PLUCKING THE FRUITS OF DIVORCE

The recent case of *Viswalingam* v. *Viswalingam* [1980]1 M.L.J. 10 raises the question of the recognition in England of Muslim Law in Malaysia, especially in relation to the dissolution of Muslim marriages. In England fundamental changes have been made in the rules for the recognition of foreign divorces by the Recognition of Divorces and Legal Separations Act 1971. Section 2 and 3 of the Act read as follows:

> "2. Sections 3 to 5 of this Act shall have effect subject to section 8 of this Act as regards the recognition in Great Britain of the validity of overseas divorces and legal separations, that is to say, divorces and legal separations which (a) have been obtained by means of a judicial or other proceedings in any country outside the British Isles and (b) are effective under the law of that country.
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> 3. (1) The validity of an overseas divorce or legal separation shall be recognised if at the date of the institution of the proceedings in the country in which it was obtained (a) either spouse was habitually resident in that country; or (b) either spouse was a national of that country.
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> (2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1) of this section shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.
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> (3) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the foregoing provisions of this section (except those relating to nationality) shall have effect as if each territory were a separate country."

It must be remembered that the Courts in England have power to make orders as to financial support, rights to the matrimonial home and property, custody of the children and the like only where the Court grants a decree of divorce, nullity or judicial separation. In England jurisdiction in divorce, nullity or judicial proceeding can now be exercised where either party is domiciled or has been habitually resident for one year in England. Thus where one of the parties, in most cases the wife, wishes to claim financial relief in England, it is necessary to show that the marriage between the parties is still subsisting and that the court

in England can grant a decree of divorce, nullity or judicial separation.

The law has been criticised. In *Viswalingam* v. *Viswalingam* [1980]1 M.L.J. 10 at p. 18 Ormrod L.J. said:

> "This case is yet another example of the difficulties which arise when marriages are alleged to have been dissolved under a foreign law and one spouse is resident in this country and claims financial relief in respect of assets which are within the jurisdiction of this Court. As the law stands the granting of a decree nisi is a condition precedent to the exercise by the court of its power to make property adjustment and other financial orders under the Matrimonial Causes Act, 1973. Consequently it is necessary to establish that the marriage is still in being in order that this Court may make an order dissolving it. The result is a long complex and extremely expensive inquiry, usually at the expense of the Legal Aid Fund, into foreign law in order to determine whether the marriage is or is not subsisting in form, that is whether the dissolution under the foreign law is valid by that law and recognised by this Court. This elaborate exercise is necessary before a relatively simple decision can be made as to the disposition of the assets in this counrty between the two spouses. These cases which are apt to give rise to unfortunate conflicts between the jurisdiction of this court and the laws of other countries, are becoming increasingly frequent as the result of the extension of our recognition rules by the Recognition of Divorces and Legal Separation Act, 1971, and the relaxation of our own jurisdictional rules by the Divorce and Matrimonial Causes Act 1973 which reduced the period of residence to one year'".

In *Quazi* v. *Quazi* [1973]3 All E.R. 424 Ormrod L.J. in the Court of Appeal stated that the position urgently required the attention of Parliament with a view to giving power to the court to deal much more simply with such situations. This view was supported by Lord Scarman in the House of Lords [1979]3 All E.R. 897 at p. 912. Lord Scarman said:

> "I agree with the Court of Appeal that the reform needed is one whereby a resident in the United Kingdom whose overseas divorce (or legal separation) is recognised by our law, should be able like one who has obtained a divorce or separation in this country to claim a property adjustment or other financial order under the Matrimonial Causes Act, 1971."

In *Viswalingam* v. *Viswalingam* [1980]1 M.L.J. 10, the husband was originally a Ceylonese Hindu (though born in Malaysia) and the wife a Ceylonese Christian. They were married under the provisions of the Marriage Registration Ordinance of Ceylon. Subsequently the parties came to Malaysia and both of them became citizens of Malaysia. The parties had three children who were sent for education in England. The wife subsequently joined the children in England and they lived in a house bought by the husband. The husband remained in Malaysia and subsequently converted to Islam and remarried another woman under the Muslim Law. The wife applied for divorce from the husband in England. The defence of the husband was that when he embraced Islam and the wife did not also embrace Islam, the marriage had automatically come to an end. Reliance was placed on a fatwa issued by the Mufti of the Federal Territory which stated that "the marriage in question no longer subsists since Dr. Umar has embraced Islam and his wife has not followed suit."

Both the High Court and the Court of Appeal in England were prepared to hold that under Malaysian Law the marriage had automatically come to an end on the husband's conversion to Islam. In the High Court Dr. Yaacob Marican gave expert evidence on the Malaysian Law and the effect of his evidence was thus summarised by Ormrod L.J. in the Court of Appeal at p. 19:

> "Dr. Yaacob maintained that in the Federal Territory the status of Malaysian citizens of the Muslim faith depends on Muslim religious law according to the rules of the Shafii sect. Under these rules a Muslim woman can only marry a Muslim man but a Muslim man can marry a non-Muslim Woman, provided she is what is known as kitabiyya. A kitabiyya is a woman who is either a Jewess or a Christian. If a man who is married to a woman who is neither a Kitabiyya nor a Muslim afterwards becomes a Muslim the marriage is automatically terminated. So far the Shafii rules are in line with the general law of Islam but according to Dr. Yaacob the Shafii sect adopts a very narrow and obscure interpretation of the meaning of Christianity. There was much argument on this point before the learned Judge, but he eventually accepted Dr. Yaacob's evidence that under the Shafii rules a member of the Anglican Church is not kitabiyya, apparently because it was held that the Anglican Church was not in existence at the time of the birth of the Prophet Mohamed. He supported his

> argument by reference to a document, called a fatwa, which was issued by the Mufti, the highest authority in Malaysia on such problems. A fatwa seems to be something in the nature of a declaratory ruling given at the request of a party on the point of Muslim religious law which would be acted upon by the Court in Malaysia."

The question was whether the Court in England was bound to recognise the dissolution of the marriage according to Malaysian Law. Wood J. held that the mere cessation of the marriage was not within the meaning of the words "a divorce or legal separation" in sections 2–5 of the Recognition of Divorces and Legal Separations Act, 1971. In any event, neither the conversion nor the fatwa could come within the words "judicial or other proceedings" "The fatwa "obtained" nothing. It had no effect upon the cessation which was already complete without any outside intervention."

In the Court of Appeal it was contended on behalf of the husband that the change of status should be treated as a divorce and recognised under the provisions of the 1971 Act. Ormrod L.J. said at p. 20 –

> "That Act provides for two rules of recognition. Sections 2–5 relate to divorces obtained by means of "judicial or other proceedings" in any country outside the British Isles. Assuming that we are dealing with a divorce these sections clearly do not apply to this case because there were no proceedings of any kind. Section 6 in its original form preserved the common law recognition rules in respect of a divorce "obtained in the country of the spouses' domicile" but it has been amended by the Domicile and Matrimonial Proceedings Act, 1973, S. 2(2) and in its amended form it appears to refer only to divorces obtained as a result of the institution of proceedings (See S. 6(4)). An attempt was made on behalf of the hudband to argue that the fatwa was a proceeding within this section. The learned Judge held rightly in our view, that is was nothing more than a confirmation of the local law that the marriage has ceased to exist on the husband's conversion. It effected nothing of itself. In any event, as the judge found, the wife had ceased to be domiciled in the Federated (sic) Territory, when the Fatwa was obtained and had assumed her domicile of origin in Sri Lanka where this form of "dissolution" of marriage is not recognised. Consequently the husband could not satisfy the condition set out in section 6(3). We do not think that the 1971 Act has any application in this case because the way in which the marriage came to an end cannot properly be categorised as a divorce or legal separation within

> the meaning of the Act. Moreover both sections 6 and 8 appear to contemplate some form of proceedings but here there were none".

The Court of Appeal however concluded that on the learned Judge's findings as to the effect of the relevant law on the marriage, namely that on the husband's conversion it had ceased to exist, the Court ought to recognise the change of status, so effected, subject to the proviso that to do so would not offend against British notions of substantial justice. Ormrod L.J. said at p. 20 -

> "In the present case we are concerned with a form of dissolution of marriage by operation of law which cannot be fitted into our concepts of either divorce or nullity. However we take the general principle to be that in cases involving status this court will follow the law of that domicile, even though there has been no decree or judgment of the Court subject to the proviso that it must not offend against British idea of substantial justice".

Finally the Court of Appeal considered whether the change of status under the law of the Federal Territory accords with the British idea of substantial justice to the wife. The Court echoed the words of Sir Jocelyn Simon in *Lepre* v. *Lepre* (1965) P. 52 "it must be taken to offend intolerably against the concept of justice which prevails in our courts". Ormrod L.J. said at p. 20-

> "The idea that a marriage of over twenty-years duration can be brought to an end by the conversion of the husband to another religion in itself offends our concept of justice. We bear in mind that both parties are Malaysian citizens and therefore subject to the law in force in that country, but they were married in Sri Lanka where the law is quite different. Moreover the Muslim law in force in the Federated Territory adopts a peculiarly narrow definition of the term "kitabiyya" which appears to depend upon on arbitrary and inaccurate distinction between particular denominations of the Christian religion."

There were also a number of ways in which the facts of the case demonstrate that a serious injustice would be done to the wife if the change in her status was to be recognised by the Court. Moreover the circumstances in which the fatwa itself was

obtained by the husband was not satisfactory and not in accordance with the court's sense of justice. On the facts the Court found out the wife had an overwhelming case of unreasonable behaviour. For these reasons the Court of Appeal, agreed with the High Court, in refusing to recognise that the wife had ceased to be the wife of the husband when she presented her petition to the Court. The wife was therefore held entitled to obtain a divorce in England and to obtain financial relief.

It should be noted that the Court's decision not to recognise the dissolution on the ground that it offended against its concept of justice was based on the facts of the case. The dissolution itself could not have been held to be unjust in itself, as in fact the Court itself granted a divorce to the wife. Moreover the husband could have pronounced a talak divorce against the wife. The Court appeared to be more concerned with the fact that if the dissolution in Malaysia was recognised, there would be no power to make financial provision for the wife.

Viswalingam v. *Viswalingam* can be contrasted with the recent case of *Quazi* v. *Quazi*. In *Quazi* v. *Quazi* [1979]3 All E.R. 897 the facts were that the husband and wife were both born in India and were married there in 1963. Both were Pakistani nationals and Muslims. After the marriage they resided in a number of places in the Far East but in February 1973 they moved to Pakistan. The marriage was not a happy one and in March 1973 the husband left Pakistan and went to England where he bought a house. The wife continued to reside in Pakistan. In June 1974 the wife came to England on a temporary visit and lived separately from the husband in his house. In July 1974 the husband went to Pakistan and there pronounced under the Pakistan Muslim Family Laws Ordinance 1961 a talaq divorce of the wife. As required by the Ordinance the husband gave notice of the pronouncement of the talaq to a public authority and supplied a copy of the notice to the wife. Under the Ordinance failure to comply with this requirement was punishable by a fine or imprisonment. Moreover the Ordinance suspended the effect of the talaq for 90 days from the day the notice was given to the authority, to enable the authority to constitute an arbitration council for the purpose of bringing about a reconciliation between the parties.

There was no sanction to compel a party to take part in the conciliation proceedings and if as in this case, the wife chose not to do so, then subject to his having given the required notice, divorce by talaq was still obtainable by the husband's unilateral act and the divorce could not be prevented from taking effect automatically after the expiration of ninety days. During the suspension period the husband could revoke the talaq. The Ordinance did not require the authority or the arbitration council to give a decision or issue a certificate making the divorce effective. The husband returned to England and in 1975 presented a petition for a declaration pursuant to the Recognition of Divorces and Legal Separations Act, 1971 that the marriage was lawfully dissolved *inter alia* by the talaq. The real reason as the trial judge, Wood J., said behind the litigation was financial. The husband had a home in London and both parties wanted it. Wood J. granted the declaration. He held that the talaq divorce had been obtained by means of "judicial or other proceedings" in Pakistan and was effective under the Law of Pakistan and thus could be recognised under S. 2 of the 1971 Act. The Court of Appeal reversed his decision. On appeal by the husband to the House of Lords the issue was whether the talaq divorce was obtained by "other proceedings" within the meaning of section 2(a) of the 1971 Act and was effective under the Law of Pakistan. The House of Lords held that having regard to the policy of the 1971 Act as a whole and the purpose for which it was enacted the words "or other proceedings" in section 2(a) included all proceedings for divorce, other than judicial proceedings which were legally effective in the country where they were taken. The talaq divorce obtained under the 1961 Pakistan Ordinance followed the acts of pronouncing a talaq and giving of notice to the authority and to the wife, which though not judicial in character, fell within the description of "other proceedings" in section 2(a) for they were acts officially recognised by the law of Pakistan as leading to an effective divorce and without which divorce by talaq could never become effective in that country. Therefore the husband was entitled to a declaration that the marriage had been dissolved by the talaq.

What would have been the position if the case of *Viswalingam* v. *Viswalingam* had been brought before the courts in

Malaysia? One thing seems to be clear and that is that the Shariah Court would have no jurisdiction in this matter. The Administration of Muslim Law Enactment 1952 of Selangor, which applies in the Federal Territory, makes it clear that the Court of the Chief Kathi and the Court of a Kathi can only hear and determine actions and proceedings in which all the parties profess the Muslim religion. No decision of the Court of the Kathi Besar or a Kathi can effect any right of property of a non-Muslim.

The so-called fatwa of the Mufti in this case would not have been recognised in the High Court or the Federal Court, as Muslim Law is the law of the land and the Court cannot take evidence on what the Muslim Law is. In the case of *Tengku Mariam* v. *Commissioner for Religious Affairs, Trengganu* [1969]1 M.L.J. 110 Wan Suleiman J., as he then was, cited with approval the views expressed in *Ramah* v. *Laton* (1927) 6 F.M.S.L.R. 128 and *Patimah binte Harris* v. *Haji Ismail bin Tasmin* [1939]M.L.J. 134 and said that "even if it had been this court which had sought the fatwa, the court yet retains unfettered discretion as to how much of the fatwa it should accept and may decline to be bound by it. I can find nothing in the Enactment which has affected the power of this court to propound Islamic Law, which power I now propose to exercise." In the Federal Court [1970]1 M.L.J. 222 at p. 227) Suffian F.J. (as he then was) said that –

> "Wan Suleiman J, was right in ruling that he was not precluded by the gazetted fatwa from himself determining the validity of the wakf".

The actual decision in that case was that the parties were estopped from challenging the validity of the wakaf as they or their predecessors had agreed to abide by the decision of the Mufti in this case. It might be noted that Ali F.J. would have held that the respondents were precluded from challenging the validity of the wakaf as an authoritative ruling binding on them had been given by the Mufti and therefore the trial court had in the circumstances no jurisdiction to hear the case. While the majority in the Federal Court were prepared to hold that the wakaf would have been invalid (but for the estoppel), Ali F.J. said –

> "I do not think it would be right for me to say anything on the validity of the wakaf".

In *Tengku Nik Maimunah* v. *Majlis Ugama dan Adat Melayu Trengganu* [1979] 1 M.L.J. at p. 261 Harun J. said-

> "In the instant case a fatwa was also issued by the Mufti declaring the first plaintiff's wakaf valid but with this difference: neither of the parties requested for the fatwa nor is there any agreement that any of them would abide by it. The plaintiffs contend that the fatwa does not apply to this case as the second plaintiffs are not Muslims. The defendants however rely on the fatwa as part of the defence. As far as this case is concerned the Court is bound by the decision of the Federal Court in *Tengku Mariam's* case in that the court is not bound by the fatwa and as neither of the parties requested for such a fatwa they too are not bound by it."

The application for divorce could have been made to the High Court. The High Court would have jurisdiction to make a decree of dissolution of marriage under section 4(1) of the Divorce Ordinance 1952 and the wife could have presented her petition under section 7(2)(a) on the ground "that her husband had since the solemnisation thereof gone through a form of marriage with another woman." Finally the High Court could have made orders for alimony under sections 30–32 of the Divorce Ordinance, 1952.

The High Court would probably have held that it was unneccessary and irrelevant to decide whether the marriage had been terminated by the conversion of the husband to Islam and the failure of the wife to do so.

The position would be even clearer under the Law Reform (Marriage and Divorce) Act, 1976 as amended by the Law Reform (Marriage and Divorce) (Amendment) Act, 1980 if the Acts had come into force. The wife could have applied for divorce under section 51 of the Act and the Court would then be able under section 76 to make an order for the division of the matrimonial assets.

Finally despite the criticisms of the Courts in England, it would appear that the learned Mufti of the Federal Territory has correctly set out the position under the Islamic Law of the Shafii Mazhab as it is followed in Malaysia. Ibn Hajar, who is a

recognised authority in the Shafii school of law, said in his commentary on the Minhaj-et-Talibin of Imam Nawawi to the effect –

> "Those (that is the Jewish and Christian women) whose first ancestors are undoubtedly known to have been converted to their religions after the mission of the Prophet Mohamed (peace be upon him) or converted to Judaism after the mission of Jesus (Peace by upon him) or whose conversions are in doubt as to whether they were before or after the mission of Mohamed or that of Jesus (peace be upon them both respectively), are forbidden to the Muslims to marry."

Further authorities are referred to in an article on "Marriages of Muslims with non-Muslims" in [1965] 1 M.L.J. xvi and in an article on "Hukum Berkahwin dengan kitabiyyah" in [1979] J.M.C.L. 353. Reference might also be made to a learned discussion on the question of marriage with a kitabiyyah in Dr. Tanzil-ur-Rahman's book "A Code of Muslim Personal Law" Vol. 1 pages 23 f., Karachi, 1978.

In the Ahkam Shariyyah Johore, which was an attempt to codify the Muslim Personal Law made in 1935 it is stated in paragraphs 134–136 –

> "Halal berkahwin dengan kafir ahli Taurat dan Injil iaitu Yahudi dan Nasrani dengan syarat daripada Kaum Bani Israel yang berimankan oleh datuk neneknya dengan Nabi Musa alaihisalam sebelum dibangkitkan Nabi Isa atau beriman dengan Nabi Isa sebelum dibangkitkan Nabi Muhammad Sallallahu alaihi wassalam dan sebelum dinasakhkan Injil sekalipun sudah diubah.
>
> Kalau kaum itu lain daripada kaum Bani Israel seperti orang Rom umpamanya jika diketahuikan oleh kaum itu berugama dengan ugama Yahudi sebelum diubahkan Taurat dan bangkit Nabi Isa alaihisalam atau diketahuikan oleh kaum itu berugama dengan Yahudi sebelum diubahkan Taurat dan bangkit Nabi Isa alaihisalam atau diketahuikan oleh kaum itu berugama dengan agama Nasrani sebelum diubahkan Injil dan bangkit Nabi Mohamed Sallallahu Alaihi Wassalam nescaya harus berkahwin dengan mereka.
>
> Kalau kaum yang lain dari Bani Israel itu diketahuikan awal datuk neneknya masuk ugama Yahudi sudah diubahkan kitab mereka itu dan dibangkitkan Nabi Muhammad Sallallahu Alaihi Wassalam atau masuk ugama Nasrani begitu juga nescaya haram kahwin dengan mereka itu.

What should be accepted is the fact that the Islamic Law according to the Shafii mazhab as followed in Malaysia is not neccessarily the same as the Muslim Law followed in India, for example. It is a common mistake — made by the writer himself in his 1965 article — to forget or ignore this fact.

Ahmad Ibrahim

NOVATIONS, RESCISSION AND ALTERATION OF CONTRACTS

Section 63 of the Contracts Act 1950 provides that –

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

The marginal note refers to this section as 'effect of novation, rescission and alteration of contract'. 'Novation' under English law is

> a contract between a debtor creditor and a third party that the debt owed by debtor should henceforth be owed to third party.[1]

Therefore a variation of a term or substitution of a new contract between the original parties is not novation. Illustrations (a) and (c) to section 63 appear to cover cases of novation under English law. Where however, the parties to the contract rescind or vary the original contract then, there is rescission or variation of the contract. As Treitel points out,

> The object of rescission is to release the parties from the contract. The object of variation is to alter some terms of the contract.[2]

The difference between rescission of an agreement and a variation of an agreement is as follows –

> It is a rescission if it alters the original agreement in some essential way; but if it does not go 'to the root of the original contract', it is only a variation.[3]

Section 63 appears, therefore, to cover cases of novation, rescission and variation. However, the illustrations to the section do not clearly indicate the scope of rescission and variation

[1] Treitel, *The Law of Contract, 5th Ed. at page 498*

[2] *Ibid*, at page 77

[3] *Ibid*, at page 132