THE PRINCIPLES OF BREAKDOWN OF MARRIAGE AND SHIQAQ ; THEIR APPLICATION IN THE LAWS OF DIVORCE OF ASEAN COUNTRIES

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MATRIC NO ; 890205

A project paper submitted in partial fulfillment of the requirements for the Higher Degree of Masters in Comparative Law

KULLIYYAH OF LAWS

INTERNATIONAL ISLAMIC UNIVERSITY

MALAYSIA

MCL PROGRAMME 1990 / 1991

IN THE NAME OF ALLAH, THE MOST BENEFICIENT

AND THE MOST MERCIFUL

WE HAVE SENT OUR MESSENGERS WITH EXPLANATIONS,

AND SENT THE BOOK AND THE BALANCE DOWN WITH THEM,

SO THAT MANKIND MAY CONDUCT THEMSELVES WITH

ALL FAIRNESS.....

SURAH AL- HADID (57) ; 25

CONTENTS

TABLE OF CASES

SEAH CHENG HOCK V. LAU BIAU CHIN

SIM KIM ONG V. GOH PHAIK SOOI

SIVANESAN V. SHYMALA

TALIB V. CHE SEPIAH

TAY KAY POH V. TAN SURIDA & ANOTHER

WONG SENG V. LEE YO LEN

ZAWIYAH V. MAHAYUDIN

CHAPTER ONE ; INTRODUCTORY

(a) Introduction

Most societies in the world seek to regulate divorce through the instrumentality of law. The laws and grounds of divorce vary from one country to another. In South East Asia countries for example, divorce laws in Malaysia and in Singapore are premised upon the theory of breakdown of marriage, whereas in the Philippines, Thailand and Indonesia the divorce laws do not seem to be based on the breakdown principle. Thus, the provisions of divorce of those countries are different from that of Malaysia and Singapore.

Contemporary development in English law have altered the principal basis of divorce by subtituting 'irretrievable breakdown' in place of the fault oriented grounds. It was felt that breakdown principle is a better basis for a modern law of divorce then fault.

Under the fault principle an innocent spouse could petition to end the spousal relationship provided he or she could show the other to have been guilty of any of the matrimonial offences of bigamy, adultery, cruelty or desertion. The innocent spouse had to prove, first, the fault of the other in terms of these matrimonial offences and, second that he or she was in contrast,

completely blameless. The new principle, on the other hand introduces that irretrievable breakdown of marriage is the sole ground for divcorce. However breakdown of marriage may be established only by proving one of specified 'guideline facts.' Some of these facts bear a close resemblance to the former grounds of divorce; but it is essential to note that they are no longer grounds for divorce, but serve merely as guidelines by which the court may infer the fact of irretrievable breakdown. It can be said that under the breakdown principle the burden on the petitioner is solely to prove one of the facts, whilst that on the respondent in a defended suit is to show that the marriage has not broken down irretrievably.[1]

It is the purpose of this paper to examine the extent to which, the principle of breakdown of marriage has been followed and applied in the matrimonial laws of South East Asia countries. To achieve this, reference is made to the law of divorce provided for in marriage statutories of those countries as well as cases wherever available. It also discusses Shiqaq i.e., a comparable principle in Islamic Law and its application in the law of divorce of South East Asia countries. The paper will discuss the law in Malaysia and Singapore together as the provisions of divorce in both countries are similar.

1.Bromley P.M., Family Law, Butterworths, London, 7th. Edition, 1987.p.

(b) Historical Background

The first steps towards the present law of divorce were taken in England, in 1857 with the passing of the first Matrimonial Causes Act. Before that Act a divorce, in the sense in which we understand the term, could be obtained only by a complicated and expensive procedure that included the passing of a private Act of Parliament. The 1857 Act established a Court for Divorce and Matrimonial Causes with power to grant decrees of dissolution of marriage, though only on the ground of the other spouse's adultery. The grounds for divorce were broadened by the Matrimonial Causes Act 1937 to include cruelty, desertion and incurable insanity and these, with adultery, remained the only grounds until the Divorce Reform Act 1969 came into force on January 1, 1971.[1]

The changes that this Act introduced were the result of widespread dissatisfaction with the law's reliance on the matrimonial offence as the normal ground for divorce. The need, in most cases, to brand one spouse as the ' guilty ' party was felt by many to be unrealistic and unfair. Thus, in 1951, a Royal Commission was appointed to inquire into the law. The next really significant developments occurred in the mid-1960s, where two reports were published. One by the established church called

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1. Reekie & Tuddenham, Family Law and Practice , Sweet & Maxwell, London 1988, p. 27.

Putting Assunder and another one secular. Putting Assunder was organized by a group of Archbishop of Canterbury, recommended the abolition of all existing grounds for divorce and their replacement by a single ground i.e., breakdown of marriage. The court would be charged with conducting an investigation of the current marital circumstances in order to discover whether the marriage was still viable ; fault was to be abandoned as the basis for divorce. But essentially it proposed that the law should concern itself with the current state of the marriage, rather than with its history.[1]

At the same time, another report i.e., The Law Commission Report entitled Reform of the Grounds of Divorce ; The field of choice, CMND. No. 3132 (1966) was published. As the result of both reports, a number of alternatives were submitted based on the assumption that a good divorce law should seek to achieve two aims ;[2]

i) To buttress, rather than undermine, the stability of marriage ; and

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1. The Report of A Group Appointed by the Archbishop of Canterbury, Putting Asunder ; A Divorce Law for Contemporary Society (1966).

2. The Law Commission, Reform of the Grounds of Divorce ; The Field of Choice, CMND. No. 3123 (1966) para 15, at 10.

ii) When, regrettably a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimun bitterness and humiliation.

Thus in 1969, Divorce Reform Act has been enacted which adopted a compromise position of the two reports. This new Act came into effect on 1 January 1971. It makes irretrievable breakdown of marriage as the sole ground of divorce, and provides also that this ground may be established only by proof of one or more of five fact, specified by the Acts.

The five facts are as follows ;[1]

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 a continous period of at least two years immediately preceding the presentation of the petition ;

1.Divorce Reform Act of 1966, Sec. 2[1].

d) that the parties to the marriage have lived apart for a continous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted ;

e) that the parties to the marriage have lived apart for a continous period of at least five years immediately preceding the presentation of the petition.

CHAPTER TWO ; THE LAW IN ASEAN COUNTRIES

(a) The law in Malaysia and Singapore

i) Background

In Malaysia, divorce was, before the passing of the Law Reform (Marriage and Divorce) Act, 1976 regulated and conditioned by the philosophy of religion of the spouses and the customary law that governed them. The seeds for reform of the matrimonial law were sown by the judicial decision of Re Ding Do Ca.[1] Thomson C.J. in the case expressed the hope that questions relating to the family law " be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of the inviduals beyond the chances the of litigation".

As an indirect result a Royal Commission was set up and a bill was drafted. Among the recommendations made by the Royal Commission was that irretrievable breakdown of marriage should be the sole ground for divorce. [2] This principle has been taken from the principle of the English Divorce Reform Act 1969. With this, the principle of the ' matrimonial guilt ' came to be replaced by the principle of irretrievable breakdown.

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1. (1966)2 MLJ. 220, 224.

2. Law Reform (Marriage and Divorce) Bill, 1972 annexed to the Royal Commission on Non- Muslim and Divorce law. K.L.; Government Printer, 1971.

In Singapore, the first law of divorce in the Strait Settlement was implanted from the Matrimonial Causes Act, 1857 from England. However in England, divorce was entirely a creation of Parliament, thus the importation of the Act to Singapore had no conception of divorce.

The Second Charter of Justice has incorporated some of the customs and religous practices of local inhabitants. The first divorce statute of the Strait Settlement was Divorce Ordinance XXV of 1910. This ordinance was closely modelled upon the English Matrimonial Causes Act, 1857. The Ordinance provides that the jurisdiction to entertain petitions for divorce has been restricted to petitioners who professed the Christian religion and to parties who were domiciled in the colony at the time of the petition.

Adultery could, for all purposes, be said to be the sole ground for divorce under the first Divorce Ordinance although the task was harder for a wife who petitioned than for her husband. A husband could petition for divorce on the ground that his wife had committed adultery, rape, sodomy or bestiality or adultery coupled with desertion without reasonable cause for two years or upwards. She also had two other grounds ; her husband had forsaken christianity for some other religion or had gone through a

form of marriage with another womam.[1]

In 1933, the Strait Settlement Divorce Ordinance (Ordinance 123 of 19 Revision Edition of the law of Strait Settlement) was amended so that a wife could petition simply on the husbands adultery or on his committing rape, sodomy or bestiality although it remained possible for her also to petition on his forsaking Christianity for another religion and his marrying another woman.

Under Divorce Ordinance 1941, now Cap. 84 of the 1936 Revision Edition of the laws of Strait Settlement, three more grounds were added i.e., cruelty, desertion and insanity.

When the Women's Charter was enacted in 1961, the Divorce Ordinance was repealed and its provisions inserted as part IX of the Women's Charter where they have remained since. The ground of divorce were still similar as 1941 ordinance.

On the 2nd. June 1967, the Women's Charter (amendment) Act came into operation, in the words of the explanatory statement to the Act ;

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1. Leong Wai Kum, Family Law in Singapore, M.L.J. Sdn. Bhd, Singapore, 1990, p. 192.

" makes a number of amendments to the Women Charter 1961, in the light of experience gained since 1961 and the recent developments in the law of matrimonial relations in the United Kingdom, Australia and New Zealand ".[1]

The amendment, following the recent English Legislation in the case of divorce provides that collusion has become discretionary and not an absolute bar ;[2] adultery once condoned shall no longer be capable of being revived ;[3] resumption or continuation of conjugal cohabitation by the husband following a matrimonial offence by the wife no longer raises an irrebuttable presumption of condonation against him ;[4] also provisions have been made to allow spouses to continue or resume cohabitation in an attempt to effect a reconciliation without such necessary amounting to either condonation of adulteryy or cruelty, or termination of desertion.[5]

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1. Singapore Government Gazette, Bill Supplement No. 19, November, 8th. 1966.

2. Clause 29, amending Sec. 86.

3. Clause 31, adding Sec. 87 (4).

4. Clause 31, adding Sec. 87 [2].

5. Clause 31 and 28, adding Sec. 87 [1], Sec. 84 [6].

After receiving a lot of attacks and criticism as well as following the development of the law in Australia and New Zealand and also in England, thus, in 1976, an amendment Bill was presented in Parliament.

The principle of breakdown of marriage was then first introduced in June 1981 when the amended Bill was passed into law.[1] Before this amendment the law of divorce as in Malaysia and England was based on fault principle. Under this Amendment Act there is only one ground for divorce that is the irretrievable breakdown of marriage. This Act differs from the Bill in that the provision allowing spouses to jointly petition for divorce by mutual consent has been deleted.

ii) <u>To what extent the breakdown of marriage is the sole ground for divorce</u>

In Malaysia the above issue has been debated on two occassions in Court. First, in the High Court case of <u>In re Divorce Petitions Nos 18, 20 and 24 of 1983</u> [2] Shanker J. held that the sole ground for divorce under the Act is irretrievable breakdown of marriage and mutual consent does not of itself entitle the par-

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1. Amendment Act 26 of 1980 wef 1 June 1981.

2. (1984) 2 M.L.J 158, p.163.

ties to a dissolution. The judge said ;

> " Although the marginal note to section 52 does read " Dissolution by mutual consent, " the note to section 53 reads "Breakdown of Marriage to be sole ground for divorce." The section goes on to specify that the breakdown must be irretrievable. "

He went on to say ;

> " The words ' sole ground ' must as a matter of definition exclude dissolution by mutual consent as a distinct ground unless it was accompanied by irretrievable breakdown of marriage."

The learned Judge then concluded ;

> " On a reasonable construction of the language of the Act I hold that mere mutual consent by the spouses to a decree of dissolution does not of itself entitle them to divorce. Such mutual consent cannot of itself oust the jurisdiction of the courts to enquire into, if it thinks fit, and decide whether in all the circumstances it is just and reasonable that the decree should be made. In my view irretrievable breakdown of a marriage is still the sole ground for a divorce, under the Act."

Second, in the Supreme Court case of Sivanesan V. Shymala[1] which has overruled the earlier case. Lee Hun Hoe C.J. (Broneo) who delivered the judgment in the later case said that ;

> " A perusal of ' the Act ' shows at once that irretrievable breakdown of marriage may be one of the main grounds for divorce but it is certainly not the sole ground whatever the marginal note may say. Section 51 and 52 are clear. Section 51 states in no uncertain terms that where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce. Dissolution of marriage by mutual consent is another ground....."

It is submitted that the Malaysian position is different to that in Singapore where the sole ground is the irretrievable breakdown of marriage. In Malaysia , beside irretrievable breakdown, the Act also allow for dissolution of marriage based on mutual consent and conversion to Islam. These two grounds of divorce will be discussed further below.

1.(1986) 1 M.L.J. 400, 402.

iii) Dissolution by mutual consent

In Malaysia, the customary law of both chinese and the Hindus allowed consensual divorce.[1] And the communities could dissolve their marriage without recourse to Court provided they have married according to their own customary law. Lee Hun Hoe C.J., in Sim Kim Ong V. Goh Phaik Sooi[2] stated in the judgment,

> " Divorce by mutual consent is recognised in Sarawak as part of the Chinese customary law..... The Chinese custom of dissolution of marriage by mutual consent has been extended to civil marriages in Sarawak by the Matrimonial Causes Ordinance (Cap. 94)."

Section 7 of the Matrimonial Causes Ordinance of Sarawak provides that a joint petition may be presented by spouses and that the court may if it thinks fit, dissolve such marriage, being satisfied that both parties freely consent and that proper provision is made for the wife and for the support, care and custody of the children if any of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit."

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1. Ahmad b. Mohamed Ibrahim, Family Law in Malaysia and Singapore, Singap M.L.J., 2nd. Edition, 1984, p. 65, 66, & 79.

2. (1976) 1 M.L.J. 232.

The Royal Commission on Non- Muslim Marriage and Divorce specifically adverted to this provision and recommended that it should be adopted and extended throughout Malaysia which Parliment did as section 52 of the Law Reform (Marriage and Divorce) Act 1976. The scope of this section was once discussed by the High Court of Johore Bahru in the case of **In Re Divorce Petitions Nos. 18, 20 and 24 of 1983.**[1] It was contended inter alia, that when (a) the parties are married for more than two years (b) have freely consented to the dissolution, and (c) proper provision is made for the wife and support, care and custody of the children, a decree of divorce must be given. Once the spouses had mutually agreed to dissolve the marriage it was submitted that the court had no power whatsoever to inquire into the adequacy of the reasons for the joint petition because the satisfaction of the court was not related to the basis on which such mutual consent had been reached.

Justice Shanker in his judgment said that mere mutual consent by the spouses to a decree for dissolution does not of itself entitle them to a decree. The learned Judge was of the view that irretrievable breakdown of marriage was still the sole ground for divorce under the Act. This decision in effect lays down that even where dissolution is sought on the ground of mutual consent,

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1.[1984] 2 MLJ.158

the Court has still to see whether or not there is irretrievable breakdown of marriage.

Not long after this decision, the Supreme court had the opportunity to consider it in **Sivanesan V Shymala**,[1] Lee Hun Hoe C.J. stated ;

> " With respect, we are unable to agree with the view of the learned judge that in a mutual divorce the petitioners must state that their marriage has irretrievably broken down."

He went on to say that,

> " We must point out that these are not matters which the spouses have to prove in mutual divorce..... In a mutual divorce there is no contest. It belongs to the class of undefended divorce. Therefore, the joint petitioners do not have to prove anything obviating the necessity of testifying to all the sordid embarrasing story of their married life. We think it is wrong to treat mutual divorce, which in unknown to English law, as if it is a contested divorce as understood in English law."

1.[1986] 1 MLJ 400

The Supreme Court did not also seem to think that mutual divorce should not be resorted to when the divorce was actually caused by breakdown of marriage due to any of the facts referred to Section 54[1]. Instead, the Court said,

> " Dissolution of marriage by mutual consent is another ground. This is covered by section 52..... Mutual divorce may be resorted to on one or more grounds, such as, adultery, desertion, cruelty, incompatibility, impotence and so forth. It is possible that the marriage has irretrievably broken down. It is possible that efforts to bring the spouses together have not been successful so that reconciliation is not possible."[1]

The Supreme Court also felt that the only substantive question for the Court to address before granting or refusing the joint petition are the voluntariness of the petitioners and the provisions for the wife and children. In mutual divorce the petitioners must appear in Court for the court may wish to satisfy itself by questioning them as to whether they freely consent to the dissolution of marriage and whether the provisions for the wife and for the support, care and custody of the children, if any, are fair and reasonable. The Court should never grant a decree of divorce by mutual consent until all the terms and conditions are settled and agreed to in the joint petition.

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1. Ibid., P. 403

iv) Dissolution on ground of conversion to Islam

In the case of the conversion of one party to a marriage to Islam the other party who has not so converted may petition for divorce, but no such petition may be presented before the expiration of 3 months from the date of the conversion.

This conversion to Islam as provided for in the Law Reform (Marriage and Divorce) Act 1976, seems to imply that the party who has converted to Islam is at fault hence prerogative is given to the other party who has not so converted to petition for divorce or otherwise. If he \ she does not do so the marriage holds i.e., akin to the fault principle. However, viewed from Islamic Law , this is a clear cut situation of legally defined breakdown of marriage principle and the convert and non-convert alike are not implied to be at fault and both of them are allowed to apply for divorce.

The present position as provided for in the LRA of 1976 is grossly unfair and unsatisfactorily as the spouse who has converted to Islam are punished by taking away their right to petition for divorce and thus leaving no avenue in Civil or Shariah Courts for them to pursue.