishmen who had made a contract with a Scotsman in Glasgow or with a Frenchman in Paris would be unable to enforce it in England; and if the courts of the other countries adopt the same principles, the contract could not be enforced in any country in the world.

Theoritically, it would be possible for English courts, while opening their doors to foreigners, to apply English domestic law in all cases. But if they did so, grave injustice would again be inflicted not only on foreigners but also on Englishmen. For instance, if two people married in France in accordance with the formalities prescribed by French law, but not in accordance with the formalities prescribed by English law, the English court, if it applied English law to the validity of the marriage, would have to treat the parties as unmarried persons and their children as illegitimate.

Theoritically, it would be possible for English courts, while opening their doors to foreigners and while ready to apply foreign law in appropriate cases, to refuse to recognise or enforce a foreign judgement determining the issues between the parties. But if they did so, grave injustice and inconvenience would result. For instance, if a divorce was granted in a foreign country in which the parties were settled, and afterwards one of them remarried in England, he or she might be convicted of bigamy. Or if a plaintiff sued a defendant in a foreign country for damages for breach of contract or for tort, and eventually obtained a judgement in his favour, he might find that the defendant had surreptitiously removed his assets to England, and then he would have to start all over again to enforce his rights.[3]

It is therefore for good reasons that a local court should want to apply a foreign law instead of its own, that is to do justice between the parties.

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[3] Dicey & Morris, 5-6

Sources

The sources of conflict of laws are, in the main, statutes, judicial decisions and the opinions of jurists. The order of mention is not accidental. Rules of the conflict of laws had, for many centuries been developed by courts and jurists. But there can be no doubt that statutes have become potentially by far the most important source and is likely to remain so in the future.[4] Legislative forms of the choice of law rules sometimes took shape, and still does, in a more or less systematic fashion, i.e. through a code or a set of provisions specially set aside and reserved for conflicts rules. Sometimes these rules are spread over substantive enactments in a haphazard way. The LRA, which is the subject of this paper, comes to mind as a substantive enactment with conflict rules clauses spread over it. Whether these legislative forms of the rules are fragmentary and haphazard remain to be seen.

Statutes and Conflict of Laws [5]

In view of the increasing importance of statutes as a source of conflict of laws (and the fact the subject of this paper concerns one of such statutes), it is not out of place to discuss a little further the relationship between the two. It was fittingly one John Morris who drew attention, in 1946, to choice of law clauses in statutes[6]. Then, he identified three classes of statutes from the point of view of conflict of laws, namely (1) those with no choice of law clause at all; (2) those with a general choice of law clause purporting to alter or restate a conflict of laws rule; (3) those with a particular

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[4] Dicey & Morris, 7

[5] There is a growing literature on this subject, of which the following has been referred to: Morris, *The Choice of Law Clause in Statues* (1964) 62 LQR 170; Unger, *Use and Abuse of Statues in the Conflict of Laws* (1967) 83 LQR 427; Mann, *The variation of Thrusts Act, 1958 and the Conflict of Laws,* (1964) 80 LQR 29; Mann, *Statues and the Conflict of Laws* (1972 - 73) 46 BYIL 117; Kelly, *Localising Rules in the Conflict of Laws,* (1974), especially Chap. 5; O Kahn-Freund, *General Problems of Private International Law* (1976), especially Chap. IV; Lipstein, *Inherent Limitation in Statues and the Conflict of Laws,* (1977) 26 ILLQ 884.

[6] Morris, (1946) 62 LQR 170

choice of law clause purporting to delimit the scope of a rule of domestic law. Since then, there has been a growing number of literature on the subject. Later, as a general editor of the flagship Dicey and Morris' Conflict of Laws, Morris expanded the division into six. The six classes are :

1. those which lay down a rule of substantive or domestic law without any indication of its application in space;
2. those which lay down a particular or unilateral rule of the conflict of laws purporting to indicate when a rule of substantive or domestic law is applicable;
3. those which lay down a general or multilateral rule of the conflict of laws purporting to indicate what law governs a given question;
4. those containing a limitation in space or otherwise which restricts the scope of a rule of substantive or domestic law (self-limiting statutes);
5. those which apply in the circumstances mentioned in the statutes, even though they would not be applicable under rules of the laws (overriding statutes); and
6. those which do not apply in the circumstances mentioned in the statutes, even though they would be applicable under the normal rules of the conflict of laws (self-denying statutes).[7]

Unilateral and Multilateral Rule

Conflict rules are not substantive rules that domestic law is, being merely indicative of which system of domestic law is applicable. They are of two kinds, particular or unilateral and general or multilateral. The distinction is important and an illustration will be useful. A comparison of Article 19(1) of the Introduction of the Italian Code with Article 15(1) of the Introductory Law to the German Civil Code should offer an instructive illustration.

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[7] Dicey & Morris, 15

The Italian provision says:

> The property relations between spouses are governed by the law of the husband's nationality at the time of the celebration of the marriage.

The German provision says:

> The property relations between the spouses are governed by German law if the husband was a German national at the time of the celebration of the marriage.

Both provisions express the same principle: that the law of the husband's nationality at the time of the marriage determines the property relations between him and his wife. Yet they both answer to different questions: the Italian provision answers the question, What law applies?; the German provision answers the question, When does German law apply?

If there is liberty to quote a non-Malaysian example, section 1 of the Marriage (Scotland) Act 1977 affords an example of a unilateral rule of the conflict of laws. The section reads:

1. No person domiciled in Scotland may marry before he attains the age of 16.
2. A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void.

This section particularises its application only to (a) where the party domiciled in Scotland is under the age of sixteen, or (b) where the marriage is solemnised in Scotland. In effect, a unilateral rule of the conflict of laws determines under which the *lex legislatoris* applies.[8]

If the Italian provision cited is a good example of a multilateral rule of the conflict of laws, such examples are rare in English law. A Malaysian examples barely qualifies as a multilateral rule (if only taken out of context). Section 104(a) of the LRA says, "A marriage contracted outside Malaysia.... shall be recognised as valid for all purposes of

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[8] See further Dicey & Morris, 17-18

the law of Malaysia if it was contracted in a form required or permitted by the law of the country where it was contracted." Taken thus by itself, the provision is a general rule of conflict of laws, that is the formal validity of marriage is governed by the *lex loci celebrationis.*

There are also hybrids of unilateral and multilateral rules. Section 104 of the LRA consists in para (a) and (b) multilateral conflict rules but the effect of the section yields a unilateral effect by para (c) which typifies a unilateral conflict rule.

The desirability of a particular choice of law clause as a legislative techniques is strongly criticised by some writers, and equally defended by others.[9]

Connecting Factors

The rules that direct the court which law to apply in a conflict of laws situation have been referred to as the choice of law rules. A case at hand may involve any number of issues, and each may be governed by a rule taken from a different law. Take the tort example of a Malaysian citizen injuring a French national in Spain. The question of liability of the Malaysian is one issue involved, but the French may have died, which then gives rise to the issue whether his heir or his estate can recover damages from the Malaysian court. The choice of law process is intended to answer the question which law governs the issue of liability or which law governs the issue of recovery of damages by the heir of the estate. How then is the governing law for each of the issue identified?

The answer is by means of a `connecting factor', consisting of a link between an event, a thing, a transaction or a person on the one hand, and a country on the other. So rules of the conflict of laws are expressed in terms of connecting factors, typified by the following:

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[9] See Morris, (1946) 62 LQR 170; Unger, (1967) 83 LQR 427 in criticism; Mann, (1964) 80 LQR 29; (1972-73) 46 BYIL 117 in defense.

1. succession to immovables is governed by the law of the *situs*
2. formal validity of a marriage is governed by the law of the place of celebration
3. capacity to marry is governed by the law of each party's antenuptial domicile

Succession to immovables, formal validity of marriage and capacity to marry are the categories while *situs,* place of celebration and domicile are the connecting factors. A fundamental problem, however lies in the determination of the connecting factor - whether the connecting factor should be determined by the law of the forum or by the law that governs the question. Since the identification of the governing law depends on the determination of the connecting factor, it is no longer controversial among learned writers that the connecting factor should be determined by the law of the forum.[10]

SELECTED PRELIMINARY MATTERS

Characterisation

In conflict of laws, the process of identifying the governing law by means of connecting factor is precluded by a foremost step of identifying the category to which the issue at hand belongs. How do you categorise an issue as one of formal validity or one of essential validity? A case at hand may involve something out of this:

A domiciled Frenchman under eighteen marries a domiciled English-woman in England without obtaining the consent of his parents as required by French law.

The requirement of parental consent is viewed under English law as one of form, and not of capacity. French law however views it as one of capacity. The problem before an English court here is one of characterising a rule of law, namely the rule of French law that minors cannot marry without the consent of their parents. Is the rule one of capacity (in which case it will be applicable to a question of validity) or one of

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[10] Dicey & Morris, 30

formalities (in which case it will not be applicable)? In *Ogden* v *Ogden*,[11] a marriage was celebrated in England between a domiciled Frenchman aged 19 and a domiciled English-woman. The Frenchman needed the consent of his parents to marry, and without such consent the marriage was voidable. In fact the husband had not obtained his parents' consent. The English court, applying English characterisation, classified the requirement of parental consent as a formal validity, which meant that it was not applicable, for the marriage had been celebrated in England.

It was only at the end of the 19th century that two great scholars, one French, Bartin, the other German, Franz Kahn, "discovered" almost simultaneously and independently from each other that this problem of characterisation was one of the fundamental problems of conflict of laws. Various solutions of the problem have been suggested by writers,[12] which are beyond the scope of this paper.

The Incidental or Preliminary Question

It has been seen that in a conflict situation, any number of issues or questions may arise. A case at hand may involve the main question of succession of a claimant to the movable property of her deceased husband, but in order to decide so, the court has to consider a subsidiary question of whether the claimant is the wife of the deceased which would entitle her to inherit. A further illustration will be useful. The illustration here is a variation on the hypothetical case used by Wolf.[13] Suppose a German national domiciled (according to all relevant laws) in England dies intestate and leaves some securities deposited with a Malaysian bank. In the Malaysian court, his Malaysian-domiciled widow claims her share in this part of the estate. The Malaysian and English law agree that the succession to the man's movable estate is governed by English law as

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11 [1908] P 46, CA

12 See Dicey & Morris, 37-48

13 Wolf, *Das Internationale Privatrecht Deutchlands*, 3rd ed. (1954): cited by O Kahn-Freund, 291

the law of his last domicile. Suppose the marriage was celebrated in England and perfectly valid by English domestic law, but was essentially void (we assume that parental consent is one of capacity in Malaysia[14]) by the Malaysian domestic law because the woman, being under the age of twenty-one, had not obtained the consent of her parents. Will the Malaysian court judge the validity of the marriage in accordance with the conflict of laws rule that governs the distribution of the estate, that is the English conflict rule or by its own conflict rule?

The question whether the marriage is valid, as Wolf said, is "incidental" to the main question who inherits the estate; others have said it is a "preliminary" question. This is a fundamental question of considerable difficulty which may arise in any conflict system. But it will only occur if, and only if, the following three conditions are satisfied. First, the main question must by the conflict rule of a one country be governed by the law of some foreign country. Secondly, there must be a subsidiary question involving foreign elements which is capable of arising in its own right and which has a conflict rule of its own available for its determination. Thirdly, the conflict rules of the former must lead to a different result from the corresponding conflict rule adopted by the foreign country whose law governs the main question.

The solution to the problem is one or the other and writers have offered arguments for each. Taking the same example above, according to one view, the lady should be permitted to share in the estate because otherwise full effect would not be given to the Malaysian conflict rule that succession to the movables is governed by English law; according to another view, however, the lady should not be permitted to share in the estate because otherwise full effect would not be given to the Malaysian rule that the validity of marriage is governed by Malaysian law. The question shows the dilemma : "international harmony versus internal consistency" in a clear and poignant

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[14] See Chap. 5 for characterisation of parental consent in the LRA.

form. International harmony would have been achieved by the Malaysian court adopting the same solution as an English court would while internal harmony must surely be uppermost in the mind of the Malaysian court since the lady would not be regarded as the deceased's wife for other purposes (forcefully also the Malaysian would have to give its effect to its domestic rule).

Renvoi

While the choice of law process may have provided the answer to the question 'What law governs', that may not be the end; the chosen law itself may "refer" the question to the "law" of the first country (the law of the forum) or to the "law" of some third country. This is the problem of renvoi, the most widely and most hotly discussed subject of conflict of laws. If law A refers to law B, and B refers to A or to C what is the judge of A going to do? This is a comparatively simple situation; C may refer back to A or to D, and then D to B, etc. The fundamental problem is always whether the reference to a foreign system includes the system's own choice of law rules.

Three solutions have been used for this problem[15] :

- Never to accept any reference either back to one's own system or forward to a third system, and always to apply only the internal rule of the law referred to, irrespective of whether the courts of the country in which that law applies would themselves have done so. Thus if law A refers to law B, and B refers to A or to C, the judge of A would apply the purely domestic rule of law B. This method requires proof of law B without necessity of proof of its conflict rules. It has been recommended (obiter) by two English judges on the ground that it is simple and rational[16] , but rejected in another case after comprehensive review of the authorities.[17]

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[15] See Dicey & Morris, 74

[16] *Re Annesty* [1926] Ch 692, 708-709; *Re Ashew* [1930] 2 Ch 259, 278

[17] *Re Ross* [1930] 1 Ch 377, 402

❖ Accept the renvoi by the foreign law to the *lex fori*, and also that to a third law. Thus the judge of A would apply the domestic rule of law A. This method requires proof of the conflict rules of B, but does not require proof of B's rule about renvoi. This is the theory of partial or single renvoi. It has been adopted by some continental courts in a number of celebrated cases[18] and is sometimes enjoined by continental legislatures[19] , but it is not the current doctrine of the English court.[20]

❖ Decide the case in exactly the same way as it would be decided by the foreign court. Thus the judge of A would decide the case as it would be decided by the judge of B. If the court of B would refer to law A and would interpret that reference to mean A's domestic law then the court of A would apply A's domestic law. If on the other hand the court of B would refer to law A and interpret that reference to mean A's conflict of laws, and would accept the renvoi from law A and apply B's domestic law, then the court of A would apply B's domestic law. This method requires proof not only of the conflict rules of B but also of B's rules about renvoi. This is the theory of total or double renvoi. In spite of its greater complexity, it seems to represent the present doctrine of the English courts[21] , at least in certain contexts.

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18 *OLG Lubeck*, March 21, 1861, 14 Scuffert's Archiv, 164; *Bigwood v Bigwood* (1881) Belgique Judiciarie, 758; *L'Affaire Forgo* (1883) Clunet 64; *L'Affaire Scoulie* (1910) CLUNET 888: SEE DICEY & MORRIS, 75

19 E.g. art. 27 of the Introductory Law of the German Civil Code (1900): Dicey & Morris, 75

20 Dicey & Morris, 75

21 see Dicey & Morris, 76

CHAPTER 2
THE ENGLISH CONFLICT OF LAWS OF MARRIAGE

Marriage unites two persons, a male and a female, in a relationship which has no parallel in its importance: for marriage as Lord Penzance once said, "is the basis upon which the framework of civilised society is built"[1] .

If indeed it is a contract, it is one of a very special kind. But, far more than that, marriage creates a status - which is something of interest to the community as well as the parties and from which flows rights and obligations. As Lord Westbury said in *Shaw* v *Gould*:[2] "Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary of dissolving, the marriage contract".

Yet, despite the significance of this institution, neither judges nor jurists have to come to terms upon the question: What law governs the validity of a marriage? The question of the validity of marriage may arise in almost any context and can affect matters as diverse as immigration and citizenship, tax liability, ability to enter into a subsequent marriage, matrimonial relief, inheritance and legitimacy. It is clearly desirable that the choice of law rules governing the validity of marriage be as certain as possible and readily ascertainable.

The original rule was that the validity of a marriage in all its aspects depended on the law of the place of celebration (*lex loci celebrationis*). It was not until the middle of the nineteenth century that the English courts drew a distinction between formalities of marriage and capacity to marry. The House of Lords *in Brook v Brook*[3] held that

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1 *Mordaunt v Mordaunt* LR 2 PD 109, 126

2 (1986) LR 3 HL 55, 82

3 (1981) 9 HLC 193