INTERACTION OF CITIZENSHIP AND FAMILY LAWS OF MALAYSIA

ABDUL KADIR BIN MUSA

Abdul Kadir Bin Musa

Interaction of Citizenship and Family Laws of Malaysia

Research paper for Family Law

LL.M (LAWS 513)

Law Faculty

Victoria University of Wellington

Wellington 1982

CONTENTS

TABLE OF STATUTES
(AND ORDINANCES)

TABLE OF CASES

Bibliography

Cheshire & North .. ..Private International Law (10 ed., Butterworth (1979)).

J.S. Mackenzie .. ..Fundamental Problems of Life - An Essay on Citizenship as Pursuit of Value (Allen & Unwin, The MacMillan Co., London (1928)).

L.A. Sheridan and Henry E. Grove .. ..The Constitution of Malaysia. (Oceana Publications, Inc., Dobbs Ferry, New York (1967)).

P.M. Bromley and P.R.H. Webb .. ..Family Law (N.Z. ed., Butterworth, Wellington (1974)).

P. Weis .. ..Nationality and Statelessness in International Law (2 ed. Sijthoff & Noordhaff, Maryland, U.S.A. (1979)).

.. ..Women in New Asia - UNESCO - 2nd Impression, February 1965.

(i) Ann E. Wee .. .."Chinese Women in Singapore. The Present States in the Family Life in Marriage", pp.376-404.

(ii) Michael Sniff .. .."Men and Women in Malay Society", pp.268-286.

Published Articles

Ahmad Ibrahim .. ..(i) "Recent Enactments on the Administration of Islamic Law" [July 1979] M.L.J. (xii).

(ii) "Law and Population of Malaysia", Law and Population - Monograph Series No.45 (1977) pp.28-39.

Jucy Carroll Stout .. .."A Question of Fact: Ascertainment of Asian Law by the English Court. A Critique of Viswalingam v. Viswalingam, Decided in the High Court, London, 14th March 1979", [1980] 22 Mal. L.R. 34.

F.R. Beasley .. .."The Recognition of Foreign Divorces", [1967] 9 Mal. L.R. 202.

G.W. Bartholomew .. .."Recognition of Talaq", [1962] 4 Mal. L.R. 137.

Huang Su Mien .. .."Ohochuku v. Ohochuku*" [1960] University of Malaya L.R.342.
*[1960] 1 All E.R. 253;
[1960] 1 W.L.R. 183.

Kenneth K.S. Wee .. .."Chinese Law and Malayan Society", [1973] 15 Mal. L.R. 111.

Lee Siow Mong .. .."Chinese Customary Marriage and Divorce" [1972] 2 M.L.J. (iii).

R.H. Hickling .. .."Effect on Marriage of a Conversion to Islam", [1979] 21 Mal. L.R. 374.

M. Siraj (Mrs) .. .."Conciliation Procedure in Divorce Proceedings", [1965] 7 Mal. L.R. 314.

S. Jayakumar .. .."The Finality of Citizenship Decision Under the Constitution of Malaysia", [1970] 2 M.L.J. (xviii).

Periodical

"Iman" Newsletter 1, Wellington, New Zealand, 1982.

CHAPTER ONE

AIM AND OBJECTS

This paper attempts[1] to examine both the family and citizenship laws of Malaysia and how they are closely inter-related either directly or indirectly to each other. Due to their close inter-relationship, it is therefore thought the title "Interaction of Citizenship and Family Laws of Malaysia" is the most appropriate in the circumstances. Being a Malaysian myself, it is observed that not many Malaysians really appreciate that the problems of one will almost certainly affect another. A marriage of a citizen to a non-citizen is a good example of such interaction. This is made more complicated by the existence of the cosmopolitan type of Malaysian citizens with various cultures, traditions and religions which are treasures of Malaysian historical development.

History also dictated and moulded substantially the present constitution affecting both question of citizenship and family laws. It is in human nature to see only the present without understanding the past. Thus dissatisfaction amongst citizens of Malaysia in those areas is mainly due to their inability to understand and appreciate fully the political-legal set up of the country flowing from their ignorance of historical development and lack of legal knowledge in such matters.

Such problems affecting the family law (hence citizenship problems) were recognised by the Government as real problems which resulted in the enactment and on March 1, 1982 the enforcement of the Law Reform (Marriage and Divorce) Act 1976 to streamline the laws of marriage and divorce amongst non-Muslim citizens. Though still in an infant stage, it is hoped that the Act will improve family law affecting such citizens. It is a law which abolishes polygamous customary marriages and recognises only monogamous marriages and by section 4(2), it

"converts" the then existing polygamous marriages into monogamous.

With the above introduction, the objects of this paper can therefore be listed as:

(1) To briefly trace the historical development of citizenship in general. The approach will be philosophical.

(2) In relation to (1) above, how Malaysian citizenship evolved. This traces from pre-British influence till the present day constitution. The approach is mainly historical.

(3) To identify the various types of marriages and divorces recognised by Malaysian law and related matters thereto. This will provide a basis for understanding the interaction of citizenship and the family law.

(4) To find out the real problems of the family and citizenship laws and how the court deals with such problems. This will directly or indirectly illustrate how their interaction has some bearing on human needs and wants.

(5) To summarise the paper in the form of conclusion and if possible to make practical suggestion(s).

CHAPTER TWO

INTRODUCTION

[A] Philosophical Approach of State and Citizenship

Though man is born naked, he is clothed with the customs and conventions by which his life is so largely controlled; man is a social creature. He is everywhere enveloped with traditions and culture in the course of his association with society around him and this affects his choice of values which in turn imposes upon him many restraints as well as providing him with privileges. The consideration of the most important and fundamental of human wants is what J.S. Mackenzie[1] termed as the "study of values." According to the learned author, Socrates was the first who emphasised the idea of "values" by urging that one can only properly understand human life by asking what is best for him in relation to his wants and needs. One cannot always definitely determine how he is to feel in a given situation since his feelings occur without any choice on his part and often the result may be contrary to his choice.

It will be appropriate for me to say that marriage is certainly one of such examples flowing from the feeling which sometimes resulted contrary to our choice. A man may come to know a lady not with a view to marriage, but contrary to their respective feelings and possibly choices, they still end up in marriage.[2] Marriage in turn will affect the parties' status with definite rights and obligations.

In human life, one finds not merely an effort to escape from conditions that are unsatisfactory to him but a positive endeavour to create better conditions directed towards higher values. The search of the same, is what the above author termed as "pursuit of values." Taking

the above example of marriage, it necessarily follows that if the said couple finds that their marriage does not satisfy their wants, they will endeavour to escape from it by way of divorce or separation. Whether their endeavours materialise or not, is the area where the law takes its proper place.

In family life, personal affection is the primary bond. As one grows up in a family, he gradually learns social obligations to other individuals. The aggregate of individuals and family groups forms a simple village community, co-operating with one another to a certain extent but with little sense of loyalty. In Greece, units of human life were considered as cities. Then individuals were of little importance. Cities were rather civic centres. The modern conception of citizenship was the result of some people, notably Socrates, who emphasised personal contacts with his fellow-men that life in the city was made possible and not just civic centres as Greeks generally took them to be.

However, it was the Romans who introduced the notable change in the general conception of citizenship. To the Roman world, a man might be a Roman citizen without ever seeing the city. If he was a Roman citizen, then he belonged to a great nation (Roman Commonwealth) which had gradually built up a definite code of laws.

Today most people think of the particular nation to which they belong as that to which their ultimate loyalty is almost entirely due. The general contention according to Plato is that human beings would prefer to pursue their own individual self-interests without restraint but find by experience that in such a condition they suffer more than they gain and consequently have led them to enter into agreement to submit to certain restraints for the sake of security. The needs of such security resulted in constitutions or appropriate Act(s)[3] being

drawn up which govern the rights and obligations of citizens with the ultimate aim of achieving "common good."

In searching for better values, one is exposed to factors like religion, economic, political, culture and the like which directly or indirectly affect the choice of citizenship. Since marriage affects the status of those concerned, it is submitted that it will, in certain cases, involve the choice of citizenship. The choice may not be due to our feelings or sense of loyalty to the state but dictated by the circumstances of the case relative to human needs. It is therefore a fair inference to say that there is a close relationship between citizenship and family laws in the light of our pursuit of values.

[B] Brief Historical Development of Malaysian Citizenship Law

Since the concept of citizenship is a gradual historical development of human needs and submission to definite code of laws for the sake of security, it will be appropriate to examine how Malaysian[4] citizenship law evolved.

Since the fourth century, Malaysia was under the influence of Hindu and Buddhist religions, tradition and culture brought by Indian merchants who came to Malaysia in search of gold and spices. A living relic of their political influence can be seen today in the system of "sultanate[5] states." However the legislative powers of each state are now vested in the State Legislative Assembly. For the Federation, they are with the Malaysian Parliament with the Yang Di Pertuan Agong[6] as the Supreme Head of the Federation under the present system of constitutional monarchy.

Traditionally and culturally a lot of present day Malay custom and tradition were inherited from the Indian Hindus. Malay wedding ceremonies are essentially Hindu by tradition. Under the Hindu-Buddhist Indian influence, the Malays then were either Hindu or Buddhism by religion.

Towards the end of the 13th century, Arab traders came to Malaysia introducing Islam[7] to Malaysia. They managed to influence the Malay sultans. In the early 15th century, Megat[8] Iskandar Shah became a Muslim.[9] His subjects (the Malays), following his example, also converted themselves to Muslims. The position of the Sultans under Islamic influence was also enhanced. Islam was accepted by the subjects as their official religion. During the reign of Sultan Muzaffar Shah (1446-59 A.D.) of Malacca, the whole of the Malay population were Muslims.

The first European interest in Malaysia was exhibited by the Portuguese when they decided to control the spice trade in South East Asia. Thus under the leadership of Alfonso de Albuerque, Malacca was captured by the Portuguese. They ruled Malacca until the Dutch took over in 1641. Both the Portuguese and the Dutch, later the British, were responsible for the introduction of Christianity to Malaysia, thus the concept of Christian monogamous marriage and the like are the impact of their influence.

The British interests in Malaysia were primarily commercial and developed through the British East India Company. In the late 18th century British settlements were established in Penang and Singapore.

Since Malaysia was and is rich in tin ore, there was an influx of Chinese from China at about that time in search of fortune. They were employed as tin-miners then owned by the Sultans and their

dignatories. Prior to that, the Malays were the tin-miners. The Chinese too, like others, brought with them their tradition and customs, one of which was polygamous marriage which is still practised and recognised by Malaysian law until this day.

The Chinese were also employed by the British planters in sugar cane and coffee plantations. However, due to the demand of sugar and coffee in European markets, the British had to employ more labourers to meet that demand. Due to the British long established trade and political relationship with India, they could easily overcome the labour shortage by bringing Indian labourers to Malaysia, and due to Her geographical and historical factors was found by those Indian labourers to be a suitable country to work and later settled permanently in Malaysia.

When the price of coffee dropped in the 1890s, the British diverted to the rubber[10] industry by opening and or converting the estates then existing to rubber plantations. They found out that the Indians were best suited to work in those rubber estates. As the result of that, more Indian labourers were brought into Malaysia by the British, beside the then existing ones. There was thus a steady flow of Indian immigrants to Malaysia between 1850 till 1904 of an approximate number of 20,000 Tamil Indians a year. They came through Penang and were sent to various British estates situated throughout the west coast of West Malaysia. The Indians too brought along with them their culture and traditions which at one time dominated Malaysian society during Hindu-Buddhist influence pointed out earlier.

In the early 1940s, the Japanese occupied Malaysia. During their occupation, they put an end to <u>all</u> immigrants during that period. The succeeding governments thereafter have carefully controlled the flow of immigrants. Hence when the British ruled Malaysia after the Japanese

occupation, they were faced with the issue of "Legal Status"[11] due to the presence of various races, both the Malays and those immigrants and their descendents. That confrontation resulted in the Federation Agreement 1948[12] being drawn up.

Delicately balancing the rights and interests of major groups (the Malays, Chinese and Indians), a constitution was drawn up incorporating the 1948 Agreement. Under the Agreement, each Malay Sultan was explicitly guaranteed the "prerogative, power and jurisdiction" which they had enjoyed prior to the Japanese occupation. Islamic religion falls within that ambit. Provisions were also made for special educational training for the Malays to enable them to maintain their position in the sphere of politics and administration.

In matters of citizenship,[13] automatic citizenship was conferred to those who habitually spoke Malay language and conformed to Malay customs rather than the place of birth or residence. Thus all Malays[14] who were then subjects of Malay rulers automatically by law became Malaysian citizens whereas the non-Malays (the Chinese and the Indians), even if born in a Malay state, had to apply for citizenship. However, the non-Malay British subjects born in the Straits Settlement[15] could also opt for Malaysian citizenship, but not others. Thus the net effect of the 1948 Agreement was to accord legal status to the differences already existing in the population and to make ethnicity a political issue.

When the Federation achieved Her independence on 31 August 1957, most of the above matters were re-affirmed in Her constitution. Islam was made a state religion with freedom of worship guaranteed to all non-Muslims. The State Religious Councils were established in each state and were made (and still are) autonomous in all matters of religious rulings, doctrines and subject only to the authority of the Sultans of

each state. Special privileges of Malays and the use of the Malay language as the national language of Malaysia were also entrenched in the Constitution.

[C] The Present Law Affecting Citizenship

Before discussing the problems facing Malaysian family law and the interaction with the question of citizenship, it is necessary to look into Her present day citizenship law. However, it must be noted that in doing so, it is only intended to discuss citizenship law in general and not an in-depth examination of constitutional matters which is beyond the scope of this paper.

Citizenship matters are now governed by Part III articles 14-31 read together with the First and Second Schedules of the Constitution. Citizenship can be acquired by one of the four ways:

(a) operation of law (article 14); or

(b) registration (articles 15-18); or

(c) naturalisation (article 19); or

(d) incorporation of territory (article 22).

Article 23 of the Constitution deals with renunciation of citizenship. Loss of citizenship by deprivation by the Federal Government (hereafter referred to as "the Government") is provided by articles 24-28A of the Constitution. Doubts as to the question of citizenship could be resolved by the Government in accordance with article 30, ibid.

The First Schedule of the Constitution deals with the oath to be taken by those who acquired Malaysian citizenship other than by operation of law. Basically, it requires such persons to give absolute and full

allegiance to only Malaysia and to His Majesty the Yang Di Pertuan Agong. Malaysia does not recognise dual[16] citizenship.

The Second Schedule (Parts I and II) deals in detail with the acquisition of citizenship by operation of law both before and after Malaysia Day which is 16 September 1963.[17] Sections 17-22 of Part III of the Schedule are interpretation sections which include, inter alia, the manner in which the period of residence is to be calculated.

Thus it can be clearly seen that Malaysian citizens by operation of law are those people who, by virtue of the Constitution, are citizens without volition on their part, without a choice in the matter by the Government and without taking oath or (in most cases) formality. On the other hand, wives[18] of Malaysian citizens who are not themselves citizens of Malaysia, must take the oath of allegiance before they can be registered as Malaysian citizens under article 15(1) of the Constitution.

[D] Domicile

P. Weis[19] pointed out that "Nationality" is frequently used with "citizenship" but said that there is a definite distinction between the two terminologies. "Nationality", according to him is the delimitation of personal jurisdiction while "citizenship" refers to legal relationship of a person (citizen) to the state. He concluded by saying that "every citizen is a national, but not every national necessarily a citizen of the state concerned."[20]

"A national", according to joint authors[21] Cheshire and North, represents a political status by virtue of which he owes allegiance to some particular country, while "domicile" indicates civil status and it

provides the law by which his personal rights and obligations are determined. "Nationality" (other than acquisition by naturalisation) depends on the place of birth or on parentage; domicile, on the other hand, depends on residence in a particular country.

A person may be a national (or citizen) of one country but domiciled in another. Bromley and Webb[22] pointed out that domicile has nothing to do with nationality. A man must have a domicile at any one time. While it is true that a person cannot be without a domicile at any one time, he can still be a stateless person.[23]

Whatever the view may be, it has now been accepted that domicile can either be one of the three types, namely:

(i) Domicile of origin;

or (ii) Domicile of choice;

or (iii) Dependent domicile.

In this context, Malaysia follows the same common law rules of domicile.

It is worth noting that since "intention of permanent residency" is the test for acquiring domicile of choice and the acquisition of Malaysian citizenship by registration[24] and naturalisation[25] also require the same test, it is therefore submitted that an acquisition of domicile of choice of Malaysia should be a strong ground for consideration of an award of Malaysian citizenship to such a person. The second point that can justifiably be inferred from the concept of domicile is in relation to married women. Since a woman's domicile will be that of her husband's, it is perhaps one of the prime factors why special passes[26] are given to wives (who are not Malaysian by birth and of foreign citizenship) of Malaysian citizens by the Government of Malaysia.

CHAPTER THREE

FAMILY LAW IN MALAYSIA

[A] Marriages

(i) General

Due to Malaysian cosmopolitan society, both polygamous and monogamous marriages are recognised in Malaysia. Professor Ahmad Ibrahim wrote, "marriages can be validly performed in Malaysia under either customary law or statutory law. In the former case the law recognises the peculiarities of religious opinion, custom and rites as practised by the cosmopolitan society of the Malaysian peoples, and upholds their validity as a moral necessity."(1) The recognition of various types of marriages as stated by the learned author has a lot to do with the very nature of Malaysian history pointed out earlier and needs no further repetition here.

This chapter is therefore intended to look into the law of marriages in Malaysia generally in order to understand the problems facing Her family law.

(ii) Polygamous Marriages

Chinese polygamous marriage is essentially based on custom. Hindu law and custom allow Indian Hindus to also contract polygamous marriages. Even though they are allowed to do so, some Hindus in Malaysia have accepted monogamous marriage to be their customary rule as in the case of Paramasuri v. Ayadurai [1959] M.L.J. 195.(2) Malay

marriages are governed by Islamic law. Islamic law permits a Muslim[3] to contract a polygamous marriage but imposes a limit of four wives at any one time.

The Chinese customary (polygamous) marriage is based on publicity and the only legal requirement is that the marriage must be consensual.[4] On publicity, it is best to quote the words of an expert on Chinese customary law and accepted by court as such,[5] when he said,

> "The chief ingredient is that marriage must be an open affair known to friends and relatives alike,..."[6]

Though Chinese customary law prohibits marriage between persons of certain relationship which not only makes it an offence[7] but also void ab initio,[8] there is no specific guidance, pointed out Professor Ahmad Ibrahim,[9] both from the law or customary usage as to matters such as prohibited degrees of consanguinity and affinity, minimum age and consent of the parents or guardians. What can clearly be inferred is that the consent to marry is strictly a matter between the parties involved. This, it is submitted, could be subject to abuse by those who can influence the other party (the weaker one) to give the necessary consent to make their intention of cohabitation public because of his position, power or financial standing. The last situation is evidenced by the fact that most polygamous marriages (in fact) involve successful businessmen. I think I am not wrong to say in such circumstances, "money can buy a rich Chinese businessman wives."

In Malysian Chinese society, though Chinese customary marriage is polygamous in nature, the vast majority of the Chinese contracted such marriages not because they want to take more than one wife but basically to conform only to the wishes of their custom and traditions.

Islamic religion in allowing its followers to contract polygamous marriages discourages Muslim males to take more than one wife unless he

(a) has the financial capability of supporting his wives and children and (b) is able to do justice to all his wives by being able to treat them impartially. On polygamous marriage, the Holy Koran says:

> "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two, three or four, but if you fear that you may not do justice to them, then marry only one." [4:3].(10)

The above verse was revealed to Prophet Mohammad (peace be upon him) after a major war where a lot of men were killed leaving behind widows and their orphans. The rationale behind it, it is submitted, is to permit, but not encourage, those who were capable of maintaining several wives to marry those widows and thus become guardians of the orphans. It would also reduce the sufferings by those widows and orphans as the result of the demise of their loved-ones and possibly prevented them from following immoral paths to earn their living. In practice, very few Muslim males take more than one wife. Since religious conventions cannot be changed to suit human needs, Islamic marriage will remain to be polygamous in form. Again it must be stressed here that most of the Malaysian Muslim males contracted Muslim polygamous marriages not for the purpose of taking more than one wife but to obey the command of the religion. Legal problems will only surface if a person uses Islamic religious marriage as a platform to take several wives for reason(s) best known to those individuals concerned. Such problems will be discussed later.

Unlike any other forms of monogamous marriages, Muslim women are well guarded against abuse in that, no Muslim woman, regardless of her age, is able to give herself to marriage without the consent of a "Wali" (guardian for marriage). Such consent must be given either by her father or grandfather or male relative (patrilineal side) in the absence of either her father or grandfather. If the consent is unreasonably withheld

or impossible to obtain, then she can apply to a "Kathi"[11] (a Muslim "judge") for the same. The religious "dos" and "don'ts" act as strong barriers for most male Muslims from taking more than one wife.

(iii) Monogamous Marriages

The concept of monogamous type of marriage as accepted by English law was defined by Lord Penzance in Hyde v. Hyde[12] when he said,

> "I conceive that marriage, as understood in Christendom, may...be defined as voluntary union for life of one man and one woman to the exclusion of all others."[13]

Lord Penzance's definition of monogamous union is clearly the Christian concept of marriage. Since quite a large proportion of Malaysian citizens are Christians,[14] the Christian Marriage Ordinance 1956[15] enables monogamous unions to be performed in churches.[16] The essentials[17] of a valid marriage under this Ordinance are substantially the same as those in the Civil Marriage Ordinance 1952.

The Civil Marriage Ordinance 1952, promotes the principle of "one man one wife". It caters for monogamous marriage of all except Muslims. Under this Ordinance, a couple who were married under their personal law could be subsequently married again, if they so wish, under the Ordinance, provided that neither of the parties is, at the time of marriage under the Ordinance, already married to a third person and do not offend any of the provisions affecting the validity of a marriage. The effect of this subsequent marriage under this Ordinance, it is submitted, is to convert a potentially polygamous marriage by the parties' personal law to a monogamous one as defined by Lord Penzance in the case of Hyde v. Hyde, supra. It is further submitted that, that is so since once married under the Ordinance, a person will no longer be capable of

contracting another valid marriage with another person during the continuance of the marriage. Similar provisions are enacted under the Church and Civil Marriages Ordinances of Sarawak (Sarawak Cap 92).

It is worth noting that notwithstanding the fact that marriages under the Christian Marriage Ordinance 1956 are monogamous, it has been held in Re Loh Toh Met [1961] M.L.J. 234 and Re Ding Lo Ca [1966] 2 M.L.J. 220, that there is nothing in the Ordinance to prevent a Chinese Christian from opting either to contract a monogamous marriage under the Ordinance or a polygamous marriage in accordance with his or her personal law.

[B] Divorces

(i) Polygamous Marriages

Both polygamous marriage and divorce to Chinese are based on custom and rites. To Muslims, the law of divorce is in accordance with Islamic principles. Divorces in respect of polygamous marriages can be divided into:

(a) that of customary marriages;

and (b) that of Muslim marriages.

(a) of Customary Marriages:

According to Lee Siow Mong, there are seven grounds for divorce.[18] Divorce, however, must be made publicly known. In Mary Ng & Anor. v. Ooi Gim Teong,[19] the respondent went to his mother's house to inform her of his clear intention to divorce his wife by Chinese customary law on 23 May 1970 whereby a gathering of the respondent's mother, grandmother, two uncles and an old family friend was held on the 24th May 1970. Also

present at that gathering was his wife's godfather. At that gathering the respondent made the necessary public announcement in the presence of all those stated above. He also notified by registered letter dated 7 May 1970 to his wife of his intention of divorcing her. Her solicitor was also notified on the 10 June 1970 by the respondent. In other words, the respondent's intention to divorce his wife by Chinese customary law was made abundantly clear. On the question of publicity, after accepting the expert evidence of Lee Siow Mong, Mr Justice Mohamed Azmi said,

> "The real essence of this practice is that the divorce must be made publicly known...so long as the divorce and the grounds for it are made publicly known it is sufficient. The cardinal rule is that it should not be made a secret.... What is important is that publicity as to the intention and the fact of divorce must be given [with publicity] ..."(20)

Thus so long as the divorce is made public, it is valid according to Chinese customary law and will receive recognition by the court in Malaysia. There is no need of any application to be made to the court except in Sarawak. In Sarawak an application must be made to the High Court for such a divorce.

(b) of Muslim Marriages:

Under Islamic law(21) (as recognised in Malaysia) a marriage contract may be terminated by legal action taken by the husband or by the "Kathi" which can take place in one of the three ways:

(1) at the will of the husband unilaterally;

or (2) by mutual consent;

or (3) by judicial decree through annulment or dissolution.

Under (1), the husband can divorce his wife or wives by "talak".(22) If said once, then the parties could, during the 100 days of "edah",(23)

"rojok"[24] back the marriage by revoking the "talak". During "edah", the divorced wife is forbidden to re-marry another male Muslim. This, it is submitted inter alia, due to the husband's right of "rojok" and perhaps forms a "cooling-off" period since "talak" may have taken place in the midst of the temper. However, if "talak" is said thrice in succession, then the husband cannot "rojok" his marriage again as stated above.

There should not be any problem under (2) since both the husband and wife must consent to the divorce, except in a situation where the wife is being forced to give such a consent.

The wife has the right to ask for a divorce under (3) on the husband's medical or moral grounds or on grounds of failure to maintain her and the children of the family, desertion or imprisonment. The moral injunction against divorce is contained in the prophet's (peace be upon him) saying, "Divorce is the most hateful to God of all permitted things."

The husband should only exercise his right of divorce when a situation is such that he can no longer live in peace and harmony with his wife. Abu Hurairah relates that the prophet (peace be upon him) said, "The most perfect of believers in the matter of faith is he whose behaviour is best; and the best of you are those who behave best towards their wives." (Tirmidi).

(ii) Monogamous Marriages

In West Malaysia[25] and Sabah[26] the grounds for the dissolution of marriage for either of the married couple are:

(a) adultery;

(b) cruelty;

(c) unsound mind;

(d) desertion for a period of at least three years preceding the presentation of the petition.

In addition to the above, the wife can also petition if she can show that since the solemnization of the marriage the husband has been found guilty of:

(a) rape;

or (b) sodomy;

or (c) bestiality

or (d) taking another wife

In Sarawak,[27] the grounds for the dissolution of marriage are:

(a) adultery;

(b) sodomy;

(c) wilful desertion for two years without just and reasonable cause;

(d) failure to support the petitioner and the children of the marriage under eighteen years of age for six months or more without just cause;

(e) cruelty that has caused substantial physical and mental suffering to the petitioner;

(f) has for three years preceding the petition been insane;

(g) is an incurable habitual drunkard of such nature as to endanger himself or others or is not capable of managing himself or his affairs under such influence;

(h) has been committed to imprisonment sentence of five years or more;

(i) has been presumed dead judicially;

(j) has disobeyed a decree of the court for restitution of conjugal right;

(k) wilful (without reasonable cause) to have sexual relationship with the petitioner;

(l) has communicated a venereal or loathsome disease to the petitioner;

(m) suffering from a venereal disease;

and (n) was at the time of marriage pregnant by some person other than the petitioner.

It is to be noted that bigamy is not one of the grounds for dissolution of marriage in Sarawak.

Section 494 of the Malaysian Penal Code, specifically makes bigamy an offence punishable with imprisonment for a term which may extend to seven years and shall also be liable to a fine. Thus the said provision does not apply to the Chinese Malaysian citizens who under the present law can contract customary polygamous marriages.(28)

Under the present law affecting monogamous marriages, no petition for dissolution of the marriage can, in general, be presented within the first three years of the marriage. What then if one or more of the grounds stated above took place during the first three years of marriage? The simple answer is "wait". It is therefore suggested that in such a situation where the parties really and genuinely cannot live together anymore as husband and wife (other than by judicial separation) within such a period, the three years "waiting" period should not apply. The judge in his wisdom, can always set a "cooling-off" period as he thinks fit, having regard to all the circumstances of the case, before making the divorce decree "nisi" to be absolute.

If the marriage is monogamous in form(29) and neither of the parties to the petition is a Christian, the Court may grant such a decree. Whether to grant such an application or not is a matter of the Court's discretion.

[C] Law Reform

On 4 February 1970, a Royal Commission (headed by the then Chief Justice) on Non-Muslim Marriage and Divorce Laws was appointed by His Majesty the Yang Di Pertuan Agong. Its main purpose was to study and examine the existing laws of non-Muslim marriage and divorce and to determine the feasibility of reform based (in particular) on the resolution of the 1962 United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. On 15 November 1971, the Commission submitted its recommendations proposing a radical reform on the law of marriage and divorce to His Majesty the Yang Di Pertuan Agong. The proposed reform, will eliminate polygamous marriages among the non-Muslim population of Malaysia. The important features of the recommendations are:

(a) The Commission was convinced that public opinion is overwhelmingly in favour of the abolition of polygamous and therefore recommended that henceforth all marriages should be monogamous (emphasis mine);

(b) To enable the proper implementation of the reformed law on monogamous marriages, there must be a system of compulsory registration of all marriages although the customary ceremony (features) of marriages may still be retained;

(c) The minimum age of the parties to a marriage are to be increased to 18 years for male spouse and 16 years for female spouse and, in addition, a person under the age of 21 will need parental or guardian consent before entering into matrimony;

and (d) Divorce law is also extended in scope in that the granting of divorce may be made where there is evidence of irretrievable breakdown of marriage.[30]

Irretrievable breakdown of marriage will be the sole ground for divorce was the recommendation of the Commission. It can be proved by one or more of the facts which are as follows:

(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 parties to the marriage have lived apart for a continuous period of at least two years preceding the presentation of the petition.[31]

In making the decree, the Court must take into account all the circumstances of the case, including the conduct of the parties and how the interests of any child or children of the marriage may be affected if the marriage is dissolved and may dismiss it if the Court is satisfied it would be wrong to grant a decree nisi (even if subject to such terms and condition(s) as the Court thinks fit). Divorce by mutual consent upon joint petition is preserved.

The existing rule of "no petition is to be present" within three years of marriage is also preserved but the period of such prohibition is now reduced to two years. With respect, my earlier submission on this "waiting period" applies here too.

The proposed law of marriage and divorce for non-Muslims has been enacted and is now styled as The Law Reform (Marriage and Divorce) Act 1976 which came into effect as from 1 March 1982. By implementation of this Act, there will be no more polygamous (other than for ceremonial feature/purpose) marriages which will receive legal recognition as such for non-Muslims - as before 1 March 1982. Section 494 of the Penal Code

will now apply to Chinese too with the same force as it did to Christians and other non-Muslims who are not permitted by their personal law to contract polygamous marriage prior to the 1976 Act aforesaid. The Act has no application to Muslim[32] marriages.

CHAPTER FOUR

PROBLEMS FACING MALAYSIAN FAMILY AND CITIZENSHIP LAWS

[A] GENERAL

Both marriage and citizenship affect the rights and obligations of those concerned. The question of domicile is another factor common to both when legal problems affecting the rights and obligations of married citizens are discussed. They may be so inter-related and one may be so dependent on another that it is sometimes difficult to draw a clear distinction between their individual and actual problems without considering the other.

It is worth noting that the problems in these two areas of law may be due to one or several factors such as cultural differences, beliefs, historical, political and the like in relation to human needs and an individual's aim to achieve what he thinks is best for him and possibly his family. Though such problems merit the Government's attention and consideration many have in reality slipped the legal detection of the proper authority. Such examples, as problems of Indonesian illegal immigrants to Malaysia and marriage for convenience will remain real and existing facts though could not be asserted and supported with official statistics.

However, problems arising from polygamous marriages amongst non-Muslim Malaysian citizens and residents has long been appreciated by the Government. Due to Malaysian cosmopolitan society and the differences pointed above, careful study and planning will first have

to be taken before any radical change can be affected. The coming into force on 1 March 1982 of the Law Reform (Marriage and Divorce) Act 1976, is a clear evidence of the Government's recognition of such problems. It introduced radical change in Malaysian family law affecting those citizens and residents of Malaysia.

With the coming into force of the 1976 Act as stated above, such problems can be conveniently dealt with as problems before and after 1 March 1982. However, human wants and needs, discussed earlier, are factors which may or may not be seen on the surface but are certainly, it is submitted, the driving forces that caused those problems. Those that were not noticed were taken for granted as non-existent or because they failed to attract the attention of the statisticians. Further, one tends to emphasise only problems where non-citizens are involved at the expense of not appreciating the actual and real problems of a similar nature which also exist amongst citizens. Where it involved purely citizens, interaction of both family and citizenship laws in such a situation may not be so prominently noticed to the eyes of those concerned. With that view in mind, I will attempt to endeavour to show that such problems do exist and can be as complex as those involving non-citizens and thus merit consideration of this paper.

In this chapter, I will therefore attempt to canvass some of the important problems faced by Malaysia in matters involving family and citizenship laws and their interaction with one another and the legal consequences flowing from them. These problems do not only come from citizens and non-citizens but also between citizens and citizens. In certain cases, I will be quoting the real examples and not merely my personal hypothesis by referring only to their initials. It is respectfully hoped that it will be appreciated why their full names is best not disclosed

since by doing so, it may prejudice their future and possibly the future of their families. Again for convenience, I propose to divide the discussion into problems arising:

(1) as between citizen and citizen;[1]

(2) as between citizen and non-citizen;

and (3) as between non-citizen and non-citizen who may or may not subsequently acquired Malaysian citizenship.

[B] As Between Citizen and Citizen

It is an obvious statement of fact to say that Malaysian family law is basically meant for Malaysian citizens, though not denying the fact that it also applies to non-citizens resident in Malaysia. As for Malaysian citizens both residence and/or domicile govern their personal law. It is in that context, it is respectfully submitted, that the family problems arising from the structure of Malaysian family law are directly or indirectly also due to the fact that they are Malaysian citizens.

The cosmopolitan Malaysian non-Muslim citizens' problems can be justifiably classified as (a) racial, (b) customary and (c) religious. (A) and (b) normally overlap each other and can therefore be considered together. It is (c), that may really cause social and legal problems amongst Malaysian married citizens. Even based solely on race and custom, the laws for non-Malays and Malays are different not because the former are "second class citizens",[2] but the very nature of the evolution of Malaysian constitution which has been discussed earlier in relation to citizenship law of Malaysia, and because Malays who are Muslims, are

being governed by various Muslim enactments.[3] Further various laws governing non-Muslim citizens exclude Muslims in matters affecting matrimonial problems.[4] It is because of that, that such problems facing non-Muslim and the Muslim citizens are best considered separately.

Where non-Muslim citizens' marriages are monogamous in form either under Civil Marriage Ordinance 1952 (No.44 of 1952)[5] or Christian Marriage Ordinance 1956 (No.33 of 1956)[5] or Church and Civil Marriages Ordinances (Sarawak Cap. 92)[6] or Christian Marriage Ordinance 1919 (Sabah Cap. 27),[7] their problems are basically tackled in accordance with and similar to the principles of English law. All formalities and essentials of a valid marriage such as consent (where necessary), notice of marriage and the like must be observed in order to receive legal recognition. Similarly, evidence must be sufficiently proved to the satisfaction of the Court that one or more grounds[8] for divorce took place before a judicial decree can be granted by a Court of competent jurisdiction.

The position is different in the case of polygamous customary marriages and divorces as illustrated by the case of Mary Ng & Anor. v. Ooi Gim Teong.[9] The facts of the case are as follows:

Both the first applicant (Mary Ng) and respondent (Ooi Gim Teong) were married in Penang on 10 December 1967 by Chinese rites and customs. On 20 October 1968, a son was born to them which caused the marriage to break down. The high point of the problems was when the respondent went to his mother's house in Ipoh, Perak to inform her of his intention to divorce his wife according to Chinese customs and rites viz. disrespectful and disobedient behaviour of the first applicant to him and his mother. Consequent to that visit, his mother arranged a meeting which was held the next day (24 May, 1970). Present at that meeting were the respondent's

mother, his grandmother, two of his uncles and old family friend and Mary Ng's godfather. At that meeting (gathering), he made known his wife's misconduct to those present and also his intention to divorce his wife. He further informed the said gathering that he would make the said announcement public through the local Chinese newspaper which he did on 19 June 1970. Also prior to that, he made his intention clear to his wife's solicitor on 10 June 1970. His intention was also made known to his wife by registered letter dated 23 May 1970 to her. In other words, the respondent's intention was publicly made clear and hence the divorce according to the facts of the case was effective.

According to Lee Siow Mong, both customary Chinese marriage and divorce are based on the concept of "publicity."[10]

In dismissing the first applicant's claim for maintenance under section 3 of the Married Women and Children (Maintenance) Ordinance 1950 and holding that there was publicity as required by the Chinese customs, Mohamed Azmi J said,

> "In my view...disrespectful and disobedient behavior of his wife towards him and his mother come within one of the seven grounds of divorce under Chinese customary law."[11]

Lee Siow Mong pointed out that according to the Chinese customs, adultery (which cannot be condoned), assulting the husband's parents and absconding are three grounds which make divorce a must. He was of the opinion, though divorce appears simple to obtain according to Chinese customs, there are three grounds which give the greatest protection to Chinese women against divorce, which according to him, remain unsurpassed in the divorce law of any country up to the most modern time and they are:

(1) if the wife has kept three years mourning for either of the husband's parents;

(2) if the husband having been once poor is now rich;

and (3) if the woman (wife) has no home to go to.

The above assumption of his was not shared by Kenneth K.S. Wee who suggested that it was erroneous to do so and was of the opinion that in the case of Mary Ng, supra, that assumption was in fact made to the disadvantage of the wife concerned,[12] since he doubted whether Lee Siow Mong was actually competent to speak on Chinese customs in Malaysia.[13]

The significance of the above discussion in respect of problems faced by Chinese Malaysian citizens who contracted such marriage is well summarised by the obiter of Mohamed Azmi J when he said,

> "...I have not overlooked the possible effect of my decision on the position and status of Chinese women in this country who have gone through marriage according to their personal law.
> ...allowing a Chinese man in this modern age to divorce his wife for either talkativeness or disobedience [in accordance to Chinese customary law] would amount to giving thousands of Chinese husbands a gun in their hands. This may be so; and if the Chinese customary law on marriage and divorce is no longer popular and considered obsolete, it is for the legislature to make inroads into them, as has already been done in China."[14]

From the said obiter, it is submitted that the problems amongst citizens do really exist, otherwise his Lordship would not have made any reference to the "position and status" of Chinese women in Malaysia and hence his suggestion that some form of legislation should be considered to deal with such a situation. Since the origin of such customs came from China through Chinese migration to Malaysia (and subsequently acquired Malaysian citizenship), it would be a fair and justifiable comment to say that since China has introduced legislation to control such situation, as pointed out by his Lorship, it is only proper that Malaysia too should do the same. Thus so long as the law affecting Chinese customary marriage is not changed, those Malaysian

female citizens in similar position as Mary Ng will remain to be the subject of such divorces.

His Lordship's observation as to the introduction of appropriate legislative control was shared both by Kenneth K.S. Wee[15] and Lee Siow Mong.[16] The latter suggested that the Government could enact law to make it compulsory for all customary marriages to be registered. By doing so, according to him, will put an end to all squabbles on whether a Chinese married according to custom has in fact contracted a valid marriage which will benefit both man and women and put family life on a proper footing in this modern age.

The recognition of such problems by the Government must have been, inter alia, amongst the prime factors in the appointment of the Royal Commission on Non-Muslim Marriage and Divorce Laws by His Majesty Yang DiPertuan Agong on 4 February 1970. Their efforts and recommendations have been crystallised into the Law Reform (Marriage and Divorce) Act 1976.

The Royal Commission, after examining the various statute and customary laws on marriage and divorce of non-Muslims and after considering testimonies of a cross-section of the people of Malaysia, submitted its recommendations[17] to His Majesty Yang DiPertuan Agong on 15 November 1971 proposing for a radical reform on the law of marriage and divorce. The Act was enacted and came into force as from 1 March 1982.

Looking at the Act, it appears to be a comprehensive codification of the law of marriages and divorces affecting non-Muslims except the natives[18] of Sabah and Sarawak and the aborigines[19] of West Malaysia.[20] However, such natives and aborigines may elect to be married under this Act and if so, they will be bound by its provisions just like any other non-Muslims in Malaysia. Muslims[21] are not affected by the Act by

virtue of section 3(3) which reads,

> "This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam [that is, a Muslim] shall be solemnised or registered under this Act;..."

Other than Muslims, natives of Sabah and Sarawak and aborigines of West Malaysia (subject to qualification above), the Act applies to all persons in Malaysia by section 3(1) which stipulates as follows:

> "...this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia."

By section 3(2), for the purposes of this Act, unless it can be proved otherwise, a Malaysian citizen shall be deemed to be domiciled in Malaysia. It is submitted that there is no way for a Malaysian non-Muslim citizen to circumvent the Act by contracting a marriage outside Malaysia according to the custom in that country which may permit polygamy unless he is prepared to give up his Malaysian citizenship for the sake of such marriage, since he will be deemed to be domiciled in Malaysia even though he may have been a resident outside Malaysia.

Section 5(4) states,

> "[After 1 March 1982], no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III."

Part III mentioned by section 5(4) above, deals with three matters namely,

(1) Restrictions on marriage;[21]

(2) Preliminaries to marriage;[22]

and (3) Solemnisation of marriage.[23]

Solemnisation of marriage abroad is dealt by section 26(1) which must be that as conducted at the Malaysian Embassy, High Commission or Consulate which shall be similar in all respects to that which applies to marriages solemnised and registered in Malaysia.[24] According to section 27, the marriage of every person ordinarily resident abroad who is a citizen of or domiciled in Malaysia after 1 March 1982 shall be

registered. If a marriage abroad is not conducted as stated by section 27, ibid, it has to be registered within six months after the date of such marriage (section 31(1)(a)) or if either or both parties return to Malaysia within that period, then such marriage must be registered within six months of arrival in Malaysia as required by section 31(1A), ibid.

Thus by virtue of compulsory registration of both locally celebrated and overseas conducted marriages required by sections 27,31(1)(a) and 31(1A) stated above, all marriages abroad can therefore be identified as to its form. From the wording of section 5, ibid, it is clear that polygamous marriage is specifically prohibited. Contravention to section 5, is deemed an offence of bigamy under section 494 of the Malaysian Penal Code.[25] If sanction to prosecute is given by the Public Prosecutor,[26] any person who contravenes section 5, ibid, and upon conviction will be liable to a term of imprisonment which may extend to seven years and shall also be liable to a fine. From the above discussion, it is therefore clear that no Malaysian non-Muslim citizen can contract a polygamous marriage abroad without giving up his citizenship, hence the support to the suggestion that citizenship law does interact with family law in such a situation.

As customs and usages are historical in origin and have been accepted by Malaysian citizens, the 1976 Act does not invalidate marriages conducted according to such customs prior to 1 March 1982 and such marriages remain valid.[27] What the Act prevents is contracting subsequent marriages during the subsistence of the valid marriage(s) (prior to that date) by virtue of section 5, ibid; the marriages prior to that date are deemed to be registered under this Act.[28]

Besides section 5, ibid, the wording of section 23 of the Act suggests that the marriage solemnised under the Act is certainly monogamous both in form and in effect. The words of solemnisation reads as follows:

> "Take notice then that...you consent to be legally married for life to each other, and that this marriage cannot be dissolved during your lifetime except by a valid judgement of the court and if either of you shall, during the lifetime of the other, contract another marriage, howsoever and wheresoever solemnised, while this marriage subsists, you will thereby be committing an offence against the law."(29) (emphasis mine).

Thus from the above, it is obvious that marriage according to Chinese customary custom and rites as in the case of Mary Ng v. Ooi Gim Teong,(30) is no more possible after 1 March 1982. The Act provides that solemnisation of monogamous marriage can only be performed either at the Registrar's office(31) or a church or temple or any other place as authorised by a valid licence(32) issued by the Registrar.(33) If it is to be conducted at other than the office of the Registrar, then it must be conducted by either any clergyman or minister or priest of any church or temple appointed(34) by the Minister.(35) Clearly from Mary Ng's case, supra, Chinese customary marriage (which is polygamous in nature) does not come within any of the above descriptions of solemnisation of marriage since the intended married couple do not have to go to the temple or church or to civil registry but only to perform certain custom and rites based on publicity.

Another radical change in family law in Malaysia affecting her citizens is the increase of the voluntary marriageable age of both parties to an intended marriage to twenty-one years of age notwithstanding the Age of Majority Act 1971(36) which provides that the majority age is eighteen. The Act makes a marriage void if it is contracted by the

parties under eighteen years of age unless with the necessary consent.[37] Exception is however made for a female who has attained her sixteenth birthday to contract a valid marriage if the conditions laid down by section 21, ibid, have been complied with. In such a case, the marriage will be conducted under licence by virtue of section 21(3) of the Act.

From section 37 of the Act, it is submitted that the Act must have appreciated the human needs and wants in so far as marriage is concerned in that, it makes it an offence which shall on conviction be liable to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand "ringgit" (Malaysian dollars) or to both for any one to use force or threat to compel a person to marry against his will (section 37(a), ibid) or to prevent a person attaining his marriageable age from contracting a valid marriage (section 37(b), ibid). Since marriage, it is submitted, is an association of two persons for life, it should therefore be free from such force or threat. Article 10(1)(c) of the Constitution provides that "all citizens have the right to form associations", which it is submitted, must have intended to include freedom to form association in the nature of marriage as contended above.

Sections 38-42 deals with various offences under the Act punishable by different maximum imprisonment terms ranging from three to ten years and/or shall also be liable to a fine ranging from three thousand "ringgit" to fifteen thousand "ringgit" or to both, inter alia, of making false declaration for procuring a marriage.[38]

On the premises above, it is submitted that by this Act, non-Muslim citizens will now be more safe when they decide to get married and will also know more of their legal destination by virtue of the fact that they are Malaysian citizens. To those "thousand Chinese males that were given a gun in their hands"[39] the same are now being "taken away" by the Act.

So far as Divorce (judicial separation and nullity of marriage inclusive) are concerned, they are dealt with Part VI of the Act under sections 47-71.

Under the Act, the ground for divorce petition is made uniform throughout Malaysia which is now based on one and one ground only, viz that the marriage has irretrievably broken down.(40) All the facts alleged in the petition presented should be inquired by the Court before deciding that the marriage has been so broken down before making a decree for its dissolution. In doing so, the Court should have regard to one or more facts as laid down by section 54(1)(a) to (d), and it would be just and reasonable to do so in all circumstances including the conduct of the parties and how the interests of any child or children of the marriage may be affected.(41) If adultery is alleged, a prayer may be included asking the Court that the co-respondent be condemned in costs(42) and if proved to the satisfaction of the Court, it may award petitioner such damages as it thinks fit,(43) notwithstanding the fact that the petition against the respondent is dismissed or adjourned.(44)

Reconciliation is encouraged by the Act under section 55, and in every divorce petition it is required to state what steps had been taken to effect a reconciliation.(45) Further a decree nisi, if granted, may be rescinded by the Court upon application by the party in which it was given(46) if no application to make such decree absolute is made by the said party after the expiration of three months from the earliest date where an application for decree absolute could have been made.

It is to be noted that while section 48(1) of the Act limits the Court's power to make any decree of divorce, section 49(1) provides an additional jurisdiction to the Court to entertain proceedings brought by a wife although the husband is not domiciled or resident in Malaysia if

conditions (a) or (b) of section 49(1), ibid, are satisfied. Where the Court exercises its jurisdiction under section 49(1), the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia by virtue of section 49(2).(47)

Under matters affecting nullity of marriage which are dealt with by sections 67-75, another evidence of abolishing polygamous marriage can be seen in section 69(a) of the Act, which states that,

> "A marriage which takes place after the appointed date that is, 1 March 1982 shall be void if -
> "(a) at the time of the marriage either party was already lawfully married and the former husband or wife of such party was living at the time of the marriage and such former marriage was then in force."

In both divorce and nullity of marriage cases, the right of the petitioner to petition to Court for the same is only available if the marriage is either registered or deemed registered(48) under the Act and the marriage is monogamous in form.(49) In addition to that, both the parties to the marriage must be domiciled (section 48(1)(c), ibid) in the case of divorce, and reside (section 67(c), ibid) for nullity proceedings, in Malaysia at the time of presentation of the said petition. However no petition for divorce can be presented before the expiration of a period of two years from the date of the marriage.(50)

In the light of discussion above, if the case of Mary Ng, supra, is to be decided under the present Act, it is my submission that the husband would not have succeeded since disobedience to him and/or his mother (unless disobedience to him amounted to wilful refusal to have a sexual relationship with him)(51) will certainly not fall within either ground (b) or (c) of section 54(1) of the Act.

Unless non-Muslim citizens become Muslims, the law as it stands today affecting their marriages and divorces will be as discussed above. The legal problems will arise when one of the parties to such a marriage converts himself or herself to Islam during the subsistence of their marriage. This can happen as in the case of U. Viswalingam v. S. Viswalingam,[52] which will be discussed in detail under [D] later. For the present purpose, it is sufficient to say that a Muslim woman can only marry a Muslim male while a Muslim male can marry either a Muslim female and/or a "kitabiyya".[53] Section 51(1) of the Act deals with such a situation. The section reads,

> "(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of conversion."

Other than the qualification in section 51(1), ibid, the two years' restriction period stipulated by section 50(1) of the Act does not apply. Upon the Court dissolving such marriage it may make provision for the wife or husband (as the case may be), and for the support, care and custody of the children of the marriage. Such provision will cease to have effect upon such divorced spouse re-marrying another person or living in adultery with any other person.[54]

As Muslim marriages and divorces are not in any way affected by the 1976 Act, the position now will be the same as before 1 March 1982 so far as Muslim citizens are concerned.

[C] As Between Citizen and Non-Citizen

This is the area which is always attracting the attention of both the general public as well as the Government. Their problems may be purely social, cultural, religious or legal, which may affect directly or indirectly their respective citizenships. The ability of a foreign wife or husband to adapt to the situation in Malaysia may cause her or him to change her or his foreign citizenship to Malaysian. Non-adaptability to the same but for the sake of marriage, the Malaysian citizen concerned may give up his or her citizenship in preference to the citizenship of the other party. Bringing a foreign wife into Malaysia itself may pose legal problems. I will first demonstrate those problems with two actual examples. My first example I will call case (L), and the second, case (S.K.).

(a) Case (L)

(L) was originally a Malaysian Chinese citizen by birth under the constitution. After finishing his sixth form in Malaysia he came to New Zealand and did his arts degree at the Victoria University of Wellington. While he was a student, he met and later married a New Zealand citizen named (M) in Malaysia. They first went through Chinese customary marriage and subsequently re-married under Civil Marriage Ordinance 1952. Thus by their subsequent marriage under the 1952 Ordinance as stated above, their marriage is monogamous for all intents and purposes. It may be noted that in this instance, they have no problem with the immigration authority since (M) was given a special pass under Immigration Act 1956/63 (Revised - 1975) because they intended to settle in Malaysia.

To be a Malaysian citizen, (M) by her marriage to (L) can acquire Malaysian citizenship upon making application to be registered as such in accordance with article 15(1) of the Constitution which reads,

> "(1)...any married woman whose husband is a citizen is entitled, upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the husband a citizen..., or if she satisfies the Federal Government -
>
> "(a) that she has resided in the Federation throughout[55] the two years preceding the date of the application, and intends to do so permanently; and
>
> "(b) that she is of good character."

There was no doubt when I interviewed them, both of them wanted to settle in Malaysia and (M) intended to permanently reside there. Beyond a shadow of doubt (M) is of good character. All she then needed to do in the circumstances was to reside in Malaysia for a continuous period of two years in compliance with article 15(1)(a) of the Constitution.

However, while in Malaysia and well before the two year period was up, she found out that she could not really adapt herself to the Malaysian way of life, that is Chinese custom and tradition, and decided to come back to New Zealand. (L) decided for the sake of the marriage to follow her to New Zealand. He then applied for a job with the New Zealand Government. Being a qualified man and also married to a New Zealand citizen he was successful with his application and was offered a job with one of the Ministries. He accepted the offer. His job is such that he has to take an oath of secrecy with the New Zealand Government and also to give his allegiance to the same. Since Malaysia does not recognise dual citizenship and because of his marriage to (M) and his decision to be a New Zealand citizen, he renounced his Malaysian citizenship.

By the very nature of his job, he has to travel overseas and did so on a New Zealand passport. While working with the New Zealand Government he applied for New Zealand citizenship both on the grounds of his working with the Government of New Zealand and marriage to (M). His application was granted by the Government of New Zealand and he is now a New Zealand citizen with two children born in New Zealand.

By article 24(3A)(a) or (b) of the Constitution, the very act of (L) travelling on the New Zealand passport, he could, as a matter of discretion of the Government of Malaysia, be deprived of his Malaysian citizenship notwithstanding his voluntary renunciation of the same.[56]

The case of (L) clearly demonstrates how non-adaptability of (M) to Malaysian way of life due to her marriage to (L) has affected the citizenship of (L) and how (L) could acquire his citizenship of New Zealand due to his marriage to (M). Likewise it is also true with (M) if she could adapt to Malaysian Chinese custom and tradition. Her marriage to (L) gave her special right to have a special pass to stay in Malaysia and if she were to reside continuously for two years since her marriage to (L), she has the constitutional right to apply to have herself registered as a Malaysian citizen as the wife of (L), otherwise she can only be so under article 19 of the Constitution, which requires a period of residence of an aggregate of not less than ten years in the twelve years of her residence in Malaysia preceding the date of her application.[57] Once (M) was granted Malaysian citizenship under article 15 of the Constitution, she will remain to be so, regardless of whether she was or was not subsequently divorced from (L) unless she herself voluntarily wishes to renounce her Malaysian citizenship.

(b) Case (S.K.)

My interview with the couple revealed the following facts.

(S.K.), a Malaysian female citizen went to Scotland to do a course. While doing that course she met (B) who is a citizen of the United Kingdom. After she was qualified from the course she decided to marry (B). They went back to Malaysia to be married to each other, first according to the Chinese customary law followed by civil marriage under the Civil Marriage

Ordinance 1952, thus making their marriage monogamous in form. After the marriage ceremony, they both went back to Britain. Since (S.K.) is married to (B), she was given permanent resident status by the British Government.

Later (B) decided to migrate to New Zealand. (S.K.) followed her husband to New Zealand but still retains her Malaysian citizenship. After working for some time in New Zealand, (B) decided to go to university. He applied (later accepted) for admission to Victoria University of Wellington, while (S.K.) is working in New Zealand. (B) applied for New Zealand citizenship which was later granted and is thus now a New Zealand citizen. (S.K.) is at the moment given a permanent resident status here due to her marriage to (B), but still a Malaysian citizen. Now she too is a student at the Victoria University of Wellington.

From my interview with them, they told me the reason why (S.K.) does not renounce her Malaysian citizenship is basically because they have not finally decided where to settle but indicated to me that it will either be in Australia or Malaysia. Secondly, since it is the policy of the Malaysian Government now that once a Malaysian citizen gives up his or her citizenship, he or she will not be given back his or her Malaysian citizenship, is the very reason why (S.K.) still retains her Malaysian citizenship. It is therefore important for her to retain her citizenship should they decide to settle in Malaysia later.

By reason of their marriage, it is respectfully submitted that (B) will almost certainly be given permanent resident status by the Malaysian Government should they decide to settle there. While being so, he can apply to be a Malaysian citizen under article 19 of the Constitution. In the alternative, (S.K.) can renounce her Malaysian citizenship under article 24(1) of the Constitution once they have decided to finally settle in Australia and upon acquisition of Australian citizenship.

From the above two cases, a few important conclusions can be drawn.

Firstly, due to (M) and (B) marrying Malaysian citizens, both of them have no problem in obtaining special pass and certainly permanent residency in Malaysia should they decide to be Malaysian citizens.

Secondly, in the case of (L), (M) does not have to have any knowledge of Malay language under article 15, ibid, since she is the wife of (L), a Malaysian citizen. On the other hand, (B) must have an adequate knowledge of the Malay language under article 19 of the Constitution. The Malay language qualification is a deciding factor of any foreign citizen acquiring Malaysian citizenship. It can therefore be argued that if the foreign husband could overcome that problem, his genuine intention to stay and treat Malaysia as his permanent residence should be in his favour. It is also submitted that due to the same barrier Malaysian citizens marrying foreign husbands tend to renounce their Malaysian citizenship in preference of their husbands'. It is therefore suggested that the language barrier in such cases should be relaxed or modified. Thus it is submitted (by way of suggestion) that a new article be included in the Constitution to accommodate such cases if Malaysia is to avoid loosing Her female citizens as the result of their marriage to foreign husbands. However, residential qualification should stay in order to avoid acquisition of Malaysian citizenship through marriage of convenience. It is therefore submitted that there is a definite interaction between citizenship and family laws in these cases.

The change of the domicile of (M) and (S.K.) is the third observation that can be drawn from those two cases. By virtue of (M)'s marriage to (L), her domicile of origin (New Zealand) was temporarily lost when she acquired Malaysian domicile but reverted back to her when she

decided to come back to New Zealand should (L) refused to follow her to New Zealand and there was a divorce between them. However, that was not the case. Since (L) decided to be and now retains New Zealand citizenship, her domicile as a dependent will be also that of New Zealand by virtue of her marriage to (L).

In the case of (S.K.), (S.K.)'s domicile had been changed twice already. She acquired the British domicile when she married (B) and stayed in Britain before migrating to New Zealand. When (B) acquired New Zealand citizenship, her domicile will therefore be that of New Zealand.

Fourthly, assuming that in both cases, while (M) and (B) were in the process of acquiring their Malaysian citizenship, both (M) and (S.K.) gave birth to a child each. In such a situation, obviously the children are Malaysian citizens by operation of law,[58] notwithstanding the fact whether or not the couples later decided to voluntarily renounce Malaysian citizenship or lose such citizenship by virtue of article 24(1) of the Constitution.[59]

While the case of (S.K.) may not create more problems than those already discussed, the marriage of (M) to (L) may do so. What will be the position if (M) submitted to Chinese customary law marriage to (L) without later undergoing the second marriage as stated above? Since (M)'s marriage to (L) took place before 1 March 1982, it is submitted they will still be legally married based on Mary Ng v. Ooi Gim Teong.[60] What then will be the legal position if (before 1 March 1982) similar circumstances as explained above took place, but (L) insisted that (M) should remain in Malaysia as his customary wife and (M) refused to obey him and still came back to New Zealand?

Will the New Zealand Court recognise her marriage and what will be her legal status in relation to her marriage if (L):

(1) refused to divorce her?

and (2) divorced her in accordance with Chinese customary law based on Mary Ng's case, supra, for being disobedient to him and possibly his parents?

It is my submission that in the case of (1), New Zealand Court will still consider (M) married to (L) since such marriage is valid in Malaysia.[61] (M) can invoke section 27(1)(a) of the Family Proceedings Act 1980 (No.94) for a declaration as to the validity of her marriage to (L). It is also submitted that she will most likely succeed if she petitions for a divorce in New Zealand on the ground that her marriage to (L) has broken down irreconciliably under section 39(1) of the same Act. Though successful with her petition for a divorce in New Zealand, what will be the effect of such divorce decree in Malaysia? It is my contention that the net effect will be that though (M) is a divorced woman in New Zealand and thus free to re-marry another man, she will still be married to (L) in Malaysia. Thus if she re-marries in New Zealand and has issue, the issue is legitimate according to New Zealand law, but certainly illegitimate in Malaysia. While (M) cannot be charged for bigamy in New Zealand in the circumstances, she is certainly liable to be faced with such a charge in Malaysia.

If (L) were to die intestate, it will follow that she will still be able to claim interests in his estate on intestacy since she would be technically married to (L) at the time of his death without being legally divorced in Malaysia by (L). So far as (L) is concerned, under Chinese customary law he does not have to divorce (M) in order to take another customary wife during the subsistence of his marriage with (M).

It is therefore submitted that any order made by the New Zealand Court in respect of or incidental to a divorce petition by (M) will purely

be academic and will have no real practical significance in Malaysia.

As for (2), based on the wording of section 44 of the Family Proceedings Act 1980 (Act 94), such a divorce by (L) will certainly be recognised by New Zealand Court.

The general observation of the two cases above, particularly the case of (L), clearly illustrates the interaction of citizenship and family laws of Malaysia.

Neither problems in (1) or (2) above will arise after 1 March 1982 under the Law Reform (Marriage and Divorce) Act 1976, since such marriage will be deemed monogamous though originally polygamous.(62) Be that as it may, citizenship law will remain to interact with family law.

Problems such as demonstrated by those two cases though real, may pass unnoticed since neither (M) nor (B) faced any complication with immigration matters. There can really be practical and legal problems if foreign wives are faced with such matters as is demonstrated in the case of In Re Meenal w/o Muniyandi.(63)

In this case, the applicant, an Indian National, was married to an Indian Malaysian citizen some time in March 1960 in India according to Hindu rites. When she came to Malaysia she was given an entry permit. She was later granted a status of permanent resident by issuing to her a red identity card.(64) She stayed with her husband in Malaysia until 1970 when she surrendered the said red identity card to return to India, which according to her husband's affidavit dated 4 December 1979, was to accompany his mother who was mentally ill.

In 1977, the husband applied to the immigration authority to bring his wife back to Malaysia. He was advised that his wife could enter Malaysia on a social visit pass on an Indian passport valid for one year. The applicant came back to Malaysia in May 1978 issued with a social visit

pass which was extended from time to time up to 28 May 1979. When the said pass expired, she was issued with a special pass to enable the applicant to make necessary arrangements to leave the country which was extended periodically until 3 September 1979. On that date, all her travel documents were impounded by the immigration authority and on October 26, 1979 she was removed to Padu Prison in Kuala Lumpur with a view to deportation as a person whose presence was unlawful under the Immigration Act 1959/63 (Revised - 1975).(65)

The applicant then applied to Court for a writ of habeas corpus on the grounds, inter alia,

(i) as a wife of a citizen, she was entitled to remain in Malaysia;

and (ii) that refusal by the immigration authority to do so was perverse and illegal.

His Lordship said,

> "In my opinion there are two separate questions posed ...so closely inter-connected that both have to be considered simultaneously. The first is the principal one, i.e. whether the applicant is lawfully detained. The second question is what is the form of the alleged right or entitlement of the applicant under Article 15 of the Constitution as a wife of a citizen and the effect of certain provisions of the Immigration Act and Immigration Regulations on her."(66)

The Immigration Regulations His Lordship was referring to was paragraph 3(1) of the Immigration (Prohibition of Entry) Order 1963 (67), which according to His Lordship sets out a number of categories of persons such as professionals or persons with specialist qualifications and those with a special certificate from the Minister certifying that their admission is in the economic interests of the country and thus considered them as a special class of persons by themselves of which non-citizen wives of citizens are not. A wife of a citizen definitely has to apply for entry

permit under section 10 of the Immigration Act 1959/63 (Revised - 1973) without any special privileges or rights to be issued with the same. That being the case, since the applicant's special pass was cancelled as stated above, her presence in Malaysia thereafter would be unlawful under section 15 of the said Act. Thus the Order of Removal made under section 33(1) of the same was proper and hence her detention with a view to deportation in the circumstances would therefore be lawful.

As to the rights of a non-citizen wife of a citizen, His Lordship said,

> "(b) the applicant is not entitled as of right to an entry permit to enter[68] or to remain[69] in Malaysia by reason solely of the fact that her husband is a citizen."[70]

This case illustrates problems faced by interaction of both family and citizenship matters. Since the applicant was married to a citizen in India, she has to register her marriage (with no time limit to do so) under the Registration of Marriage Ordinance 1952 before she can legally be said to have a recognised marriage and thus apply for registration as a citizen of Malaysia (if she so desired) by virtue of her marriage to a Malaysian citizen under article 15(1) of the Constitution.

It is interesting to note that in the course of determining the issue of the case, His Lordship referred to the passage written by Visu Sinnadurai[71] who was of the opinion why qualifications of non-citizen wives to be Malaysian citizens were made more stringent was to eliminate the acquisition of citizenship by a formal marriage of convenience. This, it is submitted should be more so, in the case of customary marriage based on Mary Ng's case, supra, which is easy to contract and dissolve such a marriage. It is therefore my contention that, such marriages of convenience do exist as of fact though they are not able to be detected and/or supported

by official statistics, otherwise it would not be referred to by the learned author above.

Since marriages of citizens to non-citizens are quite common and the fact that human needs are such that those foreign wives may need to go back to their birthplace to visit their parents or for some other reasons, the Immigration Department, Malaysia, issued a special press statement dated 28 November 1981 affecting non-citizen wives married to citizens of Malaysia which took effect as from 30 November 1981.(72) The said statement is divided in three parts namely:

(i) those married before February 6, 1980.(73)

(ii) those married on or after 6 February 1980;

and (iii) right of appeal to the Minister of Internal Affairs in cases of dissatisfaction with the decision of the Director-General of Immigration, Malaysia.

For (i), a social visit pass for one year will be issued on application from such wives. This facility will not be given to those who are living apart for a continuous period of five years or more, though remain married. For such wives, they have to comply with section 6 of the said Immigration Act. While in possession of such valid social visit pass, such wives are free to come and go from Malaysia without having to apply for re-entry permits each time they want to enter Malaysia under section 6(1)(a) of the said Immigration Act. Such a pass is renewable every year upon application. Thus for purposes of a residence qualification, their temporary absence(74) from Malaysia will not be affected for the purpose of making application to be registered as citizens by their marriages to citizens (article 15(1)(a) of the Constitution).

For those married under (ii), a six months' social visit pass will be issued to such wives upon being satisfied of their marriage to Malaysian

citizens. After that period, their social visit pass will, upon application, be issued on yearly basis and the same condition as in (i) above applies as to their absence.

In both instances, the first social visit pass will be issued at the point of entry but they must have the necessary visa. Such facility will only be available to those who, at the time of entry or upon re-application, are still married to Malaysian citizens. It is submitted that this indirectly avoids giving the facilities to those who contracted the marriages of convenience with the main intention to subsequently acquire Malaysian citizenship.

All the three cases cited above, do not involve illegal immigrants which is another area of major problems involving the interaction of family and citizenship laws.

Geographically, Malaysia is very close to Indonesia. There is a very strong historical bond between Malays in Johore with those[75] of Indonesia. There is exodus of Indonesian immigrants coming into Malaysia undetected by the Government through well-organised syndicates. Some of them got married to local Malays. Since local Malays are Muslims and are not governed by civil law so far as their marriages and divorces are concerned, it would be much easier for those illegal immigrants to get married to local Johore Malay women. As pointed out earlier, even if those illegal immigrants were brought to book and deported back to Indonesia, their children by marriage if born after Merdeka (Independence) Day (31 August 1957), would be Malaysian citizens by operation of law.[76] In such cases, questions of citizenship certainly cause real hardship to such families.

It is therefore my humble and respectful suggestion that it is probably a right time for the Government to consider setting up a special

tribunal to deal with such problems which can then perhaps look into, inter alia:

(i) the genuiness of their marriages;

(ii) what caused them to be married;

and (iii) look into a cross-section of the hardship caused to such families as the result of such deportation.

By doing so, it is respectfully submitted, certain useful informations can be extracted and perhaps where practically possible remedy the situation to reduce such hardship. It is further submitted that matters like, amongst others;

(a) marriages of convenience may be effectively detected and thus reduced, if not completely eradicated;

(b) appropriate steps can therefore be taken to detect the well-organised syndicates involved and thus indirectly prevent such illegal immigrants from coming to Malaysia in the future;

(c) as a follow up to (b), a more effective form of control to check the flow of such illegal immigrants can be implemented by the Government of Malaysia with the co-operation of the Indonesian Government;

and (d) where appropriate, the Government may perhaps exercise its discretion to grant citizenship to such husbands upon fulfilling certain conditions as to their future character, bonds or any other consideration(s) the Government deems fit.

It is also respectfully submitted that since such matters involve government's policy, it is best that such tribunal be chaired by a legally qualified person from the Judicial and Legal Services Department with at least five years experience in the same Department assisted by at least two respected members of the public selected from the cross-section of the Malaysian society.

[D] As Between Non-Citizen and Non-Citizen

Non-citizens too while in Malaysia, whether or not they subsequently acquire Malaysian citizenship, have their problems depending on the circumstances of their case.

If they remain non-Malaysians when they are faced with such problems, their matrimonial matters will most probably be decided by Malaysian Court according to their personal laws if they are ordinarily resident in Malaysia. Should they acquire domicile of choice in Malaysia but not citizenship of Malaysia, their situation will still be the same. Depending on whether their marriage is monogamous or polygamous, problems faced by them will be the same as [B] and [C] above if they subsequently obtain Malaysian citizenship, as long as they do not become Muslims. If a married couple who became citizens later converted to Islamic faith, then their problems will be identical to those faced by Malaysian Muslim citizens. The real difficulty will be present when only one of the couple does so and not the other. It is the last situation which requires detailed discussion so far as this paper is concerned. The case of U. Viswalingam v. S. Viswalingam[77] offers such an example as illustrated below.

The husband (born in Malaysia) was a Hindu by religion. The wife (born in Sri Lanka) was a Christian of Anglican faith. Both of them were originally citizens of Sri Lanka. They were married on 30 March 1955 in Colombo (Sri Lanka) under the provisions of the Marriage Registration Ordinance of Ceylon.[78] After their marriage, they went to Bristol, England where the husband continued his medical studies. While in England, they had two children namely Nambi (born on 9 April 1957) and Ajit (born 31 October 1959). By birth, both Nambi and Ajit are therefore British nationals.

When the husband qualified from his medical studies, they returned to Ceylon and stayed with the wife's parents free from rent. Finding that they cannot settle there, they went to Malaysia in 1961. In 1962, another child was born. In 1966, they were staying in Kuala Lumpur, Malaysia where the husband opened a private clinic.

On 31 October 1969, their marriage was registered under the Registration of Marriages Ordinance 1952, a step in the process of obtaining Malaysian citizenship.(79) Later they both became Malaysian citizens.

There were family troubles that estranged their marriage relationship when the husband started to see one Mrs Lobo which ended in December 1973 when she married an Englishman. As the result of their family problems, including the education of their children, the wife and Nambi were sent by him to England. Later on 16 December 1974, he bought a house at Edgeware, London, conveying the same in joint names of both himself and his wife.

While his wife was in England, he embraced the Islamic faith on 13 August 1976 without informing his wife of the same and later married a second wife.

In 1977, the wife filed a petition in England seeking a decree of dissolution of their marriage on the ground of her husband's unreasonable behaviour to which the husband later filed his reply alleging that the marriage had been automatically ended by his conversion to Islam and prayed that her petition be dismissed. He based his answer on the strength of the "fatwa"(80) from the "Mufti"(81) of the Federal Territory, Kuala Lumpur, Malaysia dated March 6, 1978, which reads:

> "With reference to...the marriage in question, [it is] no longer subsist[ing] since [the husband] has embraced Islam and his wife has not followed suit."(82)

According to substantively Muslim law, a woman can only marry a Muslim man, but a Muslim man can marry a Muslim woman and also a kitabiyya[83] woman, which according to the ruling of the "fatwa" obtained, does not include Christians of Anglican faith. If the "fatwa" is right, then a difficult problem will arise as to who are Christians.

Based on the said "fatwa", the effect of the husband converting to Islam on the non-Muslim marriage (unless she too becomes a Muslim) will depend on whether or not she is a kitabiyya. If only the husband converts and the wife does not follow within three months of such conversion, the said marriage ceased to subsist at the end of the said three months from the date of the husband's conversion. If the non-kitabiyya wife however converts to Islam within that period, then the marriage will be valid and its validity will revert to the date of the husband's conversion. Under shafii school,[84] the husband is not required to offer the Islamic religion to his wife during this period.[85] It is therefore submitted that, if the wife converts to Islam and the husband does not do the same within three months of the wife's conversion, it must therefore necessarily follow that the marriage will also cease to subsist since she can then be married only to a Muslim man.

On appeal from the decision of Wood J by the husband, Ormrod L.J., at page 19, posed three questions.

(1) Was the marriage brought to an end by the husband's conversion to Islam, according to the law of the Federal Territory?

(2) Is the Court bound to accept that the marriage has come to an end or is there what has been called a "residual" discretion to decline recognition?

(3) If there is such a discretion should it be exercised in favour of the husband or the wife?

Based on the facts of the case and the law, his Lordship concluded that on the husband's conversion the marriage ceased to exist and that being the case, the court ought to recognise the change of status so effected, subject always to the proviso and according to his Lordship could not be a divorce since conversion was neither "judicial or other proceedings" within the meaning of "divorce" as found in sections 2-5 of the 1971 Act.(86) He therefore held that the present case did not fall within the ambit of the said Act and thus dismissed the husband's appeal from Wood J's decision of granting a decree nisi to the wife of what was alleged of the marriage which was not in existence at the time of such petition. From the case, a few observations can be made.

Firstly, in dismissing the appeal Ormrod L.J. pointed out(87) that the parties to the proceedings were still both Malaysian citizens and subject to the law of that country then in force. Following from that observation, the laws governing both Muslim and non-Muslim Malaysian citizens were made in accordance with the Constitution. The Constitution is the supreme law of the country.(88) The rights and duties of citizens, regardless of their religion which they are free to profess andpractice(89) are provided by the Constitution.(90) Thus any marriage affecting Muslim citizens, will be dictated by various Islamic Enactments made in accordance with the provisions of the Constitution and in this case, will be the Administration of Muslim Law Enactment 1952. The "fatwa" involved was made by the "Mufti" of the Federal Territory, Kuala Lumpur, Malaysia under the said Enactment. It is therefore submitted the questions to consider should be thus:

(1) Was that "fatwa" validly made?

(2) Will it be accepted by the Court in Malaysia?

(3) If accepted, what will be the effect of that "fatwa" so received?

From the facts of the case, clearly the "fatwa" was validly and legally obtained. That being the nature of "fatwa", it will certainly be accepted by the Malaysian Court. Since the parties were Malaysian citizens and the "fatwa" affected them directly, it is submitted that the Court will certainly apply Muslim law. Since Shafii school was and is observed in Malaysia, it is contended that the full effect of the "fatwa" will be given by the Malaysian Court. Thus the effect of the "fatwa" on the facts of the case will be that the marriage was no more subsisting after three months from the date of the husband's conversion to Islam since the wife did not convert to Islam too during that three months period.

The question of acceptance of such "fatwa" by Malaysian Court was recognised even by Wood J, when he said,

> "...I take the view that a Malaysian Court would accept the ["fatwa"] given by the "Mufti", and so I find."(91)

Secondly, following the observation of Wood J on the effect of the "fatwa", then it is submitted with the greatest of respect, his Lordship could and should therefore adopt what the Malaysian Court would do in the circumstances and gave effect to the said "fatwa" accordingly without going further as he did. Since divorce relates to a valid and existing marriage,(92) the petition should therefore have failed because of the non-existence of such marriage as pointed out above. In other words, the Court cannot, with respect, dissolve what was not in existence.

R. H. Hickling,(93) in commenting the case of U. Viswalingam, supra, concluded his comment in the following words,

> "The case illustrates the vigour with which English Courts will maintain the rules of natural justice... according to English standards."

It is respectfully submitted that Islamic law cannot be equated with the English concept of natural justice. It is contended that if the "fatwa" was obtained by a non-Muslim counsel, perhaps the manner in which the request for the "fatwa" can be questioned. However, that was not the case here. This is evidenced from the statement of Wood J, when he said,

> "Doctor Yaacob is a practising lawyer from Kuala Lumpur whose standing in the profession in Malaysia is of the very highest. He is also a devout Muslim who has studied Koran from his early youth,"

a testimony which speaks for itself. It is my respectful submission that in exercising the jurisdiction, the Court should not have applied the English concept of natural justice in the circumstances but substantive Islamic law.

Dr Lucy Carroll Stout,(94) in critically analysing whether the alleged dissolution of the marriage was valid or not according to the husband's domicile (that is, Malaysia) in Viswalingam's case, supra, pointed out that it was totally fallacious assumption that Muslim law applied to the case and thus the High Court (presided by Wood J.) found wrongly on every point of Malaysian law raised.(95) She supported her observation mainly from the jurisdictional point of view and not on the question of natural justice.(96) It is submitted that, that would have been a much better approach. By doing so, it would be clear that the Court "d[id] not intend in any way to criticise the laws of Malaysia nor the precepts of the Islamic law or religion."(97)

However, with the greatest of respect to the learned and distinguished writer, it is submitted that the question of jurisdiction should not be over emphasised in order to determine the effect of the

said "fatwa", but the "fatwa" itself in relation to:

(1) the definition of whether or not a Christian of Anglican faith is a "kitabiyya";

and (2) will the Court in Malaysia whether civil or "kathi" Court give effect to such "fatwa".

It is submitted that nowhere in the judgement of Wood J., suggests that he was not adequately guided by relevant materials to decide the issue before him. On the contrary, his Lordship was of the opinion that such "fatwa" will be accepted by Malaysian Court.[98] Ormrod L.J. was of the opinion that, a "fatwa" seems to be something in the nature of a declaratory ruling given at the request of a party on a point of Muslim religious law which would be acted by the Court in Malaysia,[99] and his Lordship therefore accepted Wood J's findings of fact as proof of the relevant law of Malaysia.

However, the Court[100] having accepted the effect of the said "fatwa" as ending the marriage automatically on the husband's conversion to Islam, asserted that the "fatwa" obtained was against the English concept of natural justice since the wife was not given the opportunity to challenge the said "fatwa".

It is with the greatest of respect to the Court that there are certain acts of the husband under Islamic law that the wife cannot challenge. A good example is the husband's right of "Talaq" (talak"), which can be unilaterally exercised (either orally or in writing) by the husband without any intervention of either the civil or religious authority according to substantive Islamic law.

Dr Stout questioned as to why the husband did not exercise such right.[101] Relying on the Selangor Rules Relating to Marriage, Divorce, and Revocation of Divorce 1962, she concluded that he could not

do so since the 1962 Rules expressly provided that,

> "No divorce or pronouncement of divorce will be effective unless the wife agrees to the divorce and the kathi has approved it."(102)

With the greatest of respect, I disagree with the learned and distinguished writer for the following reasons:

(i) Assuming that "fatwa" was valid[103] (which it is contended it should), how could the husband exercise the right of "talaq" over a non-existing marriage?[104]

(ii) There was a three months grace period for the wife to convert to Islam (thus saved the marriage) based on the substantive Islamic law. During that period there can be no question of the exercise of "talaq" because:

(a) "Talaq" is only applicable to a marriage that is contracted according to Muslim law;

and/or (b) where both parties to the marriage are Muslims;

(iii) It is submitted that the provision cited above should not be construed as to deprive or restrict any Muslim of his substantive rights under Muslim law. It is contended that such a provision was intended for administrative purposes in order to check and reduce the number of Muslim divorces and thus provides a method of effecting reconciliation.[105]

The approach should therefore be to determine as of fact whether or not the wife can be considered as a kitabiyya within the context of the said fatwa. If she was, then the marriage will remain valid notwithstanding the husband's conversion to Islam; if not, the said "fatwa" should be respected.

Based on the facts of the case and the manner in which the said "fatwa" was obtained, it is submitted that the High Court of Malaya

will in all probability give full effect to the "fatwa" without going into the question of jurisdiction. Thus if the wife were to petition for divorce in the High Court of Malaya, it is contended that it will most probably be dismissed.

Thirdly, based on the Court's reasoning that the first marriage was still in existence, otherwise decree nisi would not have been granted, will the husband be guilty of bigamy in England when he married his second wife, assuming that he again openly declared that he was no more a Muslim after the expiry of the required period (three months from his conversion to Islam), but before or at the time of his wife's said petition? It would appear so since until the decree nisi was made absolute, his first marriage still subsisted. However that will not be so in Malaysia since he was a free man then. If he married his second wife while he was a Muslim certainly he can never be guilty of bigamy.(106)

Fourthly, in recognising that the marriage automatically came to an end on such conversion and yet exercised its "residual" discretion, was the Court moved by the fact that hardship would be caused to the petitioner by giving effect to the "fatwa"? Certainly it can be justifiably concluded so. This is evidenced by what was stated by Wood J., when he said,

> "If I were not to make a decree and were to leave the wife to her remedies in Malaysia, she would, I understand, recover something for the sum paid by her father at the start of the marriage. Allowing...for inflation, I do not think that... would [be] more than £5,000 in the Malaysian courts."(107)

Though associating my full sympathy with the wife in the circumstances, that should not, it is submitted, be good enough a reason for the Court to exercise its "residual" discretion as not to recognise what the Court in England accepted the Malaysian Court(s) would do. It should not apply conflict rules which in the end may be viewed in relation to the English concept of natural justice. To do so, it is respectfully contended, would directly or indirectly be an attack or to criticize the laws of Malaysia or the precepts of Islamic law or religion.

The question of the parties' domicile is the fifth observation that can be drawn from the case. By an accepted rule of domicile, the wife retains the domicile of her husband until divorced. Once divorced, she can acquire her own domicile of choice if she will revive. There was no evidence at all to suggest that the husband had at any time the necessary intention to change his Malaysian domicile. As such, it must necessarily follow that the domicile of the wife must be that of Malaysia until she obtained a decree absolute.

One other important issue which was not the subject matter of the proceedings was the question of the children's citizenship.

From the facts of the case, Nambi and Ajit should not have much problem in acquiring citizenship of the United Kingdom by virtue of their birth. Prai's citizenship matters may encounter some difficulties. Depending on whose custody he was given, perhaps he will subsequently acquire the citizenship of the parent in whose custody he was entrusted.

It will therefore be right to say that problems such as those arising from Viswalingam's case, supra, clearly demonstrate the close relationship between Malaysian family and citizenship laws and thus their interaction.

If a similar situation takes place after 1 March 1982, section 51 of the Law Reform (Marriage and Divorce) Act 1976, can effectively deal with it without having to resort to the effect of a similar "fatwa". Section 51(1) of the Act, expressly provides that the wife can now petition for a divorce after the expiration of the period of three months[108] from the date of the husband's conversion to Islam.[109] By implication, the same will apply if only the wife converts to Islam and the husband does not. The operative words in section 51(1) are "one party" and the "other party". It does not specifically say whether the husband or the wife.

Thus, it is submitted that though section 51(1) does not over-rule the effect of the "fatwa" similar to that as in the Viswalingam's case, it has in effect made such a "fatwa" obsolete. The other important observation that is relevant to the case is that, the section above does not specify "what religion". In such absence, it is submitted that it matters not whether the other party who does not convert to Islam is a Christian of Anglican faith or any other religion who cannot be classified as a "kitabiyya".

By section 51(2) of the Act, it specifically gives the Court the power to make the necessary provision for such a wife[110] or husband (as the case may be) and for the support, care and custody of the children of the marriage.

CHAPTER FIVE

OTHER MATTERS

In this chapter, I propose to discuss matters like:

(A) Adoption;

(B) Legitimacy;

and (C) Loss of citizenship however caused.

[A] Adoption

This is governed by The Adoption Ordinance (No.41 of 1952) but it does not apply to Muslims. Section 31 of the Ordinance states:

> "This Ordinance shall not apply to any person who professes the religion of Islam either so as to permit the adoption of any child of such a person or as to permit the adoption by any person of a child who according to the law of the religion of Islam is a Muslim.(1)

An application for adoption must be made in the manner and form prescribed by the Adoption Rules 1953.(2) It deals in detail with the procedure as to how an application is to be made, such as filing of the necessary documents and the service of the same as required by section 11 of the Ordinance. Adoption can be made either to a High Court judge or a president of Sessions Court and the hearing of the application for the same will be heard in camera(3) in chambers. Subject to section 31 above, any person can apply for an adoption order if the necessary condition(s) in section 4 of the Ordinance is/are satisfied.

Upon such an application being made, the Court shall appoint a guardian ad litem(4) whose duties will be, inter alia, to determine that the intended adoption is genuine and to investigate as fully as

possible all the circumstances of the child concerned and the applicant and all other matters related thereto in order to safeguard the interests of the child[5] before making any adoption order. Before making such order under section 3(1) of the Ordinance, a report from the guardian ad litem must be received by the Court and the Court must be satisfied with the conditions in section 6 of the same.

However, there are restrictions imposed by section 4 of the Ordinance against making such order which stipulates:

> "(1) An adoption order shall not be made unless the applicant or, in the case of a joint application, one of the applicants:
> (a) has attained the age of twenty-five and is at least twenty-one years older than the child ..., or
> (b) has attained the age of twenty-one and is a relative of the child; or
> (c) is the mother or father of the child.
> (2)...in any case where the sole applicant is a male and the child...is a female unless the Court is satisfied that there are special circumstances for making of an order.
> (3)...in favour of any applicant who is not ordinarily resident in the Federation or in respect of any child who is not so resident."

By section 2 of the same an "adopted child" means a child who has been authorised by the Court[6] to be adopted or re-adopted and the "child"[7] is an unmarried person under the age of twenty-one and includes a female under that age who has been divorced.

Looking at section 4(3) of the Ordinance, it is submitted that, even a Malaysian citizen who is not ordinarily resident in the Federation cannot make such an application. On the other hand, it would appear that there is nothing to stop non-citizens ordinarily resident in Malaysia, subject to paragraphs (a) to (c) of section 4(1), from doing so. In the latter case, if granted, could lead the adopted child's citizenship (Malaysian) to be lost.

The other obvious effect of section 4(3), is that foreign child not ordinarily resident in Malaysia cannot be the subject of an adoption application. However, that does not prevent a child of a non-citizen who is, for example, permanently resident in Malaysia being adopted by a Malaysian citizen, it would be much easier for the said adopted child to apply and obtain Malaysian citizenship. The adoptive parent or parents can then apply on his behalf.

As from March 1, 1982, under the Law Reform (Marriage and Divorce) Act 1976, section 2(1), such adopted child is treated as "a child of the family". All the provisions under the 1976 Act concerning "child or children of the family" will also apply to such adopted child with the same force as if he has been born in the lawful wedlock.

For purposes of disposition of property, he will also be treated as if he has been born in the lawful wedlock[8] and thus come within the prohibited degrees of consanguinity whether or not he is later re-adopted by some other person. He will also be treated as the child of the family under section 2 of the Inheritance (Family Provision) Act 1971. Thus he can benefit from the application for the maintenance made on his behalf under section 3(1) of the Act.

If the adoption is made by a citizen of a non-citizen's child, it follows that such adopted child's rights and duties will be, as the result of such adoption, similar to those of adoptive parents' children. Had he not been adopted, he has no rights, privileges and duties as a Malaysian citizen. If he is a minor, he can then be included as a child of the family in either of his adoptive parents' passport or even apply his own passport when he is big enough to travel on his own or when he has good reason (example to go for studies overseas) to do so. For

purposes of section 11(1) of the Immigration Act 1959/63 (Revised - 1975) he is therefore to be treated as a citizen and is not required to have a valid entry permit or pass to enter and leave Malaysia; an evidence of interaction of family and citizenship laws.

[B] Legitimacy

Matters of legitimacy are contained in the Legitimacy Act 1961 (Revised - 1971) (Act 60). Again Muslims are expressly excluded but in negative wording found in section 3(1) of the Act which states:

> "Nothing in this Act shall operate to legitimate a person unless the marriage leading to legitimation was solemnised and registered in accordance with -
> (a) the Civil Marriage Ordinance 1952 or the Christian Marriage Ordinance 1956;
> (b) the Christian Marriage Ordinance or the Marriage Ordinance 1959 of Sabah; or
> (c) the Church and Civil Marriage Ordinance of Sarawak;
> or..."

Since, as shown by the earlier discussion, none of the Ordinances aforesaid applies to Muslim citizens of Malaysia, it will be clear from the wording of the above section, that the 1961 Act has no application to Muslim citizens. Thus an illigitimate child under the substantive Islamic law will therefore remain to be illegitimate if born such if the parents are Muslims. If they are originally non-Muslims but later convert to Islam and if the marriage took place before the conversion to Islam then such child will be legitimate and remain to be so after the said conversion. If the marriage is after the conversion, then the child so born to such parents, if illegitimate, will remain to be illegitimate.

For the purposes of the 1961 Act, the date of legitimation will be the date of the marriage leading to the legitimation or if the marriage occurred before the prescribed date then the date will be the prescribed date.(9) In order to have the effect as above, the said marriage must be between the said child's mother and father at the time he was born and not when either of them was married to a third person(10) and the marriage must be solemnised and registered in accordance with section 3(1) of the Act. The parents of the child must be domiciled in Malaysia at the date of that marriage which will render the child to be legitimate.(11) However, if the father of such child at the time of the required marriage is not domiciled in Malaysia, but such marriage by the law of the father's domicile, recognises such child as legitimate, then Malaysia will also recognise the child to be legitimate as in section 2(1) of the Act.

By such legitimation, the legitimated child can take interests in his deceased parents' estate under section 6(1) of the Act, as if he was born legitimate.(12) He will also have the same rights and obligations in respect of maintenance and support of himself.(13) He will also stand on the same footing as the other legitimate(14) children of the family to claims for damages, compensation(15) and the like. Such rights and obligations are provided by section 9 of the 1961 Act.

For purposes of travelling, under the Immigration Act 1959/63 (Revised - 1975) he will definitely be considered a child of the family. Thus if the parents are Malaysian citizens, he too will be treated as such. On the other hand, if they are just permanent residents with domiciles in Malaysia, he will be treated as a non-citizen and will require an entry permit or pass to enter or stay in Malaysia as demonstrated by the applicant in the case of In Re Meenal w/o Muniyandi.(16) If such a legitimated

child is still a minor, then upon application by the holder of a permit or pass (section 2(1), ibid.) issued for purposes of entering or staying in Malaysia (section 10(1), ibid.), to have the name of such legitimated child to be included in his or her permit by virtue of section 12 of the same Act.

One important observation that can be drawn is that children born illegitimate to Chinese couples who contracted customary Chinese marriages will always remain illegitimate and cannot be legitimated under the 1961 Act. The problem can be circumvented easily by having subsequent marriages under Civil Marriage Ordinances or church marriages. Thus pure conversion of a potentially polygamous customary marriage to monogamous by re-marrying as stated above, will therefore legitimate a child born to such a couple who would otherwise be illegitimate.

Before the 1976 Act, in order for an illegitimate child to be legitimated, the marriage of his parents had to be valid under section 3(1) of the 1961 Act but not otherwise. Hence if a decree of nullity of marriage was obtained then the child will also be affected in that he will be bastardised by the decree by implication. This situation is now remedied by section 75 of the 1976 Act.

Section 75(5) of the Act states:

> "Notwithstanding section 6 of the Legitimacy Act 1961 all children who are deemed legitimate at birth...shall be so treated in all respects and not as persons legitimated at the date of the marriage or of the legitimacy Act, 1961 as provided therein."

By section 2(1) of the 1976 Act, "child of the marriage" includes an illegitimate child and thus enjoys the same protection, rights and privileges as the children born in lawful wedlock for purposes of maintenance and the like. To invoke the 1976 Act, those concerned must either be ordinarily residents in Malaysia or citizens of Malaysia either

having residence in Malaysia or abroad or persons with Malaysian domicile.

Such a child can be a citizen of Malaysia by operation of law under article 14 of the Constitution if conditions laid down in either Part I or II of the Second Schedule are satisfied. Thus if the marriage for purposes of section 3(1) of the Legitimacy Act 1961, is between a non-citizen female, the child so born illegitimate but legitimated by such marriage can still be a citizen by registration under article 15 clause (2) or (3) of the Constitution. The same will apply to a couple who were originally not citizens but later either one or both of them become citizens of Malaysia at the time of the birth of such a child.

Thus the interaction between the family and citizenship laws of Malaysia is clearly illustrated when one looks into matters affecting legitimacy.

[C] Loss of Citizenship

The paper will not be complete without discussing the question of loss of citizenship however caused, for the family law is closely related either directly or indirectly to matters of citizenship. The case of (L) demonstrates the latter.

In divorce and marriage cases, the welfare of the "child of the family" is certainly a matter of prime importance both to the Court and to the legislature. From earlier discussion, an adopted child and a child legitimated by the marriage of his parents in accordance and in compliance with the Legitimacy Act 1961, will always be treated as the child of the family with the rights, privileges and duties as discussed earlier

(under A and B above). Consideration of the "child of the family" taken by Court can be seen in the case of U. Viswalingam v. S. Viswalingam[17] when Wood J. said,

> "The sum now standing in the joint-names...is £28,000. I had considered in argument whether some part of this should be placed in trust for Ajit during his education,... [and] as I am satisfied that [the mother] will do whatever is right and proper for the completion of Ajit's education."(18)

What his Lordship was trying to convey was that since the sum of £28,000 was not large enough, he did not think it would be necessary to put some of those sums on trust for Ajit for his education because he was satisfied that his mother would look into the interests and welfare of Ajit and to see that he completed his education.

Parents being responsible for the child's welfare, including education, may make a choice as to where their children should receive their education and the like. This choice may affect the citizenship of their children. In the Viswalingam's case, the husband became worried that English was no longer to be the language in which his children were taught, the chances of admission to local university in Malaysia and claimed the presence of fanatic Islamic elements, decided to send Ajit to England to continue his education. Had it not been due to such choice, Ajit could, it is submitted, be a Malaysian citizen by registration under article 15(3) of the Constitution. However, due to that choice - coupled with the family matrimonial problems, Ajit may later decide to follow his mother or decide to acquire citizenship of the United Kingdom taking the advantage of the place of his birth.

From the facts of the case, Prai could certainly be a Malaysian citizen by operation of law under article 14(1)(a) of the Constitution, but may renounce his citizenship of Malaysia in preference to and similar

to that of his mother's should she decide to go back to Ceylon or acquire the citizenship of the United Kingdom. In the absence of any conclusive evidence, whether or not the children will give up their Malaysian citizenship (if acquired) will be purely academic, but such problems of the family leading to such a choice by their parents may result in the loss of Malaysian citizenship.

Similar choice made by parents of a citizen is more clearly seen in the case of In Re Soon Chi Hiang.[19] In this case, the applicant in his affidavit in support of his application to set aside an order made by the Government in pursuant to section 10 of the Banishment Ordinance 1959, stated that he was sent by his parents to Peking in 1953 to further his Chinese education. He further stated in the same affidavit he only concentrated on his studies and did not participate in any political activities that may be or be deemed to be prejudicial to the security of Malaysia. He came back to Malaysia in 1958 and stayed with his parents. Later he got married and had three children. Since his return to Malaysia he had not committed any offence nor was he a member of any political party.

In spite of that, he was still deprived of his citizenship under article 24(2) of the Constitution on the ground that he "has voluntarily claimed and exercised in a foreign country, namely China, rights available to him under the law of that country, being the rights accorded exclusively to its citizens."

Four conclusions can be drawn from this case:

(i) as the result of the choice of his parents, the applicant was deprived of his citizenship, which may not have been so, had such a choice not been made;

(ii) there was nothing to suggest, otherwise than what he has stated in his affidavit in support of his application, that what he actually did was other than pure obedience to the wishes of his parents who must have thought that what they had decided was in the best interest of their son;

(iii) yet notwithstanding those facts and the fact that he was a citizen by operation of law, he was still deprived of his citizenship; and (iv) by that deprivation of his citizenship by the banishment order[20] issued against him, he was thus made a stateless person unless and until accepted by some other country.

In Re Soon Chi Hiang's case, is also an example that loss of citizenship can be political in nature. It was political in that it was decided by the Government that he should be banished and the reason for it must have been (by inference) that the Government was satisfied that the applicant must have participated in political activities that may or deemed to be prejudicial to the security of Malaysia. His participation must have been construed by the Government that he was exercising the rights available to him while he was in Peking under the law of China which were rights accorded exclusively to its citizens. The Government is not bound to disclose the ground(s) as to how it arrived at that conclusion.

In Mak Sik Kwong v. Min. of Home Affairs, Malaysia (No.2),[21] Abdoocader J. said,

> "...for the purposes of the exercise of his powers in making an order of deprivation under Article 24(2), it is open to the respondent to take into consideration relevant confidential information such as intelligence reports and the like without disclosing to the citizen where such disclosure would be prejudicial to the public or national interest."(22)

Article 26B(2) of the Constitution does not require the Minister concerned to be satisfied that statelessness will not result before he can deprive a person of citizenship but is only required to refrain himself from doing so if he is satisfied that statelessness will result. This

can be seen in the words of Wan Suleiman F.J. in the Federal Court case, in Min. of Home Affairs v. Chu Choon Yong,[23] when his Lordship said,

> "It is incumbent for the Minister to be satisfied that the deprivation of citizenship as a prelude to banishment does not have the consequences which Article 26(B)(2) sought to prevent i.e. as a result of such deprivation, such person would not be a citizen of any country or in common parlance a stateless person."(24)

Political considerations and/or decisions resulting in the loss of citizenship without any choice at all by the citizens is well illustrated by the Singapore's decision to come out from Malaysia on 9 August 1965.[25] That decision came as a surprise to every Malaysian citizen. When she became one of the Malaysian states, Her citizens automatically became Malaysian citizens without having to renounce their Singapore citizenship.[26] By that separation, Her citizens ceased to be citizens of Malaysia by virtue of section 12 of the Constitution and Malaysia (Singapore Amendment) Act 1965, though quite a number of them decided to remain as Malaysian citizens. The separation created immigration problems since many of those affected have their wives, children and parents who were reverted back to Singapore citizens. Inter-marriages between Singapore and Malaysian citizens are also common mainly due to similarities in culture, traditions, religions and races of the two countries also posed the same problems.

To overcome those problems, the Singapore Immigration Department decided to issue three types of passes to such Malaysian citizens and can be summarised as follows:[27]

(i) "Special Visit Passes", valid for two months or more, given to those upon application, whose parents or wives and children are Singapore citizens;

(ii) "Long-term Social Visit Passes", will be issued to enable those Malaysian citizens whose parents (also Malaysian citizens) who

have a Singapore work permit and are staying in Singapore or to Malaysian students studying there;

and (iii) "To and Fro Passes" ("pas Ulang Alik"), will be issued (upon application) to Malaysian male citizens married to Singapore citizens staying in Singapore with husbands working in Malaysia or unmarried Malaysian citizens with parents staying in Singapore and who are Singapore citizens.

It is submitted that such immigration matters will not be encountered by such citizens had there not been the political choice of the Singapore Government to come out of Malaysia. That choice was not the citizens' choice but that of the Government of Singapore which is obviously political in nature. The consequence of that choice, Singapore citizens who were also Malaysian citizens before the said separation, ceased to be citizens of Malaysia "by operation of law".[28] Likewise, wives of Malaysian citizens will have to face all the problems relating to both family and citizenship matters as foreign wives. Those problems were unknown to them when they were Malaysian citizens. By virtue of their marriages to Malaysian citizens there will therefore be an interaction between both the family and citizenship law of Malaysia which affect their rights, privileges and duties similar to that faced by all foreign wives.

CHAPTER SIX

PROBLEMS FACED BY COURT

Problems arising both from family and citizenship matters and their interaction can come to Court in one of two ways or a combination of both namely,

(i) when the parties concerned cannot solve their problems amongst themselves;

and (ii) when the aggrieved parties are not satisfied with the decision of the "person or persons"[1] making the same.

In cases where the parties involved are citizens or permanent residents of Malaysia, the question of jurisdiction will not be an issue to the Court. What it has to determine is the nature of the marriage or divorce, as the case may be. If it is monogamous, the law applicable will be basically the same as that applied by the English Court with modification(s), if any, in accordance with Malaysian law.

The case of Mary Ng & Anor. v. Ooi Gim Teong[2] illustrates problems that can arise from polygamous customary marriage. It was held in this case that, under Chinese customary law a husband can divorce his wife unilaterally so long as it was made publicly known and not kept a secret. Since such a divorce was held to be valid by the Court according to Chinese custom, the divorced wife was not entitled to maintenance. In coming to that conclusion, the Court had to base its decision on what the expert in such customary law had to say, which in this case, was Mr Lee Siow Mong whom the Court regarded as an expert.

Though accepted by the Court as an expert, Kenneth K.S. Wee doubted the expertise of Mr Lee Siow Mong[3] though he made no comment as

to the legal recognition of such a divorce based on Chinese custom. He suggested that the approach should be that once such a custom was proved to exist in China, then the burden should shift to its opponent to prove that it does not exist in West Malaysia. It is to be noted that the expert in the Mary Ng's case was called by the respondent. What would be the effect if the wife too called her own expert witness who may have given the evidence contrary to what Mr Lee Siow Mong had given? It is submitted that in such a situation, the Court may have a different view of what constituted a valid divorce according to the Chinese custom on the facts of the Mary Ng's case and the petitioner may just be successful with her claim for maintenance. It would be different if the expert witness was called by the Court in which case he would then be a neutral witness and thus avoid possible suspicion of bias. Thus in such a case, it is submitted that the Court should have advised the wife to call her own expert witness and if she cannot do so, then the Court could call one as a neutral expert witness.

In the Mary Ng's case, it can be observed that there was no agreement of any kind between the applicant and the respondent in respect of maintenance. So far as the maintenance to the child of the family was concerned, it was not disputed by the respondent. What will be the position if there was such an agreement between them? This question is perhaps answered by the case of Low Ai Bee v. Ralph Eu Peng Lee.(4)

In the Low Ai Bee's case, there was an agreement drawn between the husband and the wife the day the marriage was dissolved. The said marriage was contracted according to the Chinese custom similar to that as in the Mary Ng's case. The agreement was exhibited as (P1) in the proceedings whereby the wife sought to enforce the same which the husband contended was unenforceable since their marriage was polygamous in nature

and thus the Court has no jurisdiction to adjudicate such claim since the said agreement was in consideration of the dissolution of such marriage. The agreement provided inter alia:

> "(i) that the wife shall be entitled to the sole custody, control, maintenance and guardianship of the said child and the husband shall not in any way interfere...
> (ii) that the husband shall pay to the wife for her separate use and the maintenance and support of herself and the said child a sum of $600 per month..."(5)

After hearing the contentions of the counsels for both parties, Abdul Hamid J (as he then was) said,

> "Here, the court is not called upon to adjudicate as to the dissolution of the marriage or on any matters relating to matrimonial relief but to determine purely on the question of the payment of the maintenance which the dependent voluntarily agreed to pay to the plaintiff and the child of the marriage. This court, in my view, has jurisdiction to enforce the agreement.
> ....Clearly, under the Married Women and Children (Maintenance) Ordinance 1950, the plaintiff could, if the defendent had not agreed to pay maintenance, apply...and the court would have jurisdiction to make an order requiring the defendant to make monthly allowance for the maintenance of the child."(6)

In both the said cases, the Court awarded the "child of the family" maintenance under the 1950 Ordinance with a slight difference. In the Mary Ng's case, the liability (except the quantum) of the husband to pay maintenance to his child was not in dispute. In Low Ai Bee's case, supra, what was contested was the enforcement of the agreement entered into by the parties on January 11, 1971, the date of the dissolution of the marriage. That, it is submitted, amounted to an indirect dispute by the husband to pay maintenance to his son by alleging that the agreement was not enforceable against him. Item (ii) above, clearly shows that part of the sum agreed upon and stipulated must have also been meant for and towards the maintenance of their child. Though his Lordship did not make any reference to the wife's right to claim maintenance under

the Ordinance in respect of the dissolution of a customary polygamous marriage identical to that of Mary Ng's case, supra, it was nevertheless made very clear about the child's right.

In the Low Ai Bee's case, the challenge of the Court's jurisdiction was not based on the parties' citizenship or residence but on the question of the enforcement of a separation agreement of a customary polygamous marriage. Whether or not the Court will entertain any matrimonial proceedings of non-citizens or residents can be seen in the case of Mohan v. Mohan,[7] where the parties to the proceedings were domiciled in Ireland. In this case, the wife appealed against the decision of the High Court in Penang[8] in dismissing her petition for divorce under section 49(1)(b) of the Divorce Ordinance 1952 based on three years' residential qualification. In allowing the appeal by the wife and touching on the "three years' ordinarily resident" qualification, Ong C.J. (Malaya) said,

> "With respect I think the learned judge appears to have overlooked the fact that immediately after their marriage in Ireland on July 4, 1955, the parties left for Malaya and have for the past 15 years had their matrimonial home in the Federation. In the circumstances there can be no doubt that the petitioner has been 'ordinarily resident' in the Federation since 1955."(9)

His Lordship posed a question as to the object and purpose of the said section and was of the opinion that it was to spare a wife of needless hardship. Such observation, in the circumstances, should be endorsed as correct since as pointed out by his Lordship, to refuse the wife of the remedy because of the parties' domicile was Ireland amounted to "compelling her to petition for divorce in Ireland"[10] and stated,

> "The prescribed period of three years could only have been intended to prevent transient visitors, who are not bona fide resident[s], with some degree of permanence in the Federation from availing themselves of the court's assistance."(11)

Thus temporary absence as found by the learned trial judge at the trial of the petition, should not, it is submitted, deprive her of the remedy. It can be argued that given the presence of the matrimonial home in the Federation, they must have intended to treat Malaysia as their permanent residence[12] though domiciled in Ireland.

Questions of Muslim marriages and divorces are matters for "kathi" (Muslim "judge") where parties involved are Muslims. However, should a situation like that in the case of U. Viswalingam v. S. Viswalingam[13] be faced by a Malaysian Court, it is contended that, it will not have much problem since the Court will recognise and give effect to the ruling of the "fatwa". Hence as submitted earlier, the wife will fail in her petition if she were to bring her action for divorce in a Malaysian Court.

Under the Law Reform (Marriage and Divorce) Act 1976, the Court is well guided as to matters of marriage and divorce, save those as affecting the Muslims, natives of Sabah and Sarawak and the aborigines of West Malaysia (section 3(4), ibid). All marriages after 1 March 1982, will be monogamous. Those which were polygamous will be deemed as monogamous by virtue of section 4(2) of the said Act.

The jurisdiction of the Court to grant divorce is now given by section 48(1) which stipulates:

> "(1) Nothing in this Act shall authorise the Court to make any decree of divorce except -
> (a) Where the marriage has been registered sections 3(1) and 27 or deemed to be registered section 4(2) under this Act; or
> (b) Where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
> (c) Where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia."

Thus in order for the Court to find jurisdiction, it must be satisfied that (i) the marriage in question is monogamous in effect and (ii) both parties are domiciled in Malaysia. However a wife can still petition the Court for a divorce against her husband notwithstanding section 49(1)(c) if she falls either within paragraph (a) or (b) of section 49(1). In such a case, the Court will then determine the issues in accordance with section 49(2) of the same.

In nullity proceedings, the Court has power to grant a decree of nullity of marriage where both parties to the marriage reside in Malaysia at the time of the commencement of the proceedings under section 67(c) of the Act so long as the said marriage has been registered or deemed so under the Act[14] or where the marriage contracted under a law providing or in contemplation of a monogamous marriage.[15]

In exercising matrimonial jurisdiction, the Court may order a man to pay maintenance to his wife or his former wife[16] and in special circumstances order the wife to pay maintenance to her husband or former husband.[17] A woman can be ordered to pay or contribute towards the maintenance of her child if it is satisfied reasonable to do so having regards to her means.[18] At any time the Court may order a man to do the same for the benefit of his child.[19] Injunction can also be issued against molestation under section 103 at any stage of any matrimonial proceedings.

Unlike with marriage and divorce cases, problems of citizenship affecting the family to the marriage come before the Court normally as the result of dissatisfaction with the decision of those executive powers.

Dissatisfaction in the form of the right of a wife of a citizen to remain in Malaysia was advanced in the case of In Re Meenal w/o Muniyandi.[20] As such the applicant was not satisfied that she should be detained with a view to deportation and thus contended that such

detention was unlawful. Her contentions were not accepted by the Court which held that she was not entitled as of right to an entry permit to enter or remain in Malaysia by reason solely of the fact that she was married to a citizen. However, as a general rule, it can reasonably be concluded from that case that she was given special facilities by reason of her marriage to a citizen which will not easily be given to "pure" non-citizens unless they are "special categories of persons such as professional or persons with specialist qualifications and persons with a special certificate from the Minister certifying that their admission is in the economic interest of the country."[21] There was no evidence to show that she appealed against the decision requesting her to leave Malaysia. That, it is submitted, may have been the reason why the Court endorsed the decision of such executive act. Had she appealed against such a decision, it would at least enable the Court to investigate as to the reason for refusal and may have come to a different conclusion.

In Kuluwante (an Infant) v. Govt. of Malaysia & Anor.,[22] the plaintiff born a non-citizen was taken by her mother to India to attend school travelling on an Indian Passport. Later she was left alone there while the mother came back to Sarawak and in 1972 she became a Malaysian citizen and surrendered her Indian Passport. The rest of the family later too became Malaysian citizens. In 1973, the plaintiff's father applied to the Registrar of citizenship to register the plaintiff as a citizen under article 15(2) of the Constitution. The application was rejected. In 1976, both the plaintiff and her father made representations to the Registrar for reconsideration and was again rejected. The reason for the rejection was that she was not a permanent resident of Sarawak when the application was made. It is to be noted that the plaintiff did not appeal to the Minister under section 4 Part III of the Second Schedule of

the Constitution against the decision of the Registrar and therefore the Court should not have entertained the plaintiff's claim for the declaration that the decision of the Registrar as invalid.

The Court held that in exercise of its inherent supervisory jurisdiction it has the general power to make declaratory judgement in order to ensure that statutory tribunals, whether judicial or administrative, made their determination in accordance with the law and therefore could entertain an action for declaration to correct an error of law in proceedings invalid or a nullity. However it was held that since the plaintiff had not exhausted the alternative remedy of an appeal to the Minister, the claim for the declaration should be dismissed. Again failure to appeal resulted in the remedy sought being refused. The effect of that refusal by the Registrar will be that the plaintiff will have to apply for citizenship on her own behalf later and not by registration.

The plaintiff went to India and stayed there not on her own choice but that of her parents' but was still being deprived of her right to be registered as a citizen. Similar choice made by the parents for the sake of education of their child which resulted in complete deprivation of citizenship is exhibited by In Re Soon Chi Hiang,[23] which has been discussed earlier and needs no repetition here. In that case, the Court did not set aside the order of banishment because the applicant failed to discharge the onus to the satisfaction of the Court that he was not actually involved in political activities while he was in China other than his affidavit in support of his application to set aside the order. The Court however, held the view that the words,

> "A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any Court,"

does not, in the absence of explicit words to that effect, take away the Court's general and inherent supervisory power to correct an error of law in the proceedings before a tribunal by way of a declaratory judgement[24] or for an order of certiorari.[25] Thus the Court, it is submitted, could and will allow appeal or review the tribunal's findings of law (though not the facts) in appropriate cases in order to correct an error of law since,

> "...Minister [or tribunal] must be compelled to observe the law, and it is essential that bureaucracy must be kept in its place [that is, confining only to findings of facts and leaves that of law to the Court]."(26)

The above view was not shared by Ong Hock Sim J., in Liew Shin Lai v. Min. of Home Affairs,[27] when he said,

> "Whatever complaints he may wish to present with regards either to the manner or the circumstances under which the order of deprivation [of citizenship]... or as to its propriety, cannot be entertained...Even if he wishes to make an attempt to challenge the order of deprivation, he would find himself barred from doing so by...Part III of the Constitution...."(28)

and thus dismissed the application to set aside the banishment order made against the applicant. He however, pointed out in Kung Aik v. P.P.[29] by way of obiter, that he hoped the authority dealing with such matter will take it as their primary duty to satisfy themselves of, and to make full inquiry into, the status of a person before making such order under the Banishment Ordinance. Since there was no objection by the P.P. against the setting aside of such order, his Lordship exercised the Court's inherent jurisdiction to do so. It is with the greatest of respect submitted that his Lordship setting aside the banishment order in Kung Aik's case, supra, is understandable since there was no objection from the P.P. Based on his reasoning in the Liew Shin Lai's case, it is submitted also that should there be an objection by the P.P., his Lordship would almost certainly have dismissed the application, for to do otherwise

would amount to contradicting himself in the matter of interpretation of Part III of the Constitution. It is therefore contended that the view expressed in In Re Soon Chi Hiang and the Kuluwante's case, must be an accurate statement of law affecting citizenship matters.

Be that as it may, unless and until the decision of the Federal Court[30] is available on this matter, it is contended that matters involving citizenship will remain uncertain. However, it is submitted that from discussion above, there is a definite interaction between citizenship and family laws of Malaysia.

CHAPTER SEVEN

CONCLUSION

It has been demonstrated that man "in pursuit of value" in search for his needs and wants for betterment for himself and his family exercises his choice and preferences. Marriage and citizenship choice are definitely the result of such exercise and are inter-related. After exercising such choice and preference he may later find out that there are better alternatives or what he has already chosen may not be suitable and this may be the cause of him changing his citizenship or divorce.

Citizenship and family laws of Malaysia are based and evolved from historical development of Her population structure that affects the rights, duties and obligations of the present citizens which are found in Her Constitution directly or indirectly. History too differentiates the Muslim citizens from those non-Muslims with different rights and duties. Amongst those rights is the right to marry according to one's custom or religion. The same applies to divorce.

The family law in Malaysia can be classified into:

(i) Pre- and Post-1976 Act period; and

(ii) Muslim and Non-Muslim laws of marriage and divorce.

So far as Muslim citizens are concerned the Muslim law of Marriage and Divorce is not affected by the 1976 Act. Its law is based on Islamic principles found in the Holy Koran and a matter for "kathi". In case of doubt, resolve to "fatwa" will be the result. The "fatwa" will bind the parties concerned and if gazetted will bind all Muslims faced with the same problem(s).

For non-Muslim citizens, the law of Marriage and Divorce after 1 March 1982 will be governed by the Law Reform (Marriage and Divorce) Act 1976. The Act now prohibits polygamous marriage amongst non-Muslim citizens and recognises only monogamous marriages. The ground for divorce is made uniform throughout Malaysia and is now based on irretrievable break down of marriage. It is, in other words, a comprehensive and codified law of Marriage and Divorce affecting all non-Muslim citizens throughout Malaysia and also regulates those such citizens who contracted their marriages abroad. Registration of all marriages is now made compulsory by the Act. The Act also declares that all subsisting polygamous marriages on the date of coming into force of the same will be deemed monogamous and thus prevents the parties to such marriages to contract another valid marriage during the subsistence of the existing polygamous marriage. It also deals and regulates in detail the law as to divorce.

For pre-1976 Act, marriages and divorces, the law applicable to them, depended on the type of the marriage contracted. In a customary marriage, which is polygamous in nature, the appropriate custom and rites must be observed. If that was observed, then the law will recognise as valid such marriage and divorce. In the latter case, the wife to such a marriage cannot claim maintenance from her husband as demonstrated by the Mary Ng's case,[1] but the child of the family can do so under the Married Women and Children (Maintenance) Ordinance 1950,[2] thus certain degree of injustice may be caused. Those who by their custom were permitted to contract customary marriage can however, opt to have their marriage conducted or to be re-married under the Civil Marriage Ordinance 1952, in which case they will not then be able to contract another marriage during the subsistence of the first marriage. For Christian Chinese,

for example, they can also contract Christian marriages under the Christian Marriage Ordinance 1956 or other similar Ordinances then in force in Malaysia; but this could not prevent them from contracting another polygamous marriage.

Under the Registration of Marriage Ordinance 1952, there was no provision under the same to have such polygamous marriages registered.(3) Thus the Ordinance is more for a statistical purpose. However, evidence of registration of foreign marriages under this Ordinance is the preliminary step to have a wife of a citizen registered under article 15(1) of the Constitution for purposes of acquiring Malaysian citizenship.

For monogamous marriages and divorces, they were governed by the same principles as applied by English Court with modification(s) according to any written law of Malaysia then in force.

Questions like adoption or legitimacy and the like also differ between Muslim and non-Muslim citizens. All relevant Ordinances and Acts pertaining to such matters will not apply to Muslim citizens. However, legitimation by marriage was not available to Chinese who contracted customary polygamous marriage, if the said marriage was intended to legitimate an illegitimate child. That could be circumvented by converting the potentially polygamous marriage to monogamous by re-marrying under the appropriate Ordinance. Either adopted child or legitimated child will be treated as the "child of the family" for purposes of inheritance and the like.

Since the question of citizenship affects family law or vice versa, problems that are real in fact and cannot be solved by the parties concerned, will definitely come before the Court.

Renunciation of citizenship can be due to factors like culture, adaptability or family betterment and opportunity as the result of marriage of a citizen to a non-citizen. If the non-citizen wife married

to a citizen were to remain in Malaysia, she must possess a valid pass, since she cannot claim as of right to remain in Malaysia purely because she is married to a citizen, though special facilities may be accorded to such a wife.[4]

Where the citizen is dissatisfied with the tribunal's decision, the Court can always remedy the defect in law though not the facts,[5] but all avenues of appeal must be attempted, otherwise the Court will not grant relief,[6] though it is not an opinion shared by all judges[7] of Malaysia. In such cases, a citizen can loose his citizenship making him a stateless person unless and until another country is prepared to accept him as Her citizen which is rather difficult to expect.

Thus, while the 1976 Act, makes the non-Muslim laws of marriage and divorce and matters incidental thereto more certain, the question of citizenship is still uncertain. Perhaps since citizenship is such an important matter to everyone, it may be an appropriate time for the Government to make citizenship laws simple enough for Her citizens to understand and also give necessary publicity especially, how a citizen can be deprived of his citizenship. By doing so, it is respectfully submitted, the Government may be able to develop a better and real sense of loyalty to the country. Further, such a noble act, could unite the families of Malaysian citizens better and thus reduce the problems faced by both family and citizenship laws. It will also help the Court reduce its workload and hence will be able to devote its time to other urgent and pressing needs.

By way of suggestion, such publicity can be included as one of the leaves when issuing Malaysian Passports to Her citizens informing the holders how they can be deprived of their citizenship and the consequences of such loss. Alternatively, such matters should be considered as part

of the school curriculum and also the consequences of such loss on family law. Sense of legal consciousness should also be encouraged right from a tender age.

Perhaps it may again be stressed here that an establishment of a special tribunal to deal with matters of illegal immigrants (especially those from Indonesia) that affect both citizenship and family laws of Malaysia be considered by the Government.

It is therefore contended that, there is no doubt that family law is certainly inter-related closely with matters of citizenship and sometimes superimposed on each other that one tends to think that they have no connection with each other at all. In conclusion therefore it is submitted that, there is a definite interaction between the family and citizenship laws of Malaysia.

Appendix (A)

Mereka ini boleh minta pas jangka panjang ke Singapura

WARGANEGARA Malaysia yang mempunyai ibu bapa, anak atau isteri yang menjadi warganegara Singapura kini dibolehkan memohon salah satu dari tiga pas jangka panjang yang baru dikeluarkan oleh Jabatan Imigresen Singapura.

Pegawai Penerangan Imigresen Singapura, Encik Goh Ck yang dihubungi oleh Utusan Malaysia memberitahu, tiga pas jangka panjang yang baru dikeluarkan itu ialah, pas jangka panjang, pas lawatan sosial jangka panjang (L-T SVP) dan pas perjalanan ulang alik.

"Bagi pas jangka panjang, para pemegangnya akan dapat tinggal di Singapura lebih dari dua bulan, bergantung kepada keperluan termasuk warganegara Malaysia yang mempunyai ibu bapa, anak-anak atau isteri yang menjadi rakyat Singapura," kata Encik Goh.

Menurutnya, bagi rakyat Malaysia yang memegang borang masuk dan keluar yang berwarna hijau, kini boleh memohon pas lawatan sosial jangka panjang.

Pas lawatan sosial jangka panjang juga boleh dipohon oleh para pelajar Malaysia yang telah tamat pengajian tetapi masih tinggal di Singapura sehingga mereka membuat keputusan sama ada melanjutkan pelajaran atau mencari pekerjaan.

Permit kerja

"Bagi warganegara Malaysia yang berumur di bawah 21 tahun dan mempunyai ibu atau bapa yang memegang permit kerja Singapura, juga boleh memohon pas yang sama," tambahnya.

Sementara warganegara Malaysia yang berkahwin dengan wanita rakyat Singapura sebelum 1 Jun yang tinggal di Singapura, tetapi bekerja di Malaysia, boleh juga memohon pas perjalanan ulang alik.

Manakala rakyat Malaysia (warganegara) yang masih bujang dan mempunyai ibu bapa warganegara Singapura, tinggal di Singapura bersama ibu bapa mereka, tetapi bekerja di Malaysia, boleh juga memohon pas perjalanan ulang alik.

Katanya, pas yang sama juga dikeluarkan kepada para pemandu teksi Malaysia yang membayar cukai jalanraya Singapura dan mempunyai permit masuk ke Singapura bagi teksi mereka.

Para pemandu dan kelindan lori rakyat Malaysia yang sering berulang alik ke Singapura juga boleh memohon pas jenis ini.

Perubahan baru

Manakala pemandu bas berdaftar di Malaysia yang membawa kanak-kanak sekolah dan pemegang permit kerja harian ke Singapura, boleh juga memohon pas tersebut.

Menurut beliau, bagi pas perjalanan ulang alik boleh didapati di pusat pemeriksaan Woodlands Seberang Tambak Johor di sini yang mula dibuka sekarang hingga 30 Mei depan.

Manakala pas lawatan sosial jangka panjang dan pas jangka panjang boleh didapati di JabatanImigresen, Empress Place.

Sementara bagi warganegara Malaysia yang mempunyai ibu bapa yang memegang permit kerja di Singapura, boleh memohon di pejabat permit kerja, Anson Road, Singapura.

Cont.
Appendix (A)

Sementara Pengarah Imigresen Wilayah Selatan Encik Dosmy Ibrahim ketika dihubungi berkata perubahan baru yang dibuat oleh Jabatan Imigresen Singapura itu adalah hak mereka dan sepatutnyalah pihak Singapura yang mengeluarkan sebarang peraturan mengenai kemasukan rakyat Malaysia ke Singapura, manakala pihak Imigresen Malaysia tidaklah semestinya diberitahu terlebih dahulu.

Walau bagaimanapun, menurutnya, pihak Imigresen Malaysia sehingga ini belum membuat sebarang perubahan baru mengenai pas-pas masuk bagi rakyat Singapura ke Malaysia.

(91)

Appendix (B)

Permit ditimbang selepas 5 tahun

KUALA LUMPUR 28 Nov. - Pas lawatan (sosial) dari setahun ke setahun akan diberikan kepada isteri-isteri asing warganegara Malaysia yang berkahwin sebelum 6 Februari 1980 untuk selama lima tahun.

Selepas tempoh tersebut permohonan permit masuk mereka akan dipertimbangkan, menurut keputusan kerajaan mengenai penyemakan semula dasar kemasukan isteri asing yang akan berkuatkuasa lusa.

Keputusan yang diumumkan oleh Jabatan Imigresen juga menyebutkan bahawa isteri-isteri asing yang berkahwin selepas 6 Februari 1980 akan diberi pas lawatan (sosial) dan dilanjutkan selama enam bulan.

Selepas tamat tempoh tersebut pas lawatan mereka boleh dilanjutkan dari setahun ke setahun dan mereka juga layak memohon permit masuk selepas lima tahun berada di negara ini.

Isteri-isteri asing yang tidak berpuas hati dengan keputusan Ketua Pengarah Imigresen boleh merayu kepada Menteri Hal Ehwal Dalam Negeri.

Kenyataan itu menambah isteri-isteri asing yang berkahwin sebelum atau pada 6 Februari 1980 dan belum diberi pas lawatan (sosial) dari setahun ke setahun, harus membuat permohonan di pejabat-pejabat imigresen.

Permohonan boleh dibuat dengan borang rasmi dan bayaran $10 dengan disertakan salinan fotostat sijil perkahwinan.

Isteri-isteri asing yang telah mendapat kemudahan ini hanya diperlukan membuat permohonan bila pas lawatan (sosial) mereka hampir tamat.

Kenyataan itu menegaskan, mereka yang telah berkahwin sebelum atau pada 6 Februari 1980 tetapi telah tinggal berasingan selama lima tahun berterusan adalah tidak layak mendapat kemudahan tersebut.

Isteri-isteri asing yang berkahwin selepas 6 Februari 1980 diminta membuat permohonan di pejabat-pejabat imigresen untuk mendapatkan pas lawatan (sosial) untuk tempoh enam bulan.

Permohonan ini harus dilakukan dengan borang rasmi dan bayaran $10 beserta salinan fotostat sijil perkahwinan dan/atau bukti-bukti lain yang mengesahkan perkahwinan mereka.

Dalam tempoh enam bulan itu Jabatan Imigresen akan meneliti dokumen-dokumen yang dikemukakan bagi mempastikan ketulenan perkahwinan mereka.

Selepas tempoh enam bulan itu pas lawatan (sosial) akan diperbaharui dari setahun ke setahun jika permohonan dibuat, dengan menandatangani suatu bon.

Menurut kenyataan itu syarat menandatangani bon ini sebenarnya telah diamalkan sebelum ini. Ia bertujuan mempastikan kedudukan isteri-isteri asing akan terjamin dan tidak teraniaya sekiranya berlaku perpisahan, perceraian, atau didapati perkahwinan itu adalah suatu perkahwinan untuk mendapat kemudahan.

Isteri-isteri asing yang telah dibenarkan tinggal di negara ini atas pas lawatan (sosial) dari setahun ke setahun adalah bebas untuk keluar masuk negara ini, dan dibenarkan menyambungnya jika pas itu tamat tempohnya semasa mereka berada di luar negeri.

Kenyataan itu mengingatkan bahawa isteri-isteri asing yang pertama kali memasuki negara ini dan berasal dari negara yang perlu visa, harus mendapatkan visa sebelum memasuki negara ini. Selepas ini mereka boleh membuat permohonan mendapatkan pas lawatan (sosial).

Kenyataan menambah bahawa kemudahan pas akan ditarik balik sekiranya isteri-isteri asing didapati telah berpisah atau bercerai dengan suaminya ataupun jika perkahwinan mereka

Appendix (C)

Isteri2 asing selepas 6 Februari dibenar melawat negara asal

KUALA LUMPUR, 16 Dis. - Wanita asing yang berkahwin dengan rakyat Malaysia selepas 6 Februari tahun lalu adalah dibenarkan melawat negara asal mereka jika mereka mahu, kata Timbalan Ketua Pengarah Imigresen, Encik Ibrahim Abdul Malek hari ini.

Katanya, mereka boleh melawat tanahair mereka sendiri kerana mereka akan diberi layanan yang sama seperti pelawat-pelawat lain yang datang ke negara ini.

Encik Ibrahim memberi penjelasan ini berikutan satu kemusykilan yang ditimbulkan oleh seorang pembaca dalam sebuah akhbar tempatan berhubung dengan dasar baru Imigresen – yang menghendaki isteri-isteri asing mendiami negara ini selama lima tahun berterusan sebelum diberi taraf pemastautin tetap.

Pembaca itu mendakwa adalah tidak adil untuk memaksa para isteri asing tinggal di Malaysia selama lima tahun sebelum mereka dibenarkan ke luar negeri.

Encik Ibrahim menegaskan dasar baru itu jelas menyatakan bahawa mereka yang berkahwin selepas 6 Februari, tahun lalu akan diberi pas lawatan sosial sebagai pelawat biasa bila memasuki negara ini.

Pas tersebut apabila tamat tempohnya akan dilanjutkan enam bulan lagi dan selepas itu hendaklah diperbaharui tiap-tiap tahun mengikut peraturan yang ditetapkan oleh Ketua Pengarah Imigresen.

Encik Ibrahim berkata mereka dari kategori itu bagaimanapun hanya layak memohon permit masuk setelah berada di negara ini selama lima tahun.

Beliau menegaskan sekali lagi kelayakan untuk memohon tidak bermakna bahawa pemohon itu mempunyai hak mendapat taraf warganegara.

Adalah menjadi hak mutlak kerajaan untuk menolak atau melayani sebarang permohonan, jelasnya. - Bernama.

Appendix (D)

KENYATAAN AKHBAR JABATAN IMIGERESEN
BERKAITAN DENGAN PENYEMAKAN SEMULA DASAR
KEMASUKAN ISTERI-ISTERI ASING KEPADA
WARGANEGARA MALAYSIA

1. Kerajaan telah membuat keputusan mengenai kemasukan isteri-isteri asing seperti berikut:-

(i) Isteri-isteri asing yang berkahwin sebelum 6hb. Februari, 1980, samada mereka membuat permohonan sebelum atau selepas 6hb. Mac, 1980, mereka akan diberi Pas Lawatan (Sosial) dari setahun ke setahun selama 5 tahun. Hanya selepas tempoh itu permohonan Permit Masuk mereka akan dipertimbangkan.

(ii) Isteri-isteri asing yang berkahwin selepas 6hb. Februari, 1980, mereka akan diberi Pas Lawatan (Sosial) sebagai pelawat biasa di pintu-pintu masuk dan selepas itu akan dilanjutkan selama 6 bulan lagi. Selepas tempoh tersebut dan tertakluk kepada syarat-syarat yang dikenakan oleh Ketua Pengarah Imigeresen, Pas Lawatan mereka akan dilanjutkan dari setahun ke setahun. Isteri-isteri asing dalam gulongan ini layak memohon Permit Masuk selepas 5 tahun mereka mula memasuki negara ini.

..2/-

(iii) Mereka yang tidak berpuashati dengan keputusan Ketua Pengarah Imigeresen bolehlah merayu kepada YAB. Menteri Hal Ehwal Dalam Negeri.

2. Segala keputusan Kerajaan ini akan dilaksanakan oleh Jabatan Imigeresen secara serentak di seluruh negara mulai hari Isnin hadapan iaitu pada 30hb. November, 1981. Oleh itu:-

(i) Bagi isteri-isteri asing yang Berkahwin sebelum atau pada 6.2.1980.

(a) Mereka yang belum diberi pas lawatan (Sosial) dari setahun ke setahun hendaklah membuat permohonan di Pejabat-Pejabat Imigeresen dalam Borang Resmi dengan bayaran sebanyak $10/= berserta dengan salinan photostat Sijil Perkahwinan. Atas penerimaan permohonan tersebut Pas Lawatan (Sosial) untuk setahun akan dikeluarkan. Bagi mereka yang telah mendapat kemudahan ini, mereka hanya diperlukan membuat permohonan apabila Pas Lawatan (Sosial) yang ada hampir tamat.

(b) Walaubagaimanapun, bagi mereka yang telah berkahwin sebelum atau pada 6.2.1980

..3/-

tetapi telah tinggal berasingan selama 5 tahun berterusan adalah tidak layak mendapat kemudahan di perenggan i(a) di atas.

(ii) Bagi isteri-isteri asing yang berkahwin selepas 6.2.1980.

(a) Mereka dalam gulongan ini hendaklah membuat permohonan di Pejabat-Pejabat Imigeresen dalam Borang Resmi dengan bayaran sebanyak $10/= berserta dengan salinan photostat Sijil Perkahwinan dan/atau bukti-bukti lain yang menunjukkan perkahwinan itu tulin. Atas penerimaan permohonan ini, Pas Lawatan (Sosial) untuk 6 bulan akan dikeluarkan.

(b) Dalam tempoh 6 bulan ini pihak Jabatan Imigeresen akan meneliti dokumen-dokumen yang dikemukakan bagi mempastikan ketulinan perkahwinan.

(c) Selepas tempoh 6 bulan itu, Pas Lawatan (Sosial) akan diperbaharui dari setahun ke setahun jika permohonan dibuat.

..4/-

Permohonan bagi pembaharuan hendaklah dibuat dalam Borang Rasmi serta menanda tangani suatu Bon. Bon ini sebenarnya telah diamalkan selama ini mengikut peruntukan yang termaktub dalam undang-undang.

Penggunaan Bon ini adalah semata-mata bertujuan mempastikan kedudukan isteri akan terjamin dan tidak teraniaya sekira berlakunya perpisahan, perceraian, atau di dapati perkahwinan itu adalah satu perkahwinan untuk mendapat kemudahan.

3. Isteri-isteri asing yang telah dibenarkan tinggal atas Pas Lawatan (Sosial) dari setahun ke setahun adalah bebas untuk keluar masuk negera ini. Sekiranya Pas Lawatan (Sosial) mereka itu mati atau habis tempohnya semasa berada di luar negeri, semasa mereka masuk balik ke negera ini, mereka akan dibenarkan masuk bagi membolehkan mereka memperbaharui Pas Lawatan (Sosial) dari setahun ke setahun di Pejabat Imigeresen.

4. Isteri-isteri asing yang pertama kali memasuki negara ini, mereka akan diberi Pas Lawatan (Sosial) sebagai pelawat biasa di pintu-pintu masuk dan bagi mereka dari negara yang perlu visa hendaklah mendapatkan visa sebelum memasuki negara ini. Jika mereka berkahwin sebelum

6hb. Februari, 1980, mereka hendaklah membuat permohonan Pas Lawatan (Sosial) dari setahun ke setahun menurut cara-cara yang dinyatakan di para 2(i) (a) di atas, dan bagi mereka yang berkahwin selepas 6hb. Februari, 1980, mereka hendaklah membuat permohonan menurut cara-cara yang dinyatakan di para 2(ii)(a).

5. Perlu diingatkan di sini bahawa kemudahan ini hanya diberikan khusus kepada isteri-isteri asing yang perkahwinannya masih ujud dan masih kekal sebagai seorang isteri.
Kemudahan ini akan ditarik balik sekiranya isteri-isteri asing itu telah berpisah atau bercerai dengan suaminya atau jika di dapati perkahwinan mereka itu tidak tulin.

Dikeluarkan oleh
Jabatan Imigeresen Malaysia,
Kuala Lumpur.

28hb. November, 1981.

FOOTNOTES

CHAPTER ONE

1. I would not be able to produce this paper without the necessary basic essential materials like the 1976 Act and the like had it not been for the kind assistance of Mr K. S. Dass, an Advocate and Solicitor, High Court of Malaya, who promptly posted those materials to me from Malaysia upon request, to whom I am most truly obliged. My special gratitude is also recorded to the Government of Malaysia for their financial support. For their understanding and moral support, I would also like to take this opportunity to thank Bada and Azlan.

CHAPTER TWO

1. J.S. Mackenzie in his book "Fundamental Problems of Life - An Essay on Citizenship as Pursuit of Value," (Allen & Unwin, The MacMillan Co., London, 1928), argued human wants or needs in pursuit of values are always aimed at what can be called as "goodness" to achieve what a man considers are best for him and possibly his family which affect his choice. It is therefore submitted that, marriage and citizenship are two examples of such choices. Freedom of association, one of the fundamental rights of a citizen, includes the freedom of choice to marriage.

2. A's family may know B's family very well. As such, both A and B know each other. However, not known to either A or B, there may be family arrangement to have them married to each other in order to foster closer relationship between the two said families. As the result of the arrangement, A was later married to B.

   In the alternative, A by his own free will may decide to be engaged to B with the consent and blessings of both the families. While being so engaged to B, A may come to know C. Contrary to A's choice of knowing C, he fell in love with C at first sight and decided to marry C instead.

   Either of the above examples, it is submitted, can be considered more of a fate rather than the exercise of A's true choice.

3. Example, Citizenship Act 1977, provides the law affecting New Zealand citizens.

4. Formed on 16 September 1963 vide L.N.214/1963. It was formerly known as "The Federation of Malaya", otherwise also known as "Malaya" or "Federation", consisting of eleven states. They are Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang (including Province Wellesley), Perak, Perlis, Selangor and Trengganu.

   On formation of Malaysia, the states of Sabah, Sarawak and Singapore were incorporated into the Federation. On 9 August 1965, by section 3 of the Constitution and Malaysia (Singapore Amendment) Act 1965 (No.53), Singapore ceased to be one of the states of the Federation. The words "states of Sabah and Sarawak" were substituted for the words "Borneo States" with effect from August 27, 1976 by the Constitution (Amendment) Act 1976 (No. A354) s.43.

   The people of Malaysia are called Malaysians.

5. The "Sultans" are the Malay Rulers of each state in West Malaysia except Malacca, Penang and Negri Sembilan. In Negri Sembilan, he is styled as "Yang DiPertuan". In the states of Malacca and Penang (West Malaysia) and Sabah and Sarawak (East Malaysia), the Heads of the states are known as "Yang DiPertuas" (formerly known as "Governors"). They are appointed in accordance with section 19A(1) of the Eight Schedule of the Federal Constitution of Malaysia - Reprint No.2 of 1979, (incorporating all amendments up to 1 May 1977, (hereafter I will only refer to it as "the Constitution").

6. Article 32(1) of the Constitution.

7. Ibid, Art. 3(1).

8. Later, the title "Megat" was changed to "Sultan".

9. Also spelt as "Moslem".

10. Rubber (*Hevea brasiliensis*) was introduced to Singapore Botanical Garden from Brazil by Henry Ridley in 1876.

11. Prior to that, the said issue was never really raised with full force since it must have been considered not that important. That, it is submitted can be easily explained, since the concentration of those

immigrants was for the accumulation of wealth rather than legal status affecting citizenship matters.

12. Vide G.N. 6/5-2-48.

13. Is dealt with Part XII of the 1948 Agreement.

14. Ibid, s.124(3)(b) which defined "Malay" as a person who habitually speaks Malay, professes the Muslim religion and conforms to Malay customs.

15. Was a Crown Colony. So far as Malaysia is concerned, the states involved were: (a) Penang (1786) when Francis Light took possession of Penang Island; (b) Province Wellesley (1800) by agreement between the Sultan of Kedah, Sultan Diyanddin Mukarram Syah and Lieutenant-Governor Sir George Leith; (c) By the Anglo-Dutch Treaty of 1824 it provided for the cessation of Malacca to Great Britain and recognized Singapore as a British possession; and (d) Labaun (in the North Borneo states) in 1881. When the Japanese had been returned to Japan, after a brief period of British military administration the civilian government was drastically reorganized in 1946 and later the colony of the Straits Settlements affecting Malaysia was disbanded.

16. When Singapore was one of the states of Malaysia (see footnote (4) above), Her citizens were also citizens of Malaysia. When she ceased to be part of Malaysia on 9 August 1965 (Singapore Day), Her citizens too ceased to be Malaysian citizens by virtue of section 12 of the 1965 Act (No.53). Dual citizenship was therefore, it is submitted, recognised by Malaysia for a short period during the brief Singapore's union with the Federation but only affecting Singapore citizens and not citizens of other states.

17. Vide L.N. 214/1963.

18. Article 18(1) of the Constitution.

19. P. Weis, Nationality and Statelessness in International Law (2 ed. Sijthoft and Noordhaff - 1979).

20. P. Weis, op.cit., p.5.

21. Cheshire and North, Private International Law (10 ed. Butterworth - 1979) p.183.

22. P. M. Bromley and P.R.H. Webb, Family Law, (N.Z. ed., Wellington, Butterworth - 1974).

23. P. Weis, op.cit. pp.161-169, stated that "statelessness" is not inconsistent with international law since international law could not impose a duty to confer their nationality. That being the situation, he further pointed out that the states are thus free to prescribe rules. Under the "conflict rules" which can either be "Absolute" (at birth) or "Relative" (subsequent to birth), a person may be stateless without acquiring another. In general, the states may impose rules based on their own legal system and sometimes may also be political considerations and demographical reasons.

24. Articles 16(b) and 16A(b) of the Constitution.

25. Ibid, art. 19(1)(a)(i).

26. Press Statement of the Malaysian Immigration Department, Malaysia (in Malay language) dated 28 November 1981. It concerns foreign wives married to Malaysian citizens. See Appendix (D).

CHAPTER THREE

1. Ahmad Ibrahim, "Law and Population in Malaysia", Law and Population - Monograph Series no. 45. (1977) at p.28.

2. It was held that Ceylon Tamil Hindus follow a monogamous form of customary marriage (see Ahmad Ibrahim, op. cit. at p.28).

3. Besides the Malays, there are also Chinese and Indian Malaysian citizens who are Muslims. Their marriages too are being regulated by Islamic law of marriage as applied to Malay Malaysian citizens.

4. It is submitted that consent in Chinese customary law based on the above discussion is similar to canon law consent before the church intervened. The basic essential under both, is a mere consent to be married to each other. There is no need, under canon law of any ceremony though it must be in the present tense. However, if it is in

the future tense, the marriage is still valid if there is an immediate follow up of sexual relationship between the couple concerned, since in such a situation, consent was implied. (See S. M. Cretney, Principle of Family Law (3 ed. - Sweet and Maxwell) at pp. 6-8).

5. In the case of Mary Ng & Anor. v. Ooi Gim Teong [1972] 2 M.L.J. 18, at p.19, Mohamed Azmi J. said, "Having regards to the experience and qualifications of Mr Lee Siow Mong, I accept him as an expert witness and I accept his evidence...[in] Chinese customary law..."

6. Lee Siow Mong, "Chinese Customary Marriage and Divorce", [1972] 2 M.L.J. (iii) at p. (iv).

7. Under the General Code of Laws (Ta Ching Lu Li) which according to Mr Lee Siow Mong, appeared in 1740 in 47 volumes. For further discussion of how the General Code of Laws came about, see Lee Siow Mong, op.cit., at p.(iii).

8. Ibid, at p. (iv) foot-note (2).

9. Ahmad Ibrahim, op.cit., at p.28.

10. Iman Newsletter 1, Wellington, New Zealand, 1982, at p.10.

11. Also spelt as "Kadi", "Kadee", or "Cadi" (see The Shorter Oxford English Dictionary, on Historical Principles, prepared by William Little, H. W. Fowler and J. Coulson, 3 ed. Vol. 1 A-M, at p.246).

12. [1866] L.R. 1 P & D 130.

13. Ibid, at p.133.

14. Example, all Portuguese at Portuguese settlements in Malacca are Christian by religion. There are also Chinese and Indian Malaysian citizens who are christians.

15. Similar provisions are provided in respect of Malaysian Christian citizens (as well as non-citizens) of Sabah and Sarawak by Christian Marriage Ordinance 1919 (Sabah Cap. 24) and Church and Marriages Ordinances (Sarawak Cap. 92) respectively.

16. It is submitted that one of the most important practical and useful effects of facilitating such marriages will reduce the Civil Marriage Registry of being congested with applications for marriage licences.

17. Detailed provisions concerning the requirement of parental consent and the prohibition of marriage between persons who come within prohibited degrees of affinity prescribed therein are similar to those of English Law. Marriageable ages for male and female are 16 and 14 respectively, except Sarawak which is 14 for both male and female by virtue of (a) Civil Marriages Ordinance 1952 and Christian Marriage Ordinance 1956 for West Malaysia, (b) Marriage Ordinance 1959 (applicable to all marriages in Sabah) for Sabah and (c) Church and Civil Marriages Ordinances (Sarawak Cap. 92) for Sarawak.

18. Lee Siow Mong, op.cit. at p. (iv).

19. [1972] 2 M.L.J. 18.

20. Ibid, at p.20. However, Kenneth K.S. Wee, though recognising the need for expert evidence in such cases, doubted whether Lee Siow Mong was qualified to speak of Chinese divorce custom of Malaya. He based his argument, inter alia, of what Murray-Anysley J. said in the case of Woon Ngee Yew v. Ng Yoon Thai [194]] M.L.J. Rep. 32 at pp.33-34, when his Lordship said, "But whatever the position as regards divorce may have been in China it by no means follows that the custom of China as it existed under the Manchu dynasty is suitable for the Chinese population of Perak today." - Kenneth K.S. Wee, "Chinese Law and Malayan Society", [1973] 15 Mal. L.R. at pp.111-112. Professor Ahmad Ibrahim (see op.cit. at p.38), seems to agree with what Mohamed Azmi J. had concluded based on the evidence of Lee Siow Mong. Thus, it is submitted that, until there is judgement to the contrary or judgement of higher Court (Federal Court of Malaya), then it must be taken that the present state of law with regard to Chinese customary divorce is as what Mohamed Azmi J. said.

21. Each state in Malaysia has its own Islamic Enactment(s) on Administration of Islamic law in that state. Examples, sections 126-128 of the Administration of Muslim Law Enactment, Johore 1978 (No.14 of 1978) deal with matters of divorces of Muslims in the Johore state while Part VI sections 36 and 37A of the Administration of Muslim Law Enactment, Sabah 1977 (No.15 of 1977) deal with both marriages as well as divorces of Muslims in Sabah. The law relating to marriages and divorces of Muslims in Sarawak is to be found in the Muslim Marriage Ordinance (Cap. 75 of the 1948 Edition) which has not been revised since. Kedah Administration of Muslim Law Enactment 1962, Trengganu Administration of Islamic Law Enactment 1955 are another two such examples.

22. Unilateral pronouncement of divorce by the husband to his wife or wives either orally or in writing.

23. Period of reconciliation.

24. Reconciled by revocation of the "talak".

25. Divorce Ordinance 1952 (No.74 of 1952).

26. Divorce Ordinance 1963 (Sabah No.7 of 1963).

27. Matrimonial Causes Ordinance (Sarawak Cap. 94).

28. However, if a Chinese couple who are first married under the Chinese customary law subsequently re-married under Civil Marriage Ordinance 1952 (No.44 of 1952) as discussed above, the provision will also apply to them.

29. Other than marriages under Christian Marriage Ordinance 1956 (No.33 of 1956) for West Malaysia, Christian Marriage Ordinance 1919 (Sabah Cap.24) for Sabah and Church and Civil Marriages Ordinances (Sarawak Cap.92) of Sarawak, both Christians and non-Christians (except Muslims) can still contract monogamous marriages at the Civil Registry, for example, under Civil Marriage Ordinance 1952 (No.44 of 1952).

30. Ahmad Ibrahim, op.cit. at pp. 38-39.

31. Ibid, at p.37.

32. See s.3(3) of the Act.

CHAPTER FOUR

1. I used the word "citizen" here to refer to those who are Malaysian citizens either by the operation of law or by registration (other than the foreign wives of the citizens) or by naturalisation as opposed to a foreign citizen who later acquired Malaysian citizenship. Such citizens are the Chinese, Indians, Malays and other Malaysians such as the Portuguese (at Malacca Portuguese Settlement) and Eurasian Malaysians.

2. For reason(s) known best to those concerned, it would seem that some of the Malaysian non-Malay citizens have been indoctrinated to treat themselves as such. This is a major political concern in Malaysia which the past and present Governments was and is trying to overcome mainly through education. Their feelings, it is submitted, are completely unfounded but are basically due to their historical ignorance and possibly lack of knowledge of legal history which has shaped the present legal system of Malaysia. The brief historical background of Malaysian citizenship law in Chap. 2, it is hoped will help to undo that unjustifiable and unfounded attitude.

3. See n.(21) of Chap. 3.

4. Examples, s.3(3) of the 1976 Act, states, "This Act shall not apply to a Muslim...married under Muslim law...;" s.25 pt.III of the Civil Law Act 1976 (Revised 1972), on matters of "disposal and devolution of property" does not affect those that are disposed in accordance with Muslim law; s.1(2) of the Inheritance (Family Provisions) Act 1971, specifically exclude the application of the same to Muslims; s.3(1) of Legitimacy Act 1961 (Revised 1971) and s.31 of the Adoption Ordinance 1952 also have the same effect.

5. Applicable in West Malaysia.

6. Applicable in Sarawak, East Malaysia.

7. Applicable in Sabah, East Malaysia.

8. See notes 24-26 of Chap. 3.

9. [1972] 2 M.L.J. 18.

10. See Lee Siow Mong, op.cit. at p.(iv) et.seq. and the comment on the said case by Kenneth K.S. Wee, op.cit. pp.111-113.

11. [1972] 2 M.L.J. 18 at p.20.

12. Kenneth K.S. Wee, op.cit. p.110.

13. Ibid, at p.113.

14. [1972] 2 M.L.J. at p.20.

15. Kenneth K.S. Wee, op.cit., at p.113.

16. Lee Siow Mong, op.cit., at p.(iv).

17. See notes (29) and (30) of Chap.3.

18. Law Reform (Marriage and Divorce) Act 1976, s.2(1), where "natives" has the same meaning assigned to it in cl. 6 art. 161A of the Constitution.

19. Ibid, s.2(1), is as defined by s.3 of the Aboriginal Peoples Act 1954 which include "semang" and "sakai" (as examples.

20. Ibid, s.3(4) - for "natives" they are governed by their native customary laws while the "aborigines" by the aboriginal customs.

21. Ibid., ss.9-12.

22. Ibid., ss.13-21.

23. Ibid., ss.22-26.

24. Ibid., s. 26(2).

25. Ibid., s.7.

26. Ibid., s.43. It provides that no prosecution for an offence punishable under this Act shall be instituted except with the authority in writing of the Public Prosecutor.

27. Ibid., s.4(1).

28. Ibid., s.4(2).

29. Section 494 of the Penal Code by virtue of s.7, ibid.

30. [1972] 2 M.L.J. 18; the same applies to Chinese customary divorce.

31. Law Reform (Marriage and Divorce) Act 1976, s.22(1)(a).

32. Ibid, s.22(1)(c).

33. Ibid, s.22(1)(b).

34. Ibid, s.24(1) which deals with solemnisation of a marriage through religious ceremony, custom or usage.

35. Ibid, s.2(1).

36. Ibid, s.12(1).

37. Ibid, ss.10 and 12(1).

38. Ibid, s.38.

39. [1972] 2 M.L.J. 19, obiter of Mohamed Azmi J, at p.20.

40. Law Reform (Marriage and Divorce) Act 1976, s.53(1). It is to be noted that prior to this Act, there was no uniformity (in so far as the grounds are concerned) for divorce petition in Malaysia. See notes 24-26 of Chap. 3.

41. Ibid, s.54(2).

42. Ibid, s.58(2).

43. Ibid, s.58(3)(b).

44. Ibid, s.59(1).

45. Ibid, s.57(2).

46. Ibid, s.61(2)(b).

47. There is also conflicting provisions under ss.72 and 104 affecting the validity and recognition of marriages celebrated or contracted aborad.

48. Ibid, s.4(2).

49. Ibid, ss.48(1)(a) and (b) and 67(a) and (b).

50. Ibid, s.50(1).

51. Wilful refusal of such nature can be argued to amount to such a behaviour which may be justified to conclude that it would be unreasonable to expect the petitioner to live with the respondent and thus falls within the definition of s.54(1)(b), ibid.

52. [1980] 1 M.L.J. 10.

53. Ibid, at p.14.

54. Section 82(1) of the 1976 Act.

55. For the purpose of calculating the period of residence, see s.20(1) of Part III of the Second Schedule of the Constitution. What is "permanent resident", has been described by Romer L.J. in the case in the Re Gape [1952] Ch.743 at p.751 when he said,

"I take it to be clearly settled that no person who is sui juris can change his domicile without a physical change of place, coupled with an intention to adopt the palce to which he goes as his home or fixed abode or permanent residence...in other words, an intention to remain without any intention of further change except possibly for some temporary purpose."

56. Article 23(1) of the Constitution. For a married woman, article 23(3) applies.

57. Ibid, art. 19(3).

58. Article 14(1)(b) read together with s.1(a) Part II of Second Schedule of the Constitution.

59. Ibid, art. 26A, which states, "Where a person has renounced his citizenship [art.23, Cls (1) or (3)] or been deprived thereof under Clause (1) of Article 24...the Federal Government may by order deprive of his citizenship any child of that person under the age of twenty-one who has been registered as a citizen..." It is submitted that it is unlikely that the Government will exercise the above discretion in the circumstances.

60. [1972] 2 M.L.J. 18.

61. Idem. Polygamous marriage (customary) can be registered under the Registration of Marriages Ordinance 1952.

62. Law Reform (Marriage and Divorce) Act 1976, s.4(2).

63. [1980] 2 M.L.J. 299.

64. All permanent residents in Malaysia are issued with red identity cards with all the necessary particulars such as dates and places of birth, names of the parents and permanent addresses in Malaysia on one side and the holders' photographs on the other. Citizens are given (issued) with the same identity cards but blue in colour.

65. Section 15(1).

66. [1980] 2 M.L.J.299 at p.300.

67. Vide L.N. 227 of 1963.

68. Immigration Act 1959/63 (Revised - 1975) s.6(1)(c).

69. Ibid, s.10(1).

70. [1980] 2 M.L.J. 227 at p.303.

71. Ibid, at p.302.

72. See "Utusan Malaysia" (a Malay Language national newspaper), Kuala Lumpur, Malaysia, 28 November 1981 (Appendix (B)). See also Ibid, dated 16 December 1981 (Appendix (C)).

73. Though there is no definite evidence to suggest that the statement was issued as a direct response to Re Meenal's case, supra, it is submitted that a similar situation as in that case must have been among their prime considerations.

74. See s.20(1)(a) of the Second Schedule Part II of the Constitution.

75. They are mostly Malay by race and Muslim by religion.

76. Art. 14(1) read together with s.1 subs. 1(a) and (b) of Part I of the Second Schedule of the Constitution.

77. [1980] 1 M.L.J. 10.

78. Ordinance 47 of 1947; Act No.22 of 1955. The Legislative Enactments of Ceylon 1956 ed. Chap. 112.

79. Similar point of the need to register a foreign marriage under the said Ordinance was discussed in the case of In Re Meenal w/o Muniyandi [1980] 2 M.L.J. 299, at p.302. By doing so, the husband could have the wife registered under art.15(1) of the Constitution once he has been granted citizenship status.

80. Can be construed as Islamic ruling on any matter pertaining to Islamic law or religion.

81. An Islamic administrative head of each state who is also a jurist.

82. [1980] 1 M.L.J. 10 at p.15. At page 14 of the same, it was stated that the wife should also become a Muslim within three months of such conversion in order to save the marriage, otherwise the marriage ceased to subsist therefrom.

83. A loose definition would be a Jewess or Christian, but not a person of Anglican faith.

84. It is the Islamic tenet practised and observed in Malaysia.

85. This, it is submitted, is based on the fact that there is no compulsion in Islam. Conversion must be voluntary.

86. The Recognition of Divorces and Legal Separations Act 1971.

87. [1980] 1 M.L.J. 10 at p.20.

88. Art. 4(1) of the Constitution.

89. Ibid, art. 11(1).

90. Ibid, art. 3.

91. [1980] 1 M.L.J. 10 at p.15.

92. Non-official interference in the sense that divorce can be pronounced unilaterally in fact, could also be seen in cases where "Talaq" is involved, though there may be legislative requirement for "Talaq" to be registered and Malaysia is no exception. Whether or not it can be considered as "Judicial or other proceedings" within the meaning of the 1971 Act was discussed by G. W. Batholomew, "Recognition of Talaq", 4 Mal. L.R. pp.137-144 where the platform of his discussion was based on Russ v. Russ [1962] 1 All. E.R. 649. See also F. R. Beasley "The Recognition of Foreign Divorces", [1967] 9 Mal. L.R. pp. 202-223. In New Zealand, such divorce would most probably be recognised based on s.44(1) of the Family Proceedings Act 1980 (Art.94) (formerly s.82(1) of the Matrimonial Proceedings Act 1963). For the discussion on the question of recognition of "talaq" in New Zealand, see Hassan v. Hassan [1978] 1 N.Z.L.R. 385 where it was held by the court that "(4) there was no rule of law that requires refusal of recognition of a form of divorce by non-judicial process...valid in the domicile of the husband...in New Zealand just as divorce by judicial (or legislative) process

would be recognised under s.82(1)(c) of the Matrimonial Proceedings Act [now s.44(1)(c) of the 1980 Act]."

93. R. H. Hickling, "Effect on Marriage of a Conversion to Islam", [1979] wl Mal. L.R. pp.374 - at p.376.

94. Lucy Carroll Stout, "A Question of Fact: Ascertainment of Asian Law by the English Court. A Critique of Viswalingam v. Viswalingam, decided in the High Court, London, 14th March 1979", [1980] 22 Mal. L.R. 34 et.seq.

95. Ibid, at p.36.

96. Ibid. However, commended the English concept of natural justice when she said at page 64, the following,

"In the result, it is a most impressive tribute to the inherent notions of "justice" adhered to and upheld by the English courts that - in spite of the erroneous assumptions noted above...the English High Court nonetheless refused to recognize such a[n] [automatic] dissolution as effective in English law...to prevent the injustice that otherwise would have resulted." Quere; even at the expense of criticising the concept of Islamic law?

97. [1980] 1 M.L.J. 10 at p.18 per Wood J.

98. See note (91) above.

99. [1980] 1 M.L.J. at p.99.

100. Appeal Court of England.

101. L. C. Stout, op.cit. at p.42.

102. Idem.

103. It is the personal privilege of a Muslim and of any sovereign state to interpret Islamic law and the text of the faith. In Malaysia, the Shafii school is recognised and accepted both by the state and most of Muslim citizens, though Indian Muslims observe the Hannafi tenet. Since it is the view of Shafii's school that a Christian of Anglican faith is not a "kitabiyya", it is therefore submitted that it will be respected and given effect by most Muslims in Malaysia and hence by the Courts in Malaysia.

104. Huang Su Mien, "Ohochuku v. Ohochuku", [1960] 2 University of Malaya L.R. 342-343. The said case was reported in [1960] 1 All. E. R. 253; [1960] 1 W.L.R. 183.

105. M. Siraj (Mrs), "Conciliation Procedure in Divorce Proceedings", [1965] 7 Mal. L.R. 314, et. seq. She examined in detail various Islamic Enactments of various Muslim states, including Malaysia in relation to administrative checks and how the same help to reduce the rate of Muslim divorces.

106. See A. G. of Ceylon v. Reid [1968] A.C.780.

107. [1980] 1 M.L.J. 10 at pp. 17 and 18.

108. Note that the three months' grace is to accommodate the period of "eddah". The "fatwa" discussed in the Viswalingam's case, also allowed the wife to convert to Muslim in order to save her marriage. Thus it is submitted that, the relevancy of the said three months' grace in both, is to accommodate the period of eddah. The rationale behind it, is to ensure as of fact that the wife concerned is not carrying any issue of the marriage (i.e. during the period of possible gestation).

109. Section 51(3) of the 1976 Act. Thus the normal two years restriction to petition for divorce under s.50(1) of the same Act does not apply.

110. If the husband of such wife is earning wages or salary, she can then make an application to have such order of maintenance or alimony attached to his earnings under s.4 of the Married Women and Children (Enforcement of Maintenance) Act 1968.

CHAPTER FIVE

1. See also arts. 73(b) and 74(2) and List II to the Ninth Schedule of the Constitution.

2. Vide Supp. to Gazette No.12 dated 8 May 1953.

3. Section 10 subs. (1) and (2) of The Adoption Ordinance 1952.

4. Ibid, s.12(1).

5. Ibid, s.13.

6. Ibid, s.2. "Court" means any Court (High Court or Sessions Court) having jurisdiction to make adoption order. Appeal from such decision lies to Federal Court (in the High Court) and to the High Court (in the case of Sessions Court) against refusal of making such order (s.22, ibid.).

7. Ibid, s.2.

8. Ibid, s.9 subss. (2)-(6) and (8).

9. Ibid, s.2(1) - the "prescribed date" are:
   (a) in the case of the States of Perak, Selangor, Negri Sembilan, 1 January 1933;
   (b) for the States of Johore, Malacca and Pahang, 1 July 1936;
   (c) for the States of Kedah, Kelantan, Trengganu and Perlis, 23 March 1961; and
   (d) for the States of Sabah and Sarawak, it is 1 January 1972.

10. Ibid, s.3(2).

11. Ibid, s.4.

12. Ibid, s.10(1).

13. Such child will be treated as "dependent" under s.3(1) of the Inheritance (Family Provision) Act 1971. An illegitimate child born to a Muslim couple is not entitled to take any benefit of his deceased parents' estate on intestacy, under the substantive Islamic law.

14. As opposed to illegitimate but legitimated.

15. Such as the right to claim compensation for loss occasioned by the death of the member of the family due to the third party's negligence under s.7 of the Civil Law Act 1956 (Revised - 1972) (Act 67).

16. [1980] 2 M.L.J. 299.

17. [1980] 1 M.L.J. 10.

18. Ibid, at p.18. His Lordship, at page 13 of the same case, expressed his concern more clearly when he said, "...but I am extremely worried about Ajit's future..." [emphasis by way of underlining is mine, to show the Court's view towards the "child of the family's" future).

19. [1969] 1 M.L.J. 218.

20. Citizenship was also deprived in the similar manner (banishment order) in the case of Liew Shin Lai v. Min. of Home Affairs [1970] 2 M.L.J. 7. For criticism of this case and similar cases where banishment orders were involved, see S. Jayakumar, "The Finality of Citizenship Decisions: Under the Constitution of Malaysia", [1970] 2 M.L.J. xviii.
Where banishment order was set aside for the reason that the applicant was a citizen by operation of law can be seen in Kung Aik v. P.P. [1970] 2 M.L.J. 174. However, it can be argued that the order was set aside mainly because there was no objection from the Government for the order to be set aside.

21. [1975] 2 M.L.J. 175.

22. Ibid, at p.179.

23. [1977] 2 M.L.J. 20.

24. Ibid, at p.23.

25. By s.3 of the Constitution and Malaysia (Singapore Amendment) Act 1965 (No.53), Singapore ceased to be a State of Malaysia. 9 August 1965 is known as Singapore Day.

26. Note that, that was the only short period where Malaysia recognised dual citizenship in so far as Singapore citizens were concerned.

27. "Utusan Malaysia" (Malay language local newspaper), Kuala Lumpur, Malaysia, 15 May 1981 [see Appendix (A) for original test].

28. I used inverted commas to the phrase in order to differentiate with that of acquisition of citizenship by the same process under art. 14 of the Constitution. It is also intended to show that such loss is political as opposed to legal considerations.

CHAPTER SIX

1. They are husbands or wives or the Government.
2. [1972] 2 M.L.J. 18.
3. Kenneth K.S. Wee, op.cit. at pp.112 and 113.
4. [1974] 1 M.L.J. 74.
5. Ibid, at p.75.
6. Idem.
7. [1971] 2 M.L.J. 266.
8. [1971] 1 M.L.J. 287.
9. [1971] 2 M.L.J. 266 at pp. 266 and 267.
10. Ibid, at p.267 per Ong C.J. (Malaya).
11. Idem.
12. In Re Gape [1952] Ch. 743.
13. [1980] 1 M.L.J. 10.
14. Law Reform (Marriage and Divorce) Act 1976, s.67(a).
15. Ibid, s.67(b).
16. Ibid, s.77(1).
17. Ibid, s.77(2).
18. Ibid, s.93(2).
19. Ibid, s.93(1).
20. [1980] 2 M.L.J. 299.
21. Ibid, at p.301 per Hashim Yeop A. Sani J.
22. [1978] 1 M.L.J. 92.
23. [1969] 1 M.L.J. 218.
24. [1978] 1 M.L.J. 92.
25. [1969] 1 M.L.J. 218.
26. Ibid, at p.219, per Raja Azlan Shah J. (as he then was).

27. [1970] 2 M.L.J. 7.

28. Ibid, at p.8. As to the finality of citizenship, see S. Jayakumar, op.cit. p.xviii et.seq.

29. [1970] 2 M.L.J. 174.

30. It is an Appellate Court of Malaysia hearing appeals, both civil and criminal, from the Decision of High Court.

CHAPTER SEVEN

1. [1972] 2 M.L.J. 18.

2. Low Ai Bee v. Ralph Eu Peng Lee [1974] 1 M.L.J. 74.

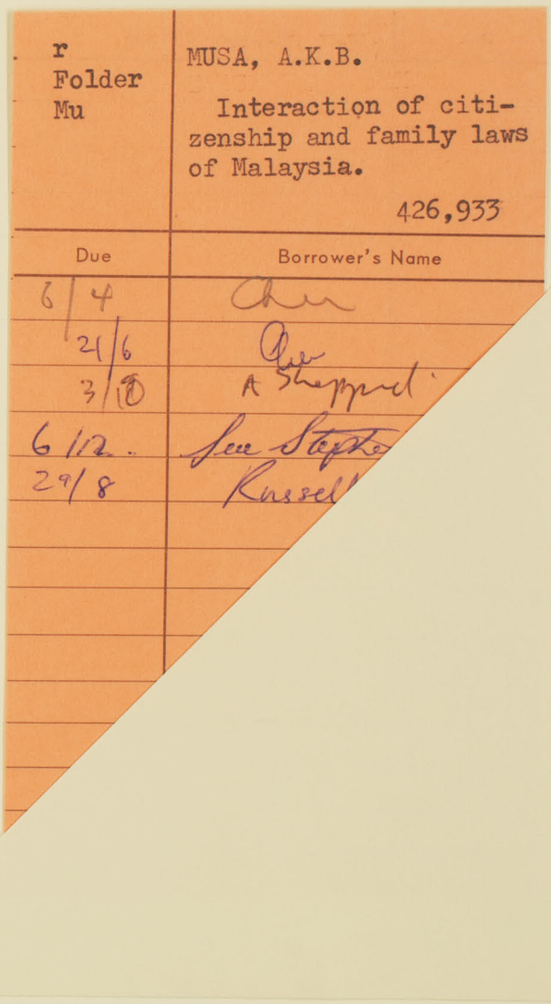
3. However, all marriages are compulsorily required to be registered by virtue of The Marriage Ordinance 1959, of Sabah in Sabah.

4. In Re Meenal w/o Muniyandi [1980] 2 M.L.J. 299.

5. In Re Soon Chi Hiang [1969] 1 M.L.J. 218.

6. Kuluwante (An Infant) v. Govt of Malaysia and Anor. [1978] 1 M.L.J. 92.

7. see Liew Shin Lai v. Min. of Home Affairs [1970] 2 M.L.J. 7 at p.8, per Ong Hook Sim J.



r
Folder
Mu

MUSA, A.K.B.

Interaction of citizenship and family laws of Malaysia.

426,933

Due	Borrower's Name
6/4	Chen
21/6	Gee A Shepherd
3/10	
6/12.	Lee Stapleton
29/8	Russell