PROPOSED AMENDMENTS OF ACT 164: A PERSONAL TOUCH

By
Tun Abdul Hamid Mohamad

Reading the bill to amend the Law Reform (Marriage and Divorce) 1976 (Act 164), I am pleased to see two of the proposed amendments are, in fact, suggestions I made in my judgments.

Proposal to amend section 51

The first is the proposal to allow the converting party to file petition to dissolve the civil law marriage in the civil court. Section 51 only allows the non-converting party to do so. Quite often, the non-converting party, the wife, not wanting a divorce, would not file the petition. So, the converting party, the husband, went to the Syariah court to obtain the order.

As early as 1992, when I was barely two years on the High Court bench, I heard the case of Ng Siew Pian v. Abdul Wahid bin Abu Hasan, Kadi Daerah Bukit Mertajam & Satu Lagi (1993) 1 CLJ 391. This case is not listed in the explanatory statement of the bill as one of the cases that had led to the proposed amendment. The earliest case cited was decided in 1994. I decided this case on 17.7.1992. Whether it is an oversight or whatever, unless shown to the contrary, I insist that I was the first to make the suggestion, assuming that a similar suggestion was made in those cases.

In that case, both the Plaintiff (wife) and the 2nd Defendant (husband) were Buddhists. They were married under the Civil Law Ordinance 1952. Eighteen years later, the husband converted to Islam and in the same year he made an application in the Syariah court to annul the marriage on the ground that he had converted to Islam. The Syariah court annulled the marriage on the ground that the wife had refused to follow the husband to convert to Islam.

The wife filed a suit in the civil court (High Court), inter alia, praying for a declaration that the Syariah court had no jurisdiction to hear the case and make the order that it did.

I heard the case and I decided that:

"T*he Kadi's Court has no jurisdiction to make the order that it made on 21 May 1991 on the application of the second defendant because the plaintiff was not a Muslim and that the Court has jurisdiction only if both parties are Muslims.* (My own translation).

In my judgment, I reverted to section 51 of Act 164 which provides:

"51. (2) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:....."

and said:

"It should be noted that this section allows the party who does not convert to Islam to petition for a divorce. It appears that this section does not entitle the party who has converted to Islam to make the application.

Anyway, if the party who does not convert to Islam makes the application to the High Court, the court has jurisdiction to hear the application because the jurisdiction of the High Court covers everyone, irrespective of his religion or even if he has no religion at all.

But, what if the party who does not convert to Islam does not apply and the party who has converted wants to make the application? To which court should he apply? He cannot make the application in the High Court. The Kadi's Court does not have jurisdiction to hear the case because one of the parties is a non-Muslim. ***There seems to be a "lacuna" here that the Legislature ought to take note and make the necessary amendments. If I may suggest, it is advisable that the High Court be given the power to dissolve such marriages because they are not marriages contracted under Islamic law and the Kadi's Court has no jurisdiction to dissolve such marriages. In my view, the jurisdiction to dissolve such marriages should be given to one court only. Otherwise, there may be situations in which there are two conflicting orders."*** (my own translation).

That was the suggestion I made in 1992, 25 years ago. Since then, I had become a Judge of the Court of Appeal, Judge of the Federal Court, President of the Court of Appeal, Chief Justice and retired. Anyway, it is nice to see it happening in my lifetime.

I do not think there would be any controversy over that proposal. The marriage is a civil law marriage, the parties were non-Muslims when it was contracted (one party remains a non-Muslim over whom the Syariah court has no jurisdiction), the applicable law is the civil (common) law, the civil court has jurisdiction over both Muslims and non-Muslims. So, it is only logical that the jurisdiction to dissolve such marriages remain with the civil court.

Proposal to amend section 95

The second is the proposal to amend section 95 by adding the words: *"or completion of such further or higher education or training"*

Let me tell the story that has led to it. Section 95 reads:

"Except where ***an order*** *for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it* ***shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later."***

In 2004, I presided the Federal Court hearing an appeal in the case of Karunairajah Rasiah v Punithambigai Poniah [2004] 2 CLJ 321. (Unfortunately again for me, that judgment, though a judgment of the Federal Court and, unless shown to the contrary, the only judgment on the issue, is not cited as the cause for proposed amendment.)

In that case, the father was ordered to pay the maintenance of his daughter. Upon the child attaining the age of 18, he stopped paying her maintenance even though she was pursuing her tertiary education. The mother applied to the High Court for an order to compel the father to continue the said payments until the child has completed her education. The High Court granted the wife's application. The Judge held that the child was suffering from an

involuntary financial dependence constituting a physical or mental disability within the exception provided by section 95 of Act 164? The Court of Appeal affirmed the decision of the High Court. The father appelled to the Federal Court. The only issue before us was whether involuntary financial dependence was a physical or mental disability within the exception provided by section 95 of Act 164.

In the course of the argument, I asked the counsel whether she understood the effect of her argument. I told her, going by her argument, every university student suffers from physical or mental disability until he or she graduates. (There was laughter in court.)

I also read to her the provision of section 79 of the Islamic Family Law (Federal Territories) Act 1984 which, inter alia, provides:

".....the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on application by the child or any other person, extend the order for maintenance ***to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training****."* (Emphasis added).

I asked the counsel whether she was urging the court to add those words to section 95 of Act 164 under the pretext of interpreting of the law.

We allowed the appeal. In my judgment, I said:

"First, personal views on the state of the law and moral obligations on the part of parents towards their children should be disregarded. A case has to be decided according to the law as it stands, irrespective of a judge's personal view on it and moral obligations can never take precedence over the law. What the law should be is a matter for the legislature.

.....

With respect, I find no legal basis for interpreting the exceptions in s. 95 to include financial dependence for the purpose of pursuing and/or vocational education after the "child" has completed the age of eighteen years. The only basis for such an interpretation, which goes against the clear words of the law, is moral basis. And Siti Norma Yaacob J puts it very aptly in Gisela Gertrut Abe v. Tan Wee Kiat (supra) that "moral grounds is of no relevance whatsoever". Moral grounds can never override clear provisions of the law in deciding a case. The function of a judge is to apply the law, whatever his personal view about the law may be.

.....

In this respect, the Islamic Family Law (Federal Territories) Act 1984 is more advanced than its civil counterpart. ***In reality, those are the words that the respondent wants this court to "legislate as an amendment" to the existing provisions of s. 95.*** *The respondent has succeeded in the High Court and the Court of Appeal. With respect, I will not do such a thing.* ***That is not the function of the court. That is a matter for the Parliament.*** *By doing so, the court will be usurping the function of the legislature. If separation of powers were to have any meaning, the three branches of the government must respect each other's jurisdiction. There should be no interference, no usurpation of powers either way."*

I remember, later, reading an article written by two lawyers, presumably who were on the losing side. They criticised the court (me, in particular) for lacking "judicial creativity" (to put it mildly) in not deciding in favour of the wife.

I was used to such things. To those lawyers, the court is right when it decides in their favour but wrong when it decides against them. When the court bends backward or even rewrites the law under the pretext of interpreting it to decide in their favour (which should never happen), they call it “judicial creativity.” In a similar case, when they are on the losing side, they would say that the court had exceeded its jurisdiction. I have no respect for such lawyers.

Now, at last, on this issue, the right thing is being done, the right way, 13 years later and still within my lifetime.

For the record, there is one more suggestion of mine pending, made 23 years ago. If it were a baby, he or she will be voting in the 14th General Election.

18 04 2017 (My 75th birthday).

tunabdulhamid@gmail.com
http://www.tunabdulhamid.my
https://tunabdulhamid.me