MARRIAGE BREAKDOWN IN ENGLAND AND MALAYSIA, COMPARISON WITH ISLAMIC LAW OF DIVORCE

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IN THE NAME OF ALLAH, THE MOST BENEFICENT AND THE MOST MERCIFUL.

"Today I have perfected your religion for you and completed my favour toward you and chose Islam as your religion"

Surah al-Maidah (5:3)

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MARRIAGE BREAKDOWN IN ENGLAND AND MALAYSIA COMPARISON WITH ISLAMIC LAW OF DIVORCE

Introduction: Scope of Study

The aim of this paper is to study:

i) the principle of divorce law in England
ii) the principle of Islamic law of divorce
iii) comparison between the concept of divorce in English law and Islamic law

The divorce law should strike the balance between the urgency need of a divorce in one hand and the need for secure marriage for the stability of the society in other hand. Majority of the people accept the view that one a marriage has irretrievably broken down it is in the interest of the community generally and the parties themselves, and any children, that the marriage be dissolved.

However an increase in divorce rate is disturbing because of the effect of divorce on children. It is believe that the future of the country depends on the way in which children are brought up. The children should be brought up in the happiness and security of a sound family life.

Divorce should be consider as the last resort after all effort of reconciliation has fail and not to be treated as a way to solve marital problems.

This paper is divided into two parts. In the first part, which is divided into two chapters, discuss English principle of divorce and its application to the non-Muslim in Malaysia.

The second part which is divided into three chapters discuss about Islamic principle of divorce and comparison between English concept of divorce and Islamic concept of divorce.

The arrangement of the chapters are suggested as below:

Part I

Chapter I deals with the historical and policy of divorce legislation in England.

Chapter II deals with the grounds of divorce in England and Malaysia.

Part II

Chapter III discusses general concept of divorce in Islamic law.

Chapter IV deals with codification of Islamic law of divorce in various Muslim country.

Chapter V a conclusion deals with comparative study of English and Islamic concept of divorce.

PART I

CHAPTER I

HISTORICAL AND POLICY OF DIVORCE LEGISLATION IN ENGLAND

i) Historical Background

As early as the tenth century the law of marriage and divorce in England was cast in a rigid mould because of the complete dominance of the church over matrimonial matters. The doctrine of the indissolubility of marriage was accepted by English ecclesiastical courts so that these courts has no power to pronounce a decree of divorce a virculo matrimoni which could permit the parties to remarry. In addition to decrees of nullity and jactitation of marriage, they could also pronounce decrees of restitution of conjugal right and divorce a mensa et thoro. The former called on a deserting spouse to resume cohabitation with the petitioner, and the latter (which was granted on the ground of adultery, cruelty or the commission of an unnatural offence) relieved the petitioner from the duty of cohabiting with the respondent without severing the marriage tie. The only way in which an aggrieved party could obtain a divorce a vinculo matrimonii was by Act of Parliament.[1]

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1 Bromley, Family Law, pg 83 (supplement to Third Edition 1969)

Matrimonial Causes Act, 1857

The Matrimonial Causes Act, 1857 was the first inroad made in the ecclesiastical divorce law. A Royal Commission was appointed in 1850 to look into the question of reforms in the matrimonial law. The commission recommended cruelty and desertion in addition to adultery as grounds upon which divorce could be granted. The Act took away the jurisdiction of the ecclesiastical courts over matrimonial matters and gave powers to the secular courts to dissolve the marriage. The Act, for the first time, provided divorce by judicial process. Divorce a menso et thoro was substituted by a decree of judicial separation on the same grounds on which divorce could have been obtained. The Act. of 1857 retained the distinction between the position of the husband and that of the wife, for a husband could petition for divorce on the ground of adultery alone, whilst a wife had to proved adultery coupled with incest, bigamy or alternatively rape or unnatural offence.[2]

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2 S. Jaafer Hussain, Marriage Breakdown & Divorce Law Reform in Contemporary Society, pg 116-117, (First Publication, 1983)

Extention of the Grounds for Divorce

The law remained in this state until 1923, when matrimonial Causes Act of that year put the husband and wife in the same position by permitting the latter to petition on the grounds of adultery simpliciter. A.P. Herbert's Matrimonial Causes Act of 1937 further extended the grounds for divorce by permitting either spouse to base his or her petition on other's cruelty, desertion or incurable insanity. It is of significance to note that divorce on the ground of insanity was not based upon the theory of matrimonial guilt which was advocated before 1937.

From this time onward various Royal Commission were appointed to enquire into the law of Matrimonial Causes. The law was further amended, repealed and finally consolidated in the Matrimonial Causes Act of 1965. The basic structure of the law of divorce remained unchanged, that is divorce shall be granted solely upon the ground of one spouse's fault.[3]

The Divorce Reform Act 1969

Since the 1940s there had been increasing disillusionment with the operation of the fault-based

3 Ibid., pg 117

law. It was argued by the proponents of reform that the court was in no position to allocate blame; that in many cases both parties were at fault, and that matrimonial offences were often merely symptomatic of the breakdown of marriage rather than the cause. However, the majority of the Royal Commission on Marriage and Divorce (the Morton Commission of 1956) affirmed the matrimonial offence as the sole basis of divorce because they saw this as the only means to ensure the stability of institution of marriage.[4]

Finally, the publication in 1966 of the report of the Archbishop of Canterbury's Group, entitled Putting Asunder-A Divorce Law of Contemporary Society paved the way for reform. The report found that the existing law concentrated exclusively on making finding of past delinquencies, whilst ignoring the current viability of the marriage. It is therefore recommended that the matrimonial offence be abolished and be replaced by the principle of breakdown as the sole ground for divorce. It was envisaged that the court would determined whether the marriage had broken down after considering all the evidence.[5]

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4 The Law Commission, Facing the Future. A Discuss paper on the Ground for Divorce, pg 147 para 2.2 (1988)

5 Ibid.,

The Lord Chancellor referred Putting Asunder to the law commission, whose response was published latter in the same year, entitled Reform of the Grounds of Divorce - The Field of Choice. The commission agree with the Archbishop's Group criticisms of the existing law. In particular, it found that the need to prove a matrimonial offence caused unnecessary bitterness and distress of the parties and their children. The law did not accord with social reality, in that many spouses who could not obtain a divorce simply left the "empty shells' of their marriage and set up "stable illicit unions" with new partners. The Commission considered the objectives for a good divorce law to be:

i) to buttress, rather that to undermine, the stability of marriage; and

ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.[6]

Both bodies agreed that the fault principle was unsatisfactory and that the law should be reformed to allow marriages which had irretrievably broken down to

6 Ibid., pg 147, para 2.3

be dissolved in a humane fashion. The difficulty, was how to identity those marriages which had irretrievably broken down. The law commission did not favour the solution advocated by Archbishop's Ground. First, it consider the proposed inquest impracticable issue. Secondly, it was concerned that such as inquest into the conduct of the parties in order to determine breakdown would cause unnecessary bitterness and humiliation and prevent the marital ties being dissolves with the decency and dignity.

After consultation between the various interested bodies, a compromise solution was reached whereby breakdown would become the sole ground for divorce, but would be inferred from the existence of one of a number of facts rather that by judicial inquest. This solution was enacted in the Divorce Reform Act 1969.[7]

ii) Objective of Divorce Reform Act 1969

The objective of a good divorce law as stated by the Law Commission in 1969 was to support marriages which have a chance of survival and the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead.

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7 Ibid., para 2.4

Following the Reform of the Grounds of Divorce in 1969,[8] the focus of attention of Divorce Reform Act 1969 has been the promotion of agreement between the parties about the consequences of divorce, primarily through conciliation. This was emphasised in the terms of reference of Booth Committee which was asked to make recommendation:

a) to mitigate the intensity of dispute

b) to encourage settlement

c) to provide further for the welfare of the children of the family.

It was argued that if solutions can be agreed between the parties rather than imposed by the court, the traumatic effect of marital breakdown on the spouses and their children may be reduced. The best way in which divorce law can promote this aim is to ensure that the legal process of dissolving a marriage does not required steps to be taken which are likely to provoke conflict between the parties.[9]

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8 Ibid., PART II para 3.2
9 Ibid.,

The second object of a good divorce law is to enable a dead marriage to buried decently as part of an approach which might be regarded as forward-looking rather than retrospective. Lord Scarman in Minton V Minton10 stated "An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down".

Divorce Reform Act 1969 came into force on January 1, 1971. However in 1973 the law of divorce was consolidated in Matrimonial Causes Act 1973 which is applicable to England now.

iii) Reform in the Divorce Legislation in Malaysia

Member of the Royal Commission on Non-Muslim Marriage and Divorce law was appointed in 1972 with the following terms of reference:

i) to study and examine existing laws relating to marriage and divorce (other than Muslim marriage) and to determine the feasibility of a reform if any is considered necessary, in particular, in the light of the resolution of the United Nations

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10 [1979] AC 593. 608

Covention on consent to marriage, minimum age for marriage and registration of marriages.

ii) to receive and consider representation that might be submitted from any racial or religious group affected or likely to be affected by the changes or reform of the existing marriage and divorce laws, and to prepare and submit a report to the Government and recommend changes reform if any, to be made to such laws.[11]

Certain groups have express concerned that reform should be made in the law of divorce so that the law of divorce in Malaysia be in line with the changes made in England. The substance of the recommendation can be summarised as below:

i) Since England has recognised irretrievable breakdown of marriage as the sole ground of divorce as stated in the Divorce Reform Act 1969, Malaysian should adopt the same principle.

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11 Laporan Suruhanjaya di Raja Mengenai Undang-Undang Perkahwinan dan Pencerian Orang-Orang Bukan Islam dan Rang Undang-Undang Perkahwinan dan Pencerian 1979, m.s. 15

ii) In order to proved breakdown of marriage one or more specific facts such as adultery, cruelty, desertion and separation must be established.

iii) It is argued that where the prospect and true significance of marriage goes with it, the empty shell should be destroyed with the maximum fairness and minimum bitterness, distress and humiliation.

iv) The court must satisfied that the marriage is irretrievably broken down before granting any divorce.

v) Where there appears a reasonable possibility of reconciliation the court may at any time adjourn the proceeding for such period as to encourage reconciliation.

The Royal Commission has accepted this recommendation and incorporate this principle in the Law Reform (Marriage and Divorce) Act 1976. The Act has been brought into force from the 1st of March 1982 in Malaysia.

CHAPTER II

GROUND FOR DIVORCE IN ENGLAND AND MALAYSIA

(i) No divorce proceedings can be started within one year of the marriage

Until the coming into force of the Matrimonial and Family Proceeding Act 1984 no petition for divorce could be presented before the expiration of the period of three years from the date of the marriage unless it was shown that the case was one of exceptional hardship suffered by the petitioner or one of exceptional depravity on the part of the respondent.[1]

According to the Law Commission, in its Report on the Field of Choice published in 1966, this rule constituted a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years and that it accordingly helped to achieve one of the main objectives of a good divorce law. The effect of the restriction was simply to delay divorce. However, it was difficult to reconcile any requirement of proof of "exceptional depravity" with

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[1] Matrinmonial Causes Act 1973, s 3

the view that marriages should be dissolved with the minimum of bitterness, distress and humiliation.[2]

In 1983 therefore the Law Commission reconsidered the matter and concluded that the law was unsatisfactory. They took the view that institution of marriage cannot make divorce available within days of the ceremony and they therefore proposed that the bar should be replaced by an absolute bar on divorce within one year of the marriage. This period of delay was intended to be a symbolic assertion on the state's interest in upholding the stability and dignity of a marriage. Parliament accepted the Law Commission's view and incorporate it in the Matrimonial and Family Proceedings Act 1984 S. 1 which provided that no petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage.[3]

In Malaysia'it is provided that no petition for divorce shall be presented to the court before the expiration of the period of two year from the date of the marriage. A judge, may on application made to him, allow the presentation of a petition for divorce within the period of two years on the ground that the

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2 CRETNEY, Principles of Family Law, pg 110 (Fourth Edition)

3 Ibid., 111

case is one of exceptional circumstances or hardship suffered by the petitioner; but in determining the application the judge shall have regard to the interest of any child of the marriage and to the question whether there is a reasonable possibility of a reconciliation between the parties during the specified period.[4]

The provision of an absolute bar on divorce within one year of the marriage has not been adopted by the Malaysian divorce legislation so far.

(ii) Breakdown of marriage to be the sole ground for divorce

The Divorce Reform Act 1969 introduced the principle that the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has brokendown irretrievably.[5] The Act thus entirely altered the conceptual basis of divorce; there is now one ground, and one ground only, on which the court has power to dissolve a marriage, and that is that the marriage has brokendown irretrievably. It has been said that the whole policy of Parliament was to create a state

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Law Reform (Marriage and Divorce) Act 1976 S 5 0 (1) (2)
Matrimonial Causes Act 1973, S 1(1)

of affairs where, once the real relationship of husband and wife has gone, and gone for good, the legal relationship of husband and wife should as far as possible be removed or dissolved so as to bring the legal situation into the line with the factual situation.[6]

However, the unqualified statement that breakdown is the sole ground for divorce is somewhat misleading and the concept of the no-fault irretrievable breakdown of marriage as the only ground for divorce has not been achieved. This is for two reasons:

a) First the provision asserting that breakdown shall be the ground for divorce is immediately followed by the requirement that the court shall not hold the marriage to have brokendown irretrievably unless the petitioner satisfied it, of one or more of five 'facts'. It is not enough for a petitioner to prove that the marriage has brokendown irretrievably.[7] In the case Buffery V Buffery[8] the parties had been married for more than 20 years. They had grown apart, had nothing in common, could not communicate. The Court of

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6 CRETNEY, Principle of Family Law, pg 101 (Third Edition 1979)

7 CRETNEY and MASON, Principle of Family Law, pg 98 (Fifth Edition, 1990)

8 [1988] 2 FLR 365

Appeal accepted that the marriage had irretrievably broken down, and also accepted that the husband had been somewhat insensitive about money matters. But it was insufficient to establish the "behaviour" fact and a decree could not be granted.

In the case of Richards V Richards[9] the husband suffered from mental illness. He assaulted the wife and exhibited symptoms of moodiness, and taciturnity. Ultimately the wife left. The judge found that the marriage had irretrievably brokendown but nevertheless refused a decree since the wife had not established any fact.

b) Secondly although the facts are not grounds for divorce but merely evidence of breakdown, proof of one of them will raise a strong presumption that there has been a breakdown which is irretrievable. Once a fact has been proved the onus in practise therefore shifts to the respondent to prove that there has not been an irretrievable breakdown. However when the presumption of breakdown was established it is usually difficult for the respondent to rebut it. It is therefore not surprising to find that the facts on the basis of

9 [1972] 3 AII E R 695