

WORKSHOP ON “THE CONSTITUTIONAL JUDICIARY IN THE MUSLIM WORLD: ITS
INFLUENCE ON THE INTERPRETATION OF CONSTITUTIONAL AND LEGISLATIVE
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CHANGES IN THE FAMILY LAW FROM 1950S TO 2008: A MALAYSIAN
PERSPECTIVE

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“In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after the coming into force of the Law Reform (Marriage and Divorce) Act 1976 is monogamous. It cannot be both monogamous and polygamous. The line dividing the two is clear.” – per Abdul Hamid Mohamad JCA in Sivanes Rajaratnam v Usha Rani Sibramaniam (2002) 3 CLJ 300 (C.A.)

That is what I said in 2002, delivering the judgment of the Court of Appeal. I think it summarizes the law on marriages in Malaysia except that I must add that a marriage has to be between a man and a woman and no other.

I would not do justice to the participants who are not familiar with the peculiarities of Malaysia if I do not give a brief account of the historical and social background of Malaysia.

Islam came to the Malay Peninsular in the 14th century through Muslim traders from Yemen and India. Some scholars say Islam came to the Malay Peninsular through China. We shall leave it to the historians to debate. The Malay *Sultans* converted to Islam and the population followed suit. In 1511, the Malay State of Melaka was colonized by the Portuguese, followed by the Dutch and the British. By the 19th century, British colonization had spread throughout what is now Malaysia. They also introduced the English common law and rules of equity and their legal and judicial system.

The British, directly or indirectly, also caused the immigration of Chinese and Indians to the then Malaya and the two Borneo States that now form Malaysia. The immigrants brought with them their religions besides their languages and cultures. However, the Muslims remained the majority with slightly over 50% of the population, even after the two Borneo States, i.e. Sabah and Sarawak joined Malaysia in 1963.

Malaysia is a Federation of 13 States. Legislative powers are shared by the Federal and State Parliaments. Most laws, including family law of non-Muslims are a federal matter and administered by the common law courts. Islamic law, especially the family law of Muslims are a State matter and administered by the *Shari'ah* courts.

Malaya obtained her independence in 1957. It was joined by the two Borneo States in 1963 and the country became Malaysia. With a population of about 26 millions, Malaysia is a multi-racial, multi-religious, multi-lingual and multi-cultural country with the Muslims, mainly Malays forming slightly over 50% of the population. You mention any religion in the world, we have it in Malaysia.

From there we can see the kind of family laws we had then. The Muslims followed the Islamic family law which provides for polygamous marriages. The Christians of whatever race could register their marriages under the Christian Marriage Ordinance which provided for monogamous marriages. The Chinese who were not Christians could choose to register their marriages under the Civil Law Ordinance which also provided for monogamous marriages. But they also practiced polygamy by taking "secondary wives". Hindu Indians married under the Hindu law and custom. Similarly, the Sikhs, the Hindus and the natives of the Borneo States married under their customary laws.

The real change came in the 80s. (Here, to avoid confusion, I shall focus more on Peninsular Malaysia). In 1976, the Law Reform (Marriage and Divorce) Act was passed by Parliament. However, it only came into force in 1982. The preamble says as follows:

"An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce....."

Avoiding the details, this law does not apply to Muslims. The law prohibits persons who are legally married on the appointed date to contract another marriage – section 5. In other words, after the appointed date, new polygamous marriages could not be contracted anymore.

The detail provisions are like any other law of marriage and divorce. I shall only mention a few salient points.

Section 10 declares that a marriage shall be void if either party is under the age of eighteen but a female above the age of sixteen, may marry with a license from the Chief Minister. However, a person, male or female, below the age of 21 years require the permission of his or her father.

Section 11 provides for the prohibited relationships, which I think is similar to laws in common law countries. There is one exception, i.e. a Hindu is not prohibited from marrying his sister's daughter or her mother's brother. I do not know whether such marriages occur.

Under section 37, it is an offence for any person to use any force or threat to compel a person to marry against his will or to prevent a person who has attained the age of twenty-one from contracting a valid marriage. I am not aware of any prosecution under this section. Even though the section talks of the male gender, I am sure it applies to female as well.

Then there are provisions regarding divorce. The sole ground for divorce is that the marriage has irretrievably broken down. As regards the circumstances causing the breakdown of the marriage, one of the following facts shall be considered by the courts:

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) that the respondent has deserted the petitioner for at least two years;
- (d) That the parties have lived apart for at least two years.

In considering whether it would be just and reasonable to make a decree the court is required to consider all the circumstance, including the conduct of the parties and the interests of the children if the marriage is dissolved.

There is also provision to encourage reconciliation but, from my observation, this procedure hardly works. In most of the cases parties choose to file a joint petition and obtain a divorce without contest, except, in some cases, on the issue of the division of matrimonial property. I don't remember hearing any contested divorce petition in my nine years as a High Court Judge. Only one went on trial on the issue of custody, a few on maintenance and distribution of matrimonial properties. The rest were settled by mutual consent.

There is also provision for the court to award damages for adultery against a co-respondent but petitioners seldom pursue this claim.

A party may remarry after the decree is made absolute, usually after three months but quite often one of the parties would request the court to shorten the period.

Without going into detail, I shall just mention that there is provision for judicial separation and also for the decree of nullity. The grounds for the decree of nullity are:

- (a) that, at the time of the marriage, either party was already married, the former husband and wife was alive and that the former marriage was still in force,
- (b) either party was under-aged and no special license was obtained'
- (c) the parties are within the prohibited degrees of relationship,
- (d) The parties are not respectfully male or female. (section 69).

We see straightaway that polygamy and same sex marriage are null and void.

A marriage is voidable on grounds of non-consummation; the marriage was without the real consent of both parties due to duress, mistake or unsoundness of mind; at the time of the marriage the respondent was suffering from venereal disease or was pregnant by some person other than the petitioner.

There are detailed provisions regarding the distribution of matrimonial assets, maintenance of spouse and children and custody of children and others which I shall not mention due to lack of time.

Since its introduction there has not been major amendments. In one case, I pointed out that it was necessary for an amendment to be made. Under section 95 of the Act, a maintenance order expires when the child attains the age of eighteen unless the child "is under physical or mental disability." In that case, the child was above eighteen and was at the university. Counsel argued that the words "physical or mental disability" were wide enough to cover an undergraduate!

I remember asking the learned counsel whether she realized the effect of her argument which means that every undergraduate is suffering from physical or mental disability. Dismissing the argument, the Federal Court, through my judgment suggested that Parliament amended the provision to cover the period during which the child was undergoing further education. In fact, such a provision had already existed in the Islamic Family Law in Malaysia. That is one instance where the Islamic Family Law in Malaysia is more advanced than its common law counterpart.

Section 51 provides that where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce in the common law court after three months of the date of the conversion. What usually happens is that the husband converts because he wants to marry a Muslim girl and he wants a divorce but the first wife does not want a divorce. The law only provides that only the non-converting party may file a divorce. So, the husband files for a divorce in the *Shari'ah* court which has a somewhat similar provision and the *Shari'ah* court makes a declaration that that the first marriage is dissolved. I see two problem here. First, the marriage is not a Muslim marriage. Secondly, the respondent is a non-Muslim. On both counts, the *Shari'ah* court (in Malaysia) is not the competent court. I have also suggested that the law should be amended to allow the converting party to file a petition too, in the common law court. Unfortunately, nothing has happened so far.

The Islamic Family Law

As I had pointed out in my Al-Sahuri Lecture last week, Islamic family law is within the jurisdiction of the States and the *Shari'ah* courts. Earlier law made in early 1950s which only formed one part of the Administration of Islamic Law was replaced by a more detailed "Islamic Family Law Act/Enactment". The law is only applicable to Muslims.

The structure of law and the procedural and the administrative parts follow the Law Reform (Marriage and Divorce) Act mentioned earlier very closely. However, the

substantive law is *Shari'ah*, mainly I believe, following the Shafi'e school as well as Malay Customs which have been incorporated into the law.

Again, without reverting to the details, I shall only address a few salient points. First, the law makes it mandatory for parties to perform a marriage in accordance with the procedure laid down by the law. In fact, it is an offence if they do otherwise. However, a marriage which is valid under the *Shari'ah* is recognized as a valid marriage though not performed according to the procedure laid down in the law. Usually, the parties would be fined and the marriage is registered. Similarly, the law provides that divorce may be either by a court order or by the pronouncement of the *talaq* with the permission of the court. It is an offence for a husband to pronounce the *talaq* otherwise. However, if a husband does that, he commits an offence and is punished but the *talaq*, if valid under *Shari'ah*, is recognized.

No marriage may be solemnized where either the man is under the age of eighteen or the woman is under the age of sixteen except with the permission of a *Shari'ah* Judge. (section 8). In reality, Malaysians, Muslims and non-Muslims alike very seldom marry when they are below twenty years of age.

Marriage of a Muslim man to a *Kitabiyah* is permitted by law. However, a *Kitabiyah* is defined as:

- (a) a woman whose ancestors were from *Bani Ya'qub*; or
- (b) a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad; or
- (c) a Jewess whose ancestors were Jews before the prophethood of the Prophet Isa;

Please do not ask me who they are and whether they exist, especially in Malaysia. I have not heard of such a marriage since the law came into force.

Polygamy is permitted but with permission of the court after hearing the applicant, the existing wife and also the prospective wife. Entering into a polygamous marriage without the court's permission is an offence. Before granting the permission, the court must be satisfied that:

- (a) that the proposed marriage is just and necessary, having regard to sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights or insanity on the part of the existing wife;
- (b) that the applicant has such means as to enable him to support all his wives and dependants;
- (c) that the applicant is able to account equal treatment to all his wives as required by the *Shari'ah*;
- (d) That the proposed marriage would not cause *darar shar'ie*.

Like the law applicable to non-Muslims, there is also a provision that makes it an offence for a person to compel a person to marry against his will or to prevent a man

who has attained the age of eighteen or a woman who has attained the age of sixteen from marrying, unless permitted by the *Shari'ah*. (section 37). Note that in the law applicable to non-Muslims, the cut-off age is twenty-one.

Where either party renounces Islam does not dissolve the marriage unless so confirmed by the court. The conversion to Islam by either party to a non-Muslim marriage does not by itself operate to dissolve the non-Muslim marriage unless and until so confirmed by the court. Note that the word "court" here means the *Shari'ah* court. I have dealt with this issue when dealing with non-Muslim marriages.

Maintenance orders are effectively enforced where the respondent is an employee. The employer is required to deduct the amount from his monthly salary. Maintenance of an illegitimate child is the responsibility of the mother. That perhaps is an area that should be looked into.

There is also provision for the court, when making the order of divorce, to order the division of assets acquired by them during the marriage by their joint efforts. (section 58)

The usual complaints are not on the provision of the law, but regarding the efficiency of the court. A simple divorce case remains pending for years because the husband does not attend court and the *Shari'ah* judge insists on him attending court to pronounce the *talaq* even when the court has found that the wife's claim for divorce should be allowed. In the common law court, the court would make the order in the absence of the husband. I hope that such problems will be resolved. Delay is a common problem in any court.

Thank you.