The Change of Religion amidst Monogamous and Polygamous Laws

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IN MATRIMONIAL matters there is no one law which applies to persons domiciled in India, they are governed by their personal laws which differ from community to community.[1] The practice of applying law in matrimonial matters, according to the religious faith and belief has led to prevalence of diverse matrimonial laws. Muslims are governed mainly by uncodified Muslim law of marriage and divorce derived from *Quoran* and *Sunnat*, and partly by codified law—the Dissolution of Muslim Marriage Act, 1939. The Parsi Marriage and Divorce Act, 1936 governs the matrimonial matters of the Parsis. Jews have their own customary law derived from the traditional Mosaic law. Christians are governed by the Indian Christian Marriage Act, 1872 and Indian Divorce Act, 1869.

Latest and the most important legislative enactment is the Hindu Marriage Act, 1955 which governs practically any person domiciled in the territory of India who is not a Muslim, Christian, Parsi or Jew. But this Act has no application to the members of any scheduled tribes within the meaning of clause (25) of article 366 of the Constitution,[2] who are still governed by the customs applicable to them before passing of the Hindu Marriage Act. In addition to these personal laws, there is the Special Marriage Act, 1954 which provides for a civil form of marriage for any one domiciled in India irrespective of religious creed followed by him/her. Lastly, even after more than 27 years of independence, we still have on the statute book, the Converts' Marriage Dissolution Act, 1866 which practically applies only to a Hindu who becomes a convert to Christianity and may get his marriage dissolved subject to certain conditions. This Act being discriminative in character, recommendation for its repeal was made by the Law Commission in 1961[4] but the government has not taken any concrete steps so far.

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1. Chagla, J., in *Khanum* v. *Irani*, A.I.R. 1947 Bom. 272-273.
2. S. 2(2) of the Hindu Marriage Act, 1955.
3. The Foreign Marriage Act, 1969 provides for marriages of citizens of India outside India; s. 18 of the Act provides for application of the Special Marriage Act, 1954 for matrimonial reliefs.
4. See *Eighteenth Report* of the Law Commission of India 1 (1961).

In this paper the author is mainly concerned with religious conversion and its effects under the Hindu Marriage Act, 1955 (hereinafter referred to as the 1955 Act) and the Special Marriage Act, 1954 (hereinafter referred to as the 1954 Act). On conversion we are faced with two main questions ; (*i*) its effect on the existing marriage; (*ii*) convert's right to contract another marriage according to his new religion.

II

There is no statutory provision in our law providing for procedure, formalities, or maintenance of record of conversions from one religion to another religion. The different religious groups have their own formalities of conversion, when resorted to, they become a part of the evidence to prove change of religion. But such formalities or conversion ceremonies or any form of expiatory ceremony is not an essential preliminary to a valid conversion.[5] In a couple of Madras cases[6] the intention to leave Christianity and re-embrace Hindusim was inferred from the convert's conduct and his acceptance as Hindu by his community. Very little, if at all any, enquiry is made to ascertain that a person who comes for conversion genuinely wished to be admitted to the new faith or the conversion is a sham conversion for some ulterior purpose. It is submitted that the cases this paper is mainly concerned with are generally regarding the conversion of a Hindu to Islam. For a conversion to Islam, the person has to present himself before the Imam of a mosque. The Imam may ask the person if he is voluntarily embaracing Islam and on receving a reply in the affirmative would give him the '*kalma*' (there is no God but Allah and Mohammed is his Prophet) to recite. After the person has recited the *kalma* he is given a Muslim sounding name (generally having the same initials as his previous name) and is asked to sign a register.[7] For conversion to Islam neither circumcision is necessary nor it is the final test.[8]

Confronted with a matrimonial dispute, the court is required to satisfy itself of the factum and finality of conversion. But is it also the function of the court to go behind the transaction of conversion and test or gauge the sincerity of religious belief or to determine whether it is intelligent con-

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5. *Perumal Nadar* v. *Ponnuswami*, A.I.R. 1971 S.C. 2352; *Gurusami Nadar* v. *Irulappa Konar*, A.I.R. 1934 Mod. 630 ; *Ramayya* v. *Josephine*, A.I.R 1937 Mad. 172; *Durga Parsada Rao* v. *Sudarsanaswami*, A.I.R. 1940 Mad. 513.

6. *Mrs. Marthamma* v. *Mumuswamy*, A.I.R. 1951 Mad. 888 ; *Durgaprasada Rao* v. *Sudarsanaswami*, A.I.R. 1940 Mad. 513.

7. See *Rakeya Bibi* v. *Anil Kumar Mukerji*, (1948) 52 C.W.N. 142. 149.

8. R. K. Wilson, *Anglo Mohammedan Law*, 86-87 (Cal. 1930).

viction or an ignorant and superficial fancy or whether the conversion was *bona fide*.

Different opinions have been expressed by the courts. No court can test or gauge the sincerity of religious belief.[9] It is immaterial whether the motive was genuine conversion or a mere device.[10] Din Mohammed, J., expressed his opinion in these words :

> Renunciation of a religious faith, therefore, requires no other proof than a person's declaration, the only condition being that the declaration is not casual of which the declarer may repent afterwards, but it should be attended with volition and should be such to which the declarer adheres and in which he persists. The motive of the declarer is similarly immaterial. A person may renounce his faith for love or for avrice. He may do so to get rid of his present commitments or truely to seek salvation elsewhere. That would not effect the factum of renunciation....A genuine conversion is one which has actually taken place and if once it is proved as an accomplised fact, further enquiry is barred.[11]

The question of *bona fides* was wholly irrelevant and, further, no court could determine *bona fides* or otherwise of a person's change of faith.[12] In a Sind case,[13] where the girl below the age of 18 embraced Islam and contracted *nikah*, Davis, J.C., observed:

> I will not say that in this matter the minor must be shown to be able to exercise an intelligent preference because religion is mere a matter of faith than of reason. But it must be shown that he or she understood the nature of his or her profession of faith. The court is not concerned to inquire into the motive or sincerity of religious belief or observances.[13a]

On the other hand, as early as 1871, when a Christian widow and a Charistian husband having a wife living, after conversion to Islam, married in a Mohammedan form, their Lordships of the Privy Council expressed doubts as to the legality of such marriage.[14] Later in 1894, the Privy

9. Lord Macnaughten in *Abdul Razak* v. *Aga Mohd.*, 1894 L.R. 21 I.A. 56.
10. *Mt. Sardaran* v. *Allahbaksa*, A.I.R. 1934 Lah. 976.
11. Mt. *Rasham Bibi* v. *Khuda Baksh*, A.I.R. 1938 Lah. 482, 484.
12. *Ayesha Bibi* v. *Subodo Chandra*, 49 C.W.N. 439.
13. *In re Muhammed Alam*, A.I.R. 1939 Sind 311.
13a. *Id.* at 314.
14. *Helen Skinner* v. *Orde*, 14 M.I.A. 309, 324.

Council leaned in favour of the validity of the marriage where the couple married according to Christian rites, and subsequently having converted to Islam married second time according to the Mohammedan form.[15] In the later case the Privy Council accepted the factum of conversion and validity of the marriage without going into the question of any motive behind the conversion.

Referring to the opinion of the Privy Council in *Skinner's* case, Chakravarti, J., observed:

> A court can and does find the true intention of men lying behind their acts and can certainly find from the circumstances of a case whether a pretended conversion was really a means to some further end....Indeed, it seems to us to be elementary that if a conversion is not inspired by religious feeling and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim or right, a court of law cannot recognise a good basis for such claim but must hold that no lawful foundation for the claim has been proved.[16]

In this case the court held that although the plaintiff undoubtedly went through a form of conversion and did so of his own free will, the conversion was not *bona fide* but was designedly undergone with the object of causing a dissolution of the marriage. The court dissented from the judgment in an earlier case decided by the same High Court where under similar circumstances the wife's conversion to Islam was established to be voluntarily gone through. The court held that without going at all into the question of motives for conversion or their relative religious or ethical values it is not open to the court to do so because all the legal consequences of the conversion would follow.[18] Overwhelming majority of cases have taken the view that motives of conversion are immaterial and what is required to be established is the factum of conversion. The factum of conversion being established the other legal consequences should follow. When the laws of the country do not prohibit its people to freely renounce their religion and embrace another, the question of motive behind the conversion becomes irrelevant. There is nothing illegal if a person decides on conversion for the specific purpose of enjoying a certain right, may be it is the right of polygamy allowed by the new religion embraced or on the other

15. *Skinner* v. *Skinner*, 1897 L.R. 25 I.A. 34.
16. *Supra* note 7 at 147-48.
17. *Id.* at 149.
18. *Supra* note 12 at 442.
19. *Mrs. Marthanma* v. *Mummuswamy*, A.I.R. 1951 Mad. 888.

hand a person changes religion even for the apparent purpose of avoiding a liability. Similar was the opinion of Panchapakesa Ayyar, J.:[19]

> It does not follow that once a man becomes a Christian he has no right to relapse into Islam or Hinduism or any other of the alternative religions available in this world for his purpose holy or unholy and get the rights of the new religion he embraces, subject of course, to any laws taking away such rights.[19a]

Ayyar, J., upheld the conversion in spite of his finding that the 'religiosn motive' did not operate either for conversion or for re-conversion, and the 'woman motive' operated.[20] Their Lordships of the Privy Council also supported this view :

> In such countries (countries with many races and creeds) there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the countries not withstanding an earlier marriage. If such inherent right is to be abrogated, it must be done by Statute.[21]

A person may embrace a particular religion in order to benefit from a worldly point of view or in the hope of entering the kingdom of heaven but so long as his conversion is genuine his ulterior or sordid motive would not effect the question of conversion.[22] Talking of change of religion as a question of fact, Macket, J., observed, "It seems to me somewhat analogous to the legal position with regard to change of domicile which must always be a question of fact in every particular case."[23]

III

The change of religion leads to different consequences under the different systems of law in India. It is surprising that even where the legislature had codified the laws of certain communities, no set pattern or defnite policy had been followed. Amongst Muslims, renunciation of religion makes the marriage null and void.[24] But under the Dissolution of

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19a. *Id.* at 889.
20. *Ibid.*
21. *Attorney Gen. of Ceylon* v. *Reid*, (1965) 1 All E.R. 812, 817.
22. *Sardar Mohommed* v. *Maryam Bibi*, A.I.R. 1936 Lah. 666.
23. *Durga Pd. Rao* v. *Sudarsanswami*, A.I.R. 1940 Mad. 513, 515.
24. *Tyabji's Muslim Law*, 190 (4th ed. 1968).

Muslim Marriage Act, 1939 in spite of the change of religion by the wife the marriage subsists, unless she was converted to Islam before marriage and relapsed to her former religion.[25] But if a Muslim husband changes the religion the old rule of automatic dissolution is still followed.[26] Under the Indian Divorce Act, 1869 the change of religion by the Christian wife is not a ground for the husband to obtain any remedy, but if the husband exchanges his profession of Christianity for the profession of some other religion and goes through a form of marriage with another woman, the first wife can petition for divorce.[27] An unconverted Parsi or a Hindu is entitled to the remedy of divorce on proof of change of religion by the other spouse, under the personal law applicable to them,[28] but neither there is an automatic dissolution of marriage nor the converted spouse has any right to get his marriage dissolved. The Special Marriage Act, does not provide for change of religion as a ground for divorce or any other remedy.

Though ordinarily the remedy to dissolve the existing marriage is available only to the unconverted spouse, yet even today a Hindu on conversion to Christianity may obtain the remedy of divorce against his or her unconverted spouse under the Converts' Marriage Dissolution Act, 1866.[29] The question of change of religion becomes rather conspicuous in India because of the existence of one polygamous personal law amidst monogamous personal laws.

IV

In Hindu law there is nothing which forbids the subsistence of a marriage if one of the parties to the marriage ceases to be a Hindu but the 1955 Act permits either party to the marriage solemnized before or after the passing of the Act, the remedy of divorce on the ground that the other party has ceased to be a Hindu by conversion to another religion.[30] The expression 'Hindu' has been used in this Act in a wide and generic sense to include therein practically all inhabitants of India who are not Muslims, Christians, Parsis or Jews.[31]

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25. S. 4, the Dissolution of Muslim Marriage Act, 1939.
26. *Supra* note 24.
27. Section 10, the Indian Divorce Act, 1869.
28. See s. 32 (j), the Parsi Marriage and Divorce Act, 1936 : s. 13 (1) (ii), Hindu Marriage Act, 1955.
29. See ss. 4 and 5.
30. S. 13 (1) (*ii*) of the Hindu Marriage Act, 1955.
31. See s. 2 of the Act.

A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith, or is an ardent admirer and advocate of such religion and its practices. But if he abandons his religion by a clear act of renunciation and adopts the other religion by undergoing formal conversion he would cease to be a Hindu.[32] As already indicated the remedy to seek dissolution is available only to the spouse who continues to be a Hindu. This may result into a great hardship in certain cases where there is genuine, intelligent conversion inspired by religious feelings. As the law stands now the converted spouse would be without any legal remedy. He or she cannot seek restitution of the conjugal rights as the unconverted spouse cannot be shown to have withdrawn from the society of the other spouse without reasonable excuse.[33] The remedy of judicial separation would be denied to him as staying away from the converted spouse would not amount to desertion on the part of the unconverted spouse.[34] As a consequence, if the unconverted spouse takes into his or her head for sadistic pleasure, jealousy or vindictiveness not to free the other party from the bond of marriage, the converted spouse may be forced to lead rest of his life without a legal wife to cohabit with or to have legitimate children or to enjoy the pleasures of married life.

The converted spouse's position is not really that hopeless as it seems, if the conversion is to Christianity or Islam.

If a spouse embraces Christianity and as a consequence of this the other spouse deserts or repudiates him for a continuous period of six months, the converted spouse may sue the unconverted spouse for conjugal society.[35] If after the petition the desertion is persisted upon the court may declare the marriage dissolved after following the prescribed procedure.[36] So under the Converts' Marriage Dissolution Act, a converted spouse (guilty party according to the 1955 Act) is legally entitled to get his or her Hindu marriage dissolved. It is submitted that despite its remedial value, the 1866 Act requires immediate repeal because this Act allows remedy only to a Hindu spouse and that too if the conversion is to Christianity, consequently it smacks of religious discrimination. Another objection to 1866 Act may be that it defeats the objects of the 1955 Act, wherein the legislature though introduced the remedy of divorce yet for the reasons

32. Mulla, *Hindu Law* 686 (13 thed. 1966).
33. See s. 9, the Hindu Marriage Act.
34. *Id* sub-section (1) (*b*) and explanation 1 of s. 10.
35. See ss. 4 and 5, the Converts' Marriage Dissolution Act, 1866.
36. *Id.* ss. 13, 15, 16 and 17.

well known made the remedy of divorce difficult to avail. The Act may also become handy for an unscrupulous Hindu spouse who wants to get rid of the wedlock for certain ulterior purpose. Derrett, while writing on the 1866 Act, said :

> But, even as a secular provision, it has the disagreeable, and (to modern eyes) prejudicial feature that it allows one spouse, by changing his religion on any ground to put an end unilaterally to his marriage (where the non-convert cannot in social terms, form part of a Christian home), or put an end to it by agreement—a special kind of collusive divorce otherwise unknown to Indian law.[37]

The conversions which are being widely used to defeat the provisions of the 1955 Act are the conversions to Islam. They are being resorted to mainly by the male spouse of Hindu marriages. It is a well known principle of law that after conversion to another religion the convert is subjected to the rights and obligations under the personal law of that religion. However, as there is no one law of marriage and divorce in India, when one spouse is converted to Islam and the other spouse continues in his or her original religion the question arises as to which law should be applicable to determine their matrimonial rights and obligations ?

There are two aspects of the problem *viz.*, the right of the spouses to dissolve the marriage and the right of the convert to contract another marriage.

On conversion of religion there is no automatic dissolution of marriage. So far as the unconverted spouse is concerned, there is no doubt, that he or she may, if desired, petition for divorce and get his or her marriage dissolved under section 13 of the 1955 Act. Unlike the Parsi Marriage and Divorce Act,[38] wherein the remedy of divorce is not available unless the petition is made within two years after the plaintiff came to know of the fact of conversion, the 1955 Act does not provide for any period of limitation to obtain the remedy on the ground of conversion. But even under the 1955 Act after the knowledge of conversion of the other spouse the plaintiff voluntarily continues the conjugal cohabitation or does not excercise the right of divorce for a considerable time, the court may refuse the remedy if it is satisfied that there had been unnecessary or improper delay in instituting the proceedings.[39]

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37. J.D.M. Derrett, 'The Native Convert's Marriage Dissolution Act, 1866 : Should it be Abolished', LXXIV Bom. L.R. 16, 20.

38. S. 32 (j).

39. See s. 23 (1) (*d*), the Hindu Marriage Act.

Where one of the parties to a marriage brings about a conflict of personal laws by forsaking their common religion and adopting Muslim religion, can the Muslim law of the converted spouse prevail over the law retained by the non-converted spouse under which the marriage was solemnized ?

Attempts have been made in the past to apply the Muslim law of dissolution of marriage on the plea that the rights and obligations of the parties relating to dissolution of marriage do not form part of the marriage contract but depend upon their personal law at the time of the institution of the suit.[40] According to Muslim law a distinction is made between conversion to Islam of one of the spouses when such conversion takes place, (*i*) in a country subject to Muslim law, and (*ii*) in a country where the Muslim law is not the law of the land. In the first case, when one of the parties embraces Islam, he or she should offer Islam to the other spouse, and if the latter refuses the marriage can be dissolved. In the second case the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses. In India, the rule of the first case mentioned above had been pleaded in a number of cases. But vast majority of the decided cases have rejected this contention mainly on the ground that the court cannot allow a party to a marriage, by converting himself or herself to Islam to evade the legal obligations of a marriage entered into by him or her and to change the status of another person who had not changed his religion and held that it would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it by unilateral act.[41] Thus, it may be taken to be well settled that conversion from a monogamous faith to Islam does not dissolve a marriage previously contracted.

V

The Law Commission in its *Eighteenth Report* has this to say :

> It was observed by Chagla, J. (as he then was) in Robasa Khanum v. Khodadad Bomanji, (A.I.R. 1947 Bom. 272) with reference to a marriage contracted between two Parsis, that it was "a solemn pact that the marriage would be monogamous and could only be dissolved according to the tenets of Zoroastrian religion", and that "it

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40. *Supra* note 12.

41. *Rakeya Bibi* v. *Anil Kumar*, (1948) 52 C.W.N. 142 ; *Noor Jehan* v. *Eugene Tischenke*, (1942) 2 Cas. 165 : *Saveda Khatoon* v. *Obadiah*, (1945) 49 C.W.N. 745 ; *Robasa Khanum* v. *Khodadad*, A.I.R. 1947]Bom. 272.

would be patently contrary to the justice and right that one party to a solemn pact should be allowed to repudiate it by a unilateral act". In other words, the marriage already contracted had created mutual rights and obligations between the parties, which did not cease on the conversion of either party, and therefore the right of the convert to marry more wives in accordance with Muslim law must be held to be subject to the right which the wife has acquired, under a monogamous marriage prior to conversion, to exclude all others in consortium so long as the marriage subsists.[42]

It is submitted that the Law Commission seems to have made a very sweeping statement on an important debatable point of law without considering the different aspects of the matter thoroughly and may be it has not given any credence to the existing decisions of the law courts in India validating second marriage of a male spouse contracted after his conversion to a polygamous religion.

The Madras High Court in *Emperor* v. *Lazar*,[43] where a native Christian, having a Christian wife living, married a Hindu woman according to Hindu rites without renouncing his religion, held the accused guilty of bigamy. The court fruther held *obiter* that it would make no difference if he had renounced the Christian religion before contracting the second marriage.

But in 1866, Holloway, J., of the same court had held that a Christian convert relapsing to Hinduism and marrying again according to Hindu rites cannot be convicted of bigamy. He observed that it seems impossible to assume that a man is not equally free to go from Hinduism to Christianity and if he pleases back from Christianity to Hinduism.[44]

Again in 1910, the same court, in a case where a Christian having a Christian wife converted to Hinduism and contracted a marriage with a Hindu woman according to Hindu rites, held, that the offence of bigamy was not committed.[45] A married Christian domiciled in India after his conversion to Islam is governed by Mohammedan law, and is entitled, during the subsistence of his marriage with his former Christian wife, to contract a valid marriage with another woman according to Mohammedan rites.[46] In

42. The Law Commission *Eighteenth Report* 4 (1961) (The Converts Marriage Dissolution Act, 1866).

43. (1907) 30 I.L.R. Mad. 550.

44. 3 M.H.C.R. Appendix p. vii.

45. *Emperor* v. *Antony*, (1910) I.L.R. 33 Mad. 371.

46. *John Jiban Chandra* v. *Chandar Sen*, (1939) I.L.R. 2 Cal. 12.

1950's also Mysore and Madras High Courts had held, that in the case of a Hindu converted to Christianity and reverting to Hinduism in order to marry another woman, no offence of bigamy within section 494 of the Indian Penal Code was committed. In a Ceylon case,[49] where a Christian having a Christian wife, converted to Islam and married a woman who had also embraced Muslim faith, the Privy Council held that a person domiciled in Ceylon, a country of many races and creeds, had an inherent right to change his religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of Ceylon, notwithstanding an earlier subsisting marriage. This decision of the Privy Council deserves greatest respect, as before 1959, their decisions had binding authority. In India, where the country is committed to secularism, it is submitted, allowing freedom of choice and worship of different religions, legal position on change of religion could not be any different.

In deciding on a Hindu woman's second marriage with a Muslim on her conversion to Islam, the Madras High Court held that principles of Hindu law should be applied to test the subsistence of her first marriage and in testing the validity of her second marriage the principles of Mohammedan law should be applied.[50] Applying the same principle to a male spouse embracing Islam and contracting a second marriage, the subsistence of his first marriage is to be determined by the rules of his former religion and validity of his second marriage according to Mohammedan law.

Where a married person changes his religion, the law under which the marriage was performed if it considers the change of religion a wrong, would ordinarily provide for a remedy against the wrongdoer. That remedy becomes available to the unconverted spouse. In India all the personal laws are treated on equal footing. The legislature may, however, specifically make provision for some limitation or restriction to be placed on the rights of a person under the new personal law which ordinarily follow on conversion. For example, in the Parsi Marriage and Divorce Act, the legislature has specifically laid down that a Parsi husband or wife cannot remarry in the life-time of his or her wife or husband untill his or her marriage is dissolved by a competent court, although he or she may have become a convert to any other faith.[51] It is submitted that in 1936, the legislature

47. *David* v. *Sudha*, A.I.R. 1950 Mys. 26.
48. *Supra* note 19.
49. *Supra* note 21.
50. *Budansa Rowther* v. *Fatima Bibi*, A.I.R. 1914 Mad. 192.
51. See s. 4 of the Parsi Marriage and Divorce Act,

in specifically providing for this prohibition of second marriage on conversion of a Parsi spouse, was mindful of the right of a person to contract a second valid marriage on conversion to a polygamous religion.

The Indian Divorce Act, 1969 provides for a wife to ask for divorce if the husband has changed his religion and has contracted a marriage with another woman.[52] Another ground mentioned for divorce is 'bigamy with adultery'.[53] The distinction appears to be that in the former case the second marriage, after the change of religion if permitted by the new religion, is valid, and therefore, it cannot be considered bigamy with adultery. This also reflects the mind of the legislature, treating remarriage, after conversion to a polygamous religion, as valid.

Then there are instances of men belonging to ploygamous religions, contracting monogamous registered marriages in England and on return to India contracting second marriage under their own personal law while there first marriage subsisted. For example in *Sainapathi* v. *Sainapathi,*[54] second Hindu marriage after the subsisting first Christian marriage was held to be not amounting to bigamy.

In deciding on the husband's capacity to take a second wife, the personal law of the husband at the time of the marriage has to be taken into account. A right to take a second wife is an incident of the status of marriage which the husband may or may not possess. If on conversion he acquires that status he can exercise that right which naturally flows from it.

It is a well known and accepted principle of private international law that a husband by voluntry and unilateral act of change of domicile may bring about the change in the application of the system of law in matrimonial matters.[55] If this change can be brought about by a change of domicile, it is difficult to see why a change of religion, the domicile remaining unchanged, may not result in a change of status, if the law to be applied is then different by reason of the difference of religion.

It seems to be settled law in India that on conversion to Islam, the converted spouse's first marriage subsists with all the rights and reliefs provided by the law of the first marriage and that marriage can be dissolved

52. See s. 10 of the Indian Divorce Act.
53. *Ibid.*
54. A.I.R. 1932 Lah. 116.
55. R.H. Graveson, *The Conflict of Laws*, 191 (6th ed.).

only under the law applicable to the parties at the time of marriage.[56] And except for this limitation, it is submitted, the law as it stands now, on conversion to Islam the convert's rights and obligations shall be governed by his or her new religious law. A Hindu wife (for that matter a wife belonging to any religion) on her conversion to Islam cannot contract another marriage so long as her first marriage subsists, as the Mohammedan law also does not allow polyandry. But a Hindu husband (or a husband belonging to any other religion except Parsi) on his conversion to Islam can contract three more marriages under the Muslim law though his first marriage is still existing. Derrett seems to hold a similar view when he says,"...even the prospect of embracing a polygamous religion in order to acquire a new, additional wife has been unpalatable to the courts, though they could not, without a statute, set aside what the personal law allows or allowed."[57] The application of section 17 of the 1955 Act which provides for punishment of bigamy is limited to two Hindus solemnizing marriage if at the date of such marriage either party had a husband or wife living. Consequently, this section shall not apply to a spouse converted to Muslim religion.

VI

The Law Commission has observed :

> The special Marriage Act allows persons belonging to different religions to marry. It is considered that since initial difference of religion does not come in the way of a marriage under that Act, the subsequent change of religion should not also effect any such marriage.[58]

Unlike its predecessor the Special Marriage Act, 1872 the 1954 Act does not require renunciation of religion by the parties marrying under the latter Act. The parties to the marriage under the 1954 Act may belong to the same religion or to different religions. Even if the parties to the marriage belong to the same religion, in matrimonial matters they would be governed by this Act and not by their personal law and even the succession to their property would be regulated by the Indian Succession Act.[59] It is difficult to say that in all the cases the parties who marry under the 1954 Act would be devoid of all religious feelings. The persons belonging to the same religion may decide to contract a marriage under the 1954 Act because of its provision allowing consensual divorces or for certain other

56. *Supra* note 41.
57. *Supra* note 37.
58. The Law Commission, *Eighteenth Report* 24 (1961).
59. S. 21 of the Special Marriage Act, 1954.

attractive provisions of the Act. In a country, having a majority of vegitarian people, change of religion by one of the spouses coupled with insistence on cooking and eating beef may bring about disruption in their family life. It may lead to non-converted spouse leaving the matrimonial home. Can it be said that the non-converted spouse has left the matrimonial home without any reasonable cause ? Would it be treated as desertion on the part of the non-converting spouse ? The dissolution of marriage would also not be available to such a spouse as change of religion is no ground for this remedy.

On embracing Islam can the male spouse contract another marriage under Muslim law ? In the absence of any specific rule of prohibition, the general provision for punishment of bigamy in the 1954 Act may not prove to be legally sufficient in barring the converted spouse to contract a second marriage under the Muslim law. Section 44 of the 1954 Act provides :

> Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code (Act 45 of 1860), for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

In the Reid case[60] the first marriage was under the Marriage Registeration Ordinance of Ceylon. Section 35 (2) of the ordinance provides :

> ...and know ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence.

The accused in the *Reid* case, while his first marriage subsisted, on conversion to Islam contracted a second marriage under Mohammedan law with a Muslim woman. It was contended that if the marital rights of the first wife had been violated as admittedly they had, then the Marriage Registration Ordinance provided a remedy in section 19, but there is nothing in any statute which rendered the second marriage invalid and nothing in the general law of the country which precluded the husband

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60. *Supra* note 21 at 812

from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognised polygamy, notwithstanding an earlier subsisting monogamous marriage. The Privy Council accepted this contention and held the second marriage valid and consequently bigamy was not committed.

The provisions relating to bigamy under the 1954 Act and Ceylon Ordinance are almost similar. Both prohibit a second marriage during the subsistence of first marriage and consider contravention of the provision as amounting to bigamy and makes it a punishable offence. It is submitted that the provision of 1954 Act may be interpreted as prohibiting and making second marriage a punishable offence only where the second marriage under the personal law of the husband is not permissible. Moreover sections 494 and 495 of Indian Penal Code mentioned in section 44 of the 1954 Act apply to second marriage which is void at the time it is contracted. Their application may be avoided if the second marriage is established to be valid according to the personal law applicable to the parties at the time of the second marriage. Specific provision, in 1954 Act, is made only in respect to succession to the property of the parties married under the Act but it does not take away other rights and obligations flowing from the personal law of the religion to which the parties belonged or any of them belongs after his or her conversion to a new religion.

VI

Under the existing personal laws the male spouse has a distinctive advantage over the female spouse. He, by conversion to the Muslim religion, may contract another marriage under his embraced religious law even if he could not get rid of his first marriage. Whereas a female spouse by embracing even the Muslim religion can niether get rid of her first marriage nor can she contract another marriage during the subsistence of her existing marriage. The spouses governed by the Hindu Marriage Act and having little or no respect for religion (there is no dearth of such people), may find a useful handle in the provision of change of religion for collusive divorces when no other ground of divorce is available. The change to Muslim religion may help the spouse to avoid the rigour of the Hindu law which prohibits collusive divorces and does not provide for consensual divorce or imposes restrictions on obtaining divorce within a certain period (three years) of time from the date of marriage and also imposes restriction on remarriage within a certain period (one year) after the decree of the court of first instance. All these and some other inconvenient provisions can be avoided under both the 1955 Act and the 1954 Act, if both parties to the

marriage embrace Islam and the husband pronounces *talak* on his wife[61] and after *talak* reconvert to their former religion and marry again.

In *Haripada Roy* v. *Krishna Benode*[62] parties were married under Hindu law, the wife converted to Islam and on petition made by the wife to the District Judge, the marriage was dissolved by applying the Muslim law. After dissolution of her marriage, she reconverted to Hindu religion and married a Hindu. The husband of the first marriage petitioned for restitution of conjugal rights. It was contended that the decree of divorce would remain operative only for the period during which the defendant remained Mahommedan and the rights of the husband under the Hindu law revived the moment she was converted back to Hinduism. The contention was rejected and the petition for restitution dismissed. A curious situation may arise where a male spouse embraces Islam and marries according to Muslim law a Hindu girl converted to Islam before her marriage. Some time after the marriage they reconvert to Hindu religion. Both marriages being valid when solemnized, the bigamy provision of 1955 Act may not apply.

It is submitted that the law as it stands now, by one way coversions from the monogamous religions to the polygamous religion, the provisions of the personal laws are being misused and this misuse is bound to increase further if immediate steps are not taken to control the device of change of religion for the purposes of avoiding or escaping the inconvenient rules of other personal laws and also of the 1954 Act. Until uniform rules of monogamy are enacted for the country, provisions may be made by statutory enactment removing the change of religion as a ground of matrimonial reliefs and putting restriction on the spouse who changes religion to contract another marriage so long as his first marriage subsists. To meet the situation that may arise because of such a provision, non-cohabitation of the spouses for a certain period of time be introduced as a ground for obtaining divorce.

61. *Muncherji Cursetji* v. *Jessie Grant*, (1934) I.L.R. 59 Bom. 278—when both spouses are converted to Islam, the wife can be divorced by *talak*.

62. A.I.R. 1939 Cal. 430.