THE SPIRIT AND SKELETON OF THE ENGLISH MARRIAGE AND DIVORCE LAW: "ITS REINCARNATION IN MALAYSIA AND NEW ZEALAND" – A DOCTRINAL STUDY

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Introduction

Malaysia and New Zealand are Commonwealth countries *vis-à-vis* as former colonies of the British Empire. It is believed that the British applied the same laws in all of the colonies based on the English law principles and legal framework. Consequently, the laws in all colonies may have some common features. Hence they originally come from the same source[1], thus forming a "reincarnation of the spirit of the English law" in the shape and framework which may have been modified and customised to meet the local needs. During the colonial era, judges who were appointed to hold positions in the legal system of the said colony were either trained or brought directly from England.[2]

However, after independence, pre-colonial laws have been formally replaced and this study seeks to examine whether laws introduced during the colonial era are still effective and echoing the spirit of English law. As such, this paper focuses on the inheritance of English family law in the Malaysian jurisdiction, with some reference to the New Zealand jurisdiction as the counterpart for comparative perspective. A jurisdictional survey is adopted to explain whether the adoption of English family law in Malaysia and New Zealand does constitute the "reincarnation of the spirit and skeletal" of English family law.

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[1] The laws applied in the colonies derives from common law and equity.

[2] Malaysia and New Zealand adopted legal system based on English legal system with variation as to the name of the court and its specific jurisdiction. The Malaysian legal system at the moment is adopting a pluralistic legal system that consists of a civil court system, Sharia courts system and the incorporation of Native Courts in Sabah and Sarawak. The civil court system in Malaysia follows the English legal system and the right to appeal to the Privy Council was retained until 1985. In New Zealand, the court system follows the English legal system alongside the incorporation of Maori land courts and the Maori appellate court.

The Law on the Requirement for a Valid Marriage

In most jurisdictions in the world, the law will impose certain conditions for a marriage to be considered valid at law, and this is not limited to only Malaysia, New Zealand, and England *per se*. The rationale and the justifications of the imposition of these conditions might vary from one jurisdiction to another based on the jurisprudence of that state alongside sociocultural and moral norms and some other relevant factors taken into consideration in the administration of laws, generally. Having considered these conditions, it is to be analysed whether the law in Malaysia and New Zealand are still the same with the law in England. The law considered in this section includes the law on the condition as to:

1. the minimum age to marry,
2. the gender of the parties to the marriage,
3. the consent of the parties to the marriage, and
4. the nature of the marriage (monogamy and polygamy).

1. The Minimum Age to Marry

In certain jurisdictions, the minimum age to marry might not follow the majority age of that jurisdiction, and usually the law stipulates a lower minimum age for marriage in most jurisdictions in the world. In England, the English family law sets the minimum age to marry at sixteen (16) years old, pursuant to section 11(a)(ii) of the Matrimonial Causes Act 1973. The provision read as follows:-

> "11. Grounds on which a marriage is void
>
> A marriage celebrated after 31st July 1971 [other than a marriage to which section 12A applies,] shall be void on the following grounds only, that is to say —
>
> (a) that it is not a valid marriage under the provisions of the [Marriage Acts 1949 to 1986] that is to say where—
>
> (ii) either party is under the age of sixteen"

It is commented that this section applies the same minimum age to marry to both parties, without specifically creating any differences on grounds of gender or any other grounds. The minimum age to marry therefore applies equally among male, female, and has also extended to the transgendered as well. In New Zealand is given under section 17 of the Marriage Act 1955 whichprovides for the minimum age to marry to be at sixteen years old. This imposition of the minimum age to marry applies across the board – equally to all subjects. This provision

echoes the position in England, and thus the "spirit and skeletal of English family law" reincarnates in New Zealand. It is concluded that the law in New Zealand with regards to this aspect is the same with English law.

The minimum age to marry in Malaysia is given under section 10 of Law Reform (Marriage and Divorce) Act 1976[3] (hereinafter referred to as "the LRA 1976"), provided in *verbatim* herein:-

> "Avoidance of marriages where either party is under minimum age for marriage:
>
> 10. Any marriage purported to be solemnised in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnisation of such marriage was authorised by a licence granted by the Chief Minister under subsection 21(2)."[4]

In the light of this provision, there are different minimum ages to marry between male and female in Malaysia. The family law of Malaysia requires that a male must attain the age of eighteen whilst the female must at least reach the age of sixteen on the date of the marriage. For the female between the age of sixteen to eighteen, there is another condition that the marriage may only be authorised when a license allowing her to marry has been granted by the chief minister or else the marriage would be considered void.[5] For a female who had attained the age of eighteen at the date of marriage, the grant of such license from the chief minister is no longer necessary for her to enter into a marriage.

The application of the LRA 1976 in Malaysia is rather limited, and it is only applicable to the non-Muslims. Marriages for Muslims in Malaysia are governed under the Shariah law of the respective states and not the LRA 1976. Furthermore, the aborigines of Peninsular Malaysia and the Bumiputeras of Sabah and Sarawak are given choices either to marry under the LRA or follow their customary laws.[6] The aborigines of Peninsular Malaysia and Bumiputeras of Sabah and Sarawak who choose to marry under their customary laws will not be subject to the LRA 1976. Consequently the requirement on minimum age to marry is not binding on them.

[3] Act No. 164 of 1976.
[4] *Ibid*. Section 10.
[5] *Ibid*. Section .21 (2)
[6] *Ibid* Section 3(4).

For the sake of the focus of this paper, Shariah law jurisdiction on family matters in the respective states and the customary laws related to the aborigines in Peninsular Malaysia and Bumiputeras of Sabah and Sarawak will not be discussed in detail in this study. Section 3(4) of the LRA 1976 makes it clear that the Act is not applicable to the Bumiputeras of Sabah and Sarawak and the aborigines of Peninsular Malaysia unless they choose to marry under this Act. Section 3 (4) is reproduced *in extenso infra*:-

> (4) This Act shall not apply to any native of Sabah or Sarawak or any aborigine of Peninsular Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless—
> *(a)* he elects to marry under this Act;
> *(b)* he contracted his marriage under the Christian Marriage Ordinance [*Sabah Cap. 24*]; or
> *(c)* he contracted his marriage under the Church and Civil Marriage Ordinance [*Sarawak Cap. 92*].

The right to choose whether to marry under the LRA 1976 which is exclusively for the aborigines of Peninsular Malaysia and the Bumiputeras of Sabah and Sarawak was properly spelled out in Section 3(4)(a). Since the LRA 1976 not applicable to them, the enforcement of duties arises from the marriage are also not enforceable in the civil court of law. If the marriage was concluded following customary rules, it is enforceable in the Native Court for the Bumiputeras of Sabah and Sarawak and for the aborigines of the Peninsular Malaysia. The customs are enforced by the tribal leader concerned. In light of the diversity in the provisions governing marriage in Malaysia, it is therefore concluded that the provision as to the minimum age to marry in Malaysia no longer reflects the spirit of English law inherited from the colonisation era.

2. The Gender of the Parties to the Marriage

The old definition of marriage was given by the English court in the case of *Hyde v Hyde and Woodmansee*[7] to connote that marriage should only involve the union of two people of opposite gender *i.e.* a male and a female. The court in this case defined marriage as a "voluntary union of one man and one woman for life to the exclusion of all others."[8] This old definition of marriage in the light of *Hyde v Hyde and Woodmansee*[9] only allowed heterosexual relationship in a marriage, thus impliedly excluding homosexual relationship of persons of the same gender either in marriage between male and male or between female and female.

Besides the case of *Hyde v Hyde and Woodmansee*, the case of *Corbett v Corbett (Otherwise Ashley)*[10] used to be the authority in England also. The common law position with regards to the gender of parties to marriage was then codified under section 11(c) of the Matrimonial Causes Act 1973 which stipulates that a valid marriage must be between a male and a female.[11] It was the position in England back then when the law only recognised heterosexual marriage thus excluding same-sex marriage in the light of this subsection 11(c) of the 1973 Act.

However, the position of the law in England which excludes same-sex marriage was challenged in the case of *Goodwin v United Kingdom* (2002)[12] for want of legal response to meet the changing social needs. In this case, Christine Goodwin, a post-operative male to female transsexual alleged that the legal status of transsexuals in the UK – and in particular their treatment in the sphere of employment, social security, pensions and marriage – violated the European Convention on Human Rights (ECHR). She claimed that the UK was in breach both of Article 8 of the European Convention on Human Rights ("respect for private life") and Article 12 ("right to marry"). Article 8(1) of the Convention provides that:

> "Everyone has the right to respect for his private ... life."

[7] [1861-73] All ER Rep 175; LR 1 P & D 130; 35 LJP & M 57; 14 LT 188; 12 Jur NS 414; 14 WR 517.
[8] *Per* Wilde JO in *Hyde v Hyde and Woodmanse* [1861-73] All ER Rep 175.
[9] [1861-73] All ER Rep 175; LR 1 P & D 130; 35 LJP & M 57; 14 LT 188; 12 Jur NS 414; 14 WR 517.
[10] *Corbett v Corbett (Otherwise Ashley)* [1971] P83, [1970] 2 All ER 33.
[11] Section 11 of Matrimonial Causes Act 1973 provides for grounds on which a marriage is void. *Inter alia*, section 11(c) stipulates that a marriage celebrated after 31st July 1971, shall be void on certain grounds, which include that is to say the parties to a marriage not respectively be male and female. This subsection 11(c) has been repealed by Marriage (Same Sex Couples) Act 2013.
[12] [2002] IRLR 664.

And Article 12 of the Convention provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Under English law, marriage is defined as being between a man and a woman. Case law has held that this is to be determined according to biological criteria, without regard to any surgical intervention. Any marriage where the parties are not respectively male and female is void. Similarly, biological criteria are used exclusively for recording the sex of a child on a birth certificate, and this is not amendable in the case of a transsexual.

Accordingly, Parliament passed the Marriage (Same Sex Couples) Act 2013 to repeal, *inter alia*, section 11(c) of the 1973 Act. Therefore, there is no more prohibition against same-sex marriage in England after the passing of the 2013 Act. The 2013 Act which came into force on 13 March 2014 brings recognition and legalisation of same sex marriage in England, and *ipso facto* renders the old definition of marriage that was limited only to heterosexual relationships becoming obsolete.[13]

In the past, New Zealand used to apply the principle which reincarnates the "spirit" of English family law in *Corbett v Corbett*[14], thus a marriage is only allowed between male and female respectively. It appears to be implicit that a marriage is a union of man and woman, but the case of *Attorney-General v Family Court at Otahuhu*[15] had rejected the English principle in *Corbett v Corbett*.[16] In this case, the Attorney-General of New Zealand applied on behalf of the Registrar of Marriages for a declaration as to whether persons of the same sex genetically determined may by New Zealand law enter into a valid marriage where one of the parties to the proposed marriage has adopted the sex opposite to that of the proposed marriage partner through sexual reassignment by means of surgery or hormone administration or by way of any other medical means.

Accordingly, Elis J held that where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation to a specified sex, there is no lawful impediment to that person marrying as a person of that sex. The judge further explained

[13] Marriage (Same Sex Couples) Act 2013, section 17(4), Sch 7, Pt 2, paras 26, 27.
[14] *Corbett v Corbett (Otherwise Ashley)* [1971] P83, [1970] 2 All ER 33.
[15] *Attorney-General v Family Court at Otahuhu* [1995] NZFLR 57.
[16] *Corbett v Corbett (Otherwise Ashley)* [1971] P83, [1970] 2 All ER 33.

that the law of New Zealand has changed to recognise a shift away from sexual activity and to place more emphasis on psychological and social aspects of sex, sometimes referred to as gender issues. There was no social advantage in the law in not recognising the validity of a transsexual in the sex of reassignment, thus would merely confirm the factual reality. The learned judge clarified, there was no statute law in New Zealand which prevented the Court making a decision to allow a transsexual to marry as a person of his/her adopted sex.

Therefore, a valid marriage in New Zealand does not require the capacity to procreate or achieve penetrative sexual intercourse. A pre-operative transsexual would not qualify as a marriage partner in his/her sex of assignment. The genital appearance of a man or a woman was necessary for marriage. It was not necessary that penetrative sexual intercourse was possible. Therefore. the possibility that a marriage partner may be deceived about the other's transsexual history was not a ground for not allowing marriage, as there were many other frauds and deceptions possible which did not invalidate a marriage at law.

It was surprising that New Zealand had moved towards the liberation of orthodox connotation of marriage of only between male and female as early as 1995 as suggested in the aforementioned case. In 1995, even the UK's position was still reflected under subsection 11 (c) of the Matrimonial Causes Act 1973 and challenged in the European Court of Human Rights only in 2002.[17] New Zealand passed the Marriage (Definition of Marriage) Amendment Act 2013 to legalise same sex couples' marriage. As the law stands today, the position in New Zealand with regards to the gender of the parties in a marriage is the same with English law.

Malaysia however only allows marriage between male and female. This position is given under section 69(d) of LRA 1976 which requires that parties to a marriage must be male and female, respectively. Under section 69, if the parties are not respectively male and female, the marriage will be void. Through this provision, Malaysian law thus disallowed same sex marriage, which provision still the same until today. Despite the movement in New Zealand and UK towards recognising same-sex marriage within their jurisdictions, Malaysia is seen to remain in the old position and there is nothing to suggest that the country is heading towards allowing same sex marriages. Not only same-sex marriage is not recognised under the current law in Malaysia, even the relationship of same-sex couples are not always accepted by the society due to cultural

[17] *Goodwin v United Kingdom* [2002] IRLR 664.

and social beliefs and practices. Moreover, same-sex couples who had undergone ceremonial marriages are deemed to be engaging in illegality.[18]

3. The Consent of the Parties to the Marriage

The consent of the parties to a marriage refers to the consent of the person of whom the marriage is going to be binding upon when the marriage is entered into. Traditionally, the consent referred herein means the consent of the bride and the bridegroom, and this applies to heterosexual couples only. With regards to current developments in law, this principle may also apply to same-sex partners who entered into a marriage in the jurisdiction where same-sex marriage is recognised.

In the UK, the law requires free consent of both parties to the marriage as given under section 12 of the Matrimonial Causes Act 1973.[19] Marriage shall be voidable if either party does not consent to it whether in consequence of duress, mistake, unsoundness of mind or otherwise.[20] An illustration of how this principle is applied by the English court could be seen in the case of *Re P (Forced Marriage)* [2011].[21] The petitioner in this case was born in England of Pakistani parents. When she was about 15 years old, her parents told her that they wished to arrange a marriage for her, but she made it clear that she would not accept this.

[18] For example, in the recent case of the allegedly male and male '"marriage" in Kuala Lumpur between Ivan Shing Yan (28 years old) and Winson Hsu Wing (26 years old), a police report was lodged by Persatuan Bela Belia (Pembela) Tawau after the couple posted about their "marriage" on their Facebook account that went viral. The grounds of such action was based on the protest to such marriage deemed as immoral and improper within society.
Source: <http://www.sinarharian.com.my/mobile/edisi/sabah-sarawak/polis-siasat-laporan-perkahwinan-sejenis-tular-1.757812>.

[19] Section 12 of Matrimonial Causes Act 1973 offers grounds on which a marriage is voidable.
(1) A marriage celebrated after 31st July 1971[, other than a marriage to which section 12A applies,] shall be voidable on the following grounds only, that is to say - (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it; (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it; (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise; (d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage; (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form; (f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner; (g) that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage; (h) that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004.
(2) Paragraphs (a) and (b) of subsection (1) do not apply to the marriage of a same sex couple.

[20] Section 12 of Matrimonial Causes Act 1973.

[21] [2011] EWHC 3467 (Fam).

When she was about 20 years old and planning to join the police service (despite her family's opposition), she went to Pakistan with her mother and some of her siblings to attend a memorial service for her grandfather. The petitioner was told that the marriage would take place in two weeks' time. She objected strongly, but her protests were ignored and was told that if she did not cooperate she would have to stay in Pakistan. The intended husband was not aware of the petitioner's objections until after the marriage ceremony, when she refused to have sex with him. About eight days later the couple separated. However, as she later discovered, her husband had already been granted a two year spousal visa. For some years, the petitioner was unaware that he had entered the UK. Secretly, her family provided him with her passport and other documents to support his application for permanent leave to remain. After the petitioner discovered these facts, she applied to the court. A decree of nullity was not available because proceedings had not been instituted within 3 years from the date of the marriage (section 13(2)(a) of the Matrimonial Causes Act 1973).

Baron J held that the burden was on the woman to satisfy the court that she had been forced into the marriage on the ordinary civil standard of the balance of probabilities. On these facts, the woman had not given valid consent; she had been subjected to unacceptable pressure such that her free will was overborne. This was not reluctant consent, but no consent at all. Baron J further explains that a genuine case of forced marriage should be dealt with by way of decree of nullity. However, since as in this case, section 13(2)(a) of the Matrimonial Causes Act 1973 was not applicable, the appropriate remedy was a declaration pursuant to the inherent jurisdiction that the marriage at its inception was not a valid marriage due to lack of consent.

In New Zealand, section 31(1)(a)(ii) of the Family Proceedings Act 1980 provides that marriage is void *ab initio* if parties do not consent by reason of duress, mistake, or insanity, or any other reason. Therefore, there is no marriage at all if either party does not consent to the marriage in the first place. Compared to the UK, a marriage entered into without consent in New Zealand is deemed not to be in existence. This is unlike the position in the UK where the marriage is still considered valid unless the non-consenting party choose to dissolve the marriage. Therefore, the spirit of English family law is not fully reincarnated in New Zealand in this particular respect.

The position in Malaysia is given under section 70(c) of LRA 1976 which stipulates that a marriage is voidable if parties do not consent to it whether in consequence of duress, mistake, unsoundness of mind or otherwise. The provision in Malaysia follows that of the English law.

And thus this principle in English law is still applicable in Malaysia with regards to the law on consent of the parties to the marriage.

4. Nature of the Marriage: Monogamy and Polygamy

All marriages in the UK must be monogamous, pursuant to section 11(b) of the Matrimonial Causes Act 1973.[22] which provides that a marriage is void if either party to the marriage was already married. The prohibition on polygamous marriage also include the same-sex marriage and the earlier forms of "marriage" including civil partnership. In the UK, bigamy is also a crime pursuant to Section 57 of Offences against the Person Act 1861[23]. The common law position is represented in *Hyde v Hyde and Woodmansee*[24] where the husband presented a petition for divorce, the "marriage" having been celebrated at Utah and according to Mormon law which permitted plurality of wives. Wilde Jo held that for the purposes of the matrimonial law of England, marriage might be defined as the voluntary union for life of one man and one woman to the exclusion of all others; and persons joined in a union *not* complying with that requirement could not be considered husband and wife in the sense in which those words must be interpreted in the Divorce Acts. And so such persons were not entitled to the remedies, the adjudication, or the relief provided by such law. Therefore, the court could not entertain the petition.

The position of the law with regards to monogamous marriage still stands today. The law was replicated in New Zealand and Malaysia during the colonisation era. However changes were made to meet some local needs. In New Zealand, section 31(1) of Family Proceedings Act 1980[25] stipulates that all marriage must be monogamous, and a marriage is void if either party

[22] A marriage celebrated after 31 July 1971 [other than a marriage to which section 12A applies] shall be void on the following grounds only, that is to say— (b) that at the time of the marriage either party was already lawfully married [or a civil partner].

[23] "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years . . . : Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

[24] [1861-73] All ER Rep 175.

[25] Section 31, Family Proceedings Act 1980 provides for grounds on which marriage or civil union is void:-
(1) A marriage or civil union that is governed by New Zealand law shall be void *ab initio* (whether or not an order has been made declaring the marriage or civil union to be void) only where—

to the marriage was already married. Despite the generality of section 31 of the 1980 Act, marriages entered into or any civil union that is not governed by the law of New Zealand, or the jurisdiction of the Family Court of New Zealand to make an order declaring any such marriage or civil union to be void *ab initio*, will not be affected. Therefore, whilst the Act does not invalidate polygamous marriages which has been entered previously and governed under the law of *other* jurisdictions, it will also *not* recognise the same. The law in New Zealand with this regards reflects the position in the UK and it still stands today.

In the old kingdoms and sultanates in the region of Southeast Asia of which modern-day Malaysia is a part, polygamous marriage was common especially amongst the royalties. It was one of the strategies in maintaining good diplomacy between kingdoms as seen in the famous royal marriage between Sultan Mansur Shah of Malacca and Permaisuri Nur Pualam from Pahang as the first wife, and with Raden Galuh Candra Kirana from Majapahit as the second wife, and also Princess Hang Li Poh from China as the third wife. It is interesting to note that the great Keris Taming Sari was given by the mighty emperor of Majapahit to Hang Tuah, *inter alia*, to protect Raden Galuh Candra Kirana who will be one of the queens to the Sultan of Malacca pursuant to this polygamous marriage.

The position of the law that allows polygamy remained in these kingdoms until colonialism. English law prohibited polygamy with the exception of the Malay-Muslims. The legal position during this era is still reflected today. A scrutiny of section 69(a) of LRA 1976 discovers that marriage in Malaysia must be monogamous, and a marriage is void if at the time of the marriage either party was already lawfully married and the former husband or wife of such party was

(a) in the case of a marriage or civil union that is governed by New Zealand law so far as it relates to capacity to marry—(i) at the time of the solemnisation of the marriage or civil union, either party was already married or in a civil union; or (ii) by reason of duress, mistake, or insanity, or for any other reason, there was at the time of the marriage or civil union an absence of consent by either party to marriage or civil union to the other party; or (iii) the parties to the marriage are within the prohibited degrees of relationship set out in the Schedule 2 to the Marriage Act 1955, and no order is in force under section 15(2) of that Act dispensing with the prohibition; or (iv) the parties to the civil union are within the prohibited degrees of civil union set out in Schedule 2 of the Civil Union Act 2004, and no order is in force under section 10 of that Act dispensing with the prohibition; or (b) in the case of a marriage or civil union that is governed by New Zealand law so far as it relates to the formalities of marriage or civil union, the parties knowingly and wilfully married without a marriage or civil union licence, or in the absence of a marriage or civil union celebrant or Registrar of Marriages, in contravention of the Marriage Act 1955; or (c) in the case of a civil union that is governed by New Zealand law so far as it relates to the formalities of civil union, the parties knowingly and willfully entered into a civil union without a license, or in the absence of a Registrar (as defined in section 3 of the Civil Union Act 2004) or civil union celebrant, or otherwise than in accordance with the rules and procedures of an exempt body (as also defined in section 3 of that Act).
(2) Nothing in subsection (1) of this section shall affect the law as to the validity in New Zealand of a marriage or civil union that is not governed by the law of New Zealand, or the jurisdiction of [the Family Court] to make an order declaring any such marriage or civil union to be void *ab initio*.

living at the time of the marriage. This echoes the voice and the tone of the "spirit" of English family law. Notwithstanding the generality of section 69, it nonetheless is not applicable to Muslims in Malaysia whose marriages are governed under state Islamic laws where polygamy is allowed up to a maximum of four wives *per* husband at any one time, and must be solemnised separately.

Monogamous civil marriage requirement in light of section 69 of the 1976 Act is therefore only applicable to the non-Muslims. The prohibition against polygamy is further strengthened under section 494 of the Penal Code that criminalises bigamy which offence carries a punishment of imprisonment up to seven years and a fine. Despite the allowance given to Muslims in Malaysia, section 69 of the LRA 1976 is consistent and of *pari materia* to the English law provision. Thus, the "spirit" and "skeleton" of English family law in this area is reincarnated in Malaysia and would be applicable in the civil courts to its exclusion in the Shariah courts and the Native Court in Sabah and Sarawak.[26]

The Law on Divorce

Before 1857, marriage in English law was indissoluble except by an Act of Parliament. This was because marriage at that time was governed by the canon law of the Church of England (as inherited thereof from the Catholic Church substantially intact) which does not allow for divorce whilst the other spouse was still living. Ecclesiastical courts could grant a divorce *a mensa et thoro*, but this was more in the nature of legal *separation*. While the decree allowed the couple to separate, it did not allow them to remarry.

The Matrimonial Causes Act 1857 conferred on the court the power to grant decrees of dissolution to marriage, nullity, and so on while retaining the fundamental principle which underpinned the basis on which a divorce had been granted under parliamentary procedure. At this point of time, the only ground for divorce was the respondent's adultery. In applying for a divorce, the petitioner had to show he was free from guilt, and the court had to be satisfied that there was no connivance or collusion between the parties seeking escape from the solemn obligation of marriage.

[26] Section 3(4) of the LRA 1976.

Divorce law was reformed in the UK as a result of the Divorce Reform Act 1969, making "irretrievable breakdown" the sole ground for divorce. The "irretrievable breakdown" can be established by proof any one of five facts pursuant to the Divorce Reform Act 1969 that constitute the grounds for divorce: adultery and intolerability; the respondent behaving in such a way that the petitioner could not reasonably be expected to live with the respondent; desertion for a continuous two-year period; the parties live apart for a continuous period of at least two years and the respondent's consents to the decree; or the parties lived apart for a continuous period of five years immediately preceding the petition.

The application of some of the grounds of divorce by the English court could be seen in the case of *Roper v Roper* [1972][27] which was itself memorable for the rather salacious facts. In this case, there were two couples living as neighbours and eventually swapped spouses frequently. When the arrangement was terminated and a decree sought, the fact that adultery had been committed and that the petitioning spouse now found it intolerable to live with the other was deemed sufficient to justify a divorce, even though the feeling of intolerability was not caused by the adultery committed by the parties involved. It was observed that adultery was enjoyed by the parties. The marriage now was intolerable, and thus sufficient to entitle the court to grant a decree. The establishment of "unreasonable behaviour" of the spouse was deemed as an effective method to prove "irretrievable breakdown" of the marriage.

According to de Cruz (2010), English case law has been most plentiful under the so-called "unreasonable behaviour" facts and courts also helped to answer questions which were sometimes raised both by the couple who were divorcing and some members of the wider public.[28] In 1980, the frequency of sexual relations between spouses in a marriage had also come to the court's scrutiny in ascertaining whether the marriage has been irretrievably broken down. In *Mason v Mason* [1980],[29] the Court of Appeal held that agreeing to sex once a week is not "unreasonable behaviour" and thus Omrod LJ discharged the petition.

The Divorce Reform Act 1969 was then consolidated into the Matrimonial Causes Act 1973 which maintained that no divorce could be presented until three years of the marriage had elapsed. Further reform on this matter could be seen in Matrimonial and Family Proceedings

[27] 3 All ER 668.
[28] Peter de Cruz, *Family Law, Sex and Society-A Comparative Study of Family Law* (Routledge 2010).
[29] 11 Fam Law 143.

Act 1984 which reduced the period to one year, and this remains until today. With regards to New Zealand, the first legislation on divorce was the historic Divorce and Matrimonial Causes Act which was passed in 1867. It was simply an adaptation of the English Act of 1857.

The ground for divorce pursuant to this Act were: (a) Adultery by the wife; (b) Adultery by the husband which is committed together with certain aggravating circumstances. These grounds for divorce is rather restrictive, since there is no wider grounds until only after 1898 – that adultery by either husband or wife became legal ground for divorce. However, pursuant to the Divorce and Matrimonial Causes Act 1867, a decree of judicial separation was obtainable by either husband or wife on the grounds of: (a) adultery; (b) cruelty; or (c) desertion without cause for two years. In 1907, additional grounds were introduced and amendment to the above Act made in 1920 when a divorce could be obtained at the court's discretion, by either party after three years' separation under a court order or an agreement.

The impact of this amendment somehow diminished in 1921 when the courts in New Zealand were required to refuse a decree if the respondent proved that the separation was due to the petitioner's wrongful conduct. The same restriction was utilised in 1953 when a provision was passed which allowed divorce after seven years of "living apart" without likelihood of reconciliation. This reform gave rise to criticism, and therefore the "living apart" ground was removed by the Matrimonial Proceedings Act 1963.

The 1963 Act came into force on 1 January 1965, and it made further changes. From 1965, the grounds for divorce in New Zealand are: adultery; artificial insemination of the respondent wife without the husband's consent; desertion for three years; habitual drunkenness for three years with failure to support, or neglect of domestic duties, or cruelty; conviction for murder or certain attempted murders; insanity and confinement for this reason for certain periods without likelihood of recovery; non-compliance for three years with a decree of restitution of conjugal rights; separation by court order or agreement for three years; living apart for seven years without likelihood of reconciliation; and conviction of certain offences: rape, sodomy, or bestiality (wife's petition). As to date, the most common ground has been three years' separation followed by adultery and then desertion.[30] It was commented in the *Encyclopaedia of New Zealand* (1966) that the trend over several years has been that the majority of divorces

[30] *Op. cit.*, de Cruz (2010).

had been initiated by wives' petitions but almost twice as many divorces are granted to husbands for the wife's adultery than *vice versa* as per McLintock.[31]

In Malaysia, the law governing divorce is provided under various sets of law: the Law Reform (Marriage and Divorce) Act 1976 for non-Muslims, and the State Islamic law (Shariah law) for Muslims respectively. There are fourteen sets of Islamic laws applicable in the respective states in Malaysia. It is important to note that for the Bumiputeras of Sabah and Sarawak and Orang Asli (aborigines) of Peninsular Malaysia who choose not to follow the LRA 1976, divorce is governed by their customary laws which are enforceable in the Native Court in Sabah and Sarawak or by the tribal leader for the aborigines in Peninsular Malaysia.

Pursuant to section 48 of Law Reform (Marriage and Divorce) Act 1976[32], the court may grant a decree of divorce:

a. Where the marriage has been registered under the Act,
b. Where the marriage between the parties was contracted under a law providing that or in contemplation of which the marriage is monogamous,
c. Where the domicile of the parties to the marriage at the time when petition is presented is in Malaysia.

An aggrieved spouse may petition for divorce on the ground that the marriage has irretrievably broken down (section 53, LRA 1976). Section 54 (1)(a) to (d) of the LRA 1976 provides the following as proof of breakdown of marriage: adultery; respondent's behaviour; respondent's desertion; or parties have lived apart for a continuous period of two years immediately preceding the presentation of the petition. Section 51 of the LRA 1976 provides also "where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce" (applied in *Eeswari Visuvalingam v. Government of Malaysia;* and *Isabela Madeline Roy & Ors v. Sarimah Low bt Abdullah*).

[31] <https://teara.govt.nz/en/1966/D/DivorceAndSeparation/en> accessed on 25 August 2017.
[32] 48(1) – Nothing in this Act shall authorise the court to make any decree of divorce except— (a) where the marriage has been registered or deemed to be registered 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.

In the case of *Sundari Raja Singam v Rasaratnam Raja Singam,* the parties were married on 17 March 1968 and except for a short period of two months, the parties lived separately. On 10 June 1970, the petitioner gave birth to a son and although the respondent came and saw his son and his wife at the maternity hospital, there was no reconciliation for a number of years. In 1974, the parties began to live together again for about six months. Subsequently, the petitioner left the matrimonial home with her son and went to live with her parents. The petitioner relied on three incidents which took place during this period and said that the cumulative effect of those incidents was that she became so frightened of living with him that she could not stand it any longer and had to leave him. Choor Singh J held that the petitioner had failed to prove beyond a reasonable doubt that there was danger to her life, limb or health, bodily or mental, or a reasonable apprehension of it. And he explained that in a case of this nature, the conduct complained of must be looked at as a whole and it must be looked at in the light of the sort of people the parties were.

Apart from the abovementioned grounds, there are other grounds for divorce which includes divorce on ground of fraud pursuant to section 70(c) of the LRA 1976; divorce on ground of bigamy pursuant to section 7(1) of the LRA and section 494 of the Penal Code[33]; divorce on ground of unsoundness of mind; and divorce on ground of impotency.[34] To conclude, it is arguable that the civil law on divorce in Malaysia was essentially the same with the position of English law during the 1970s. Whilst the law in the UK has been radically changed to meet contemporary social needs, the law on divorce in Malaysia preserved the old position with only ever so slight a modification. The slight modification is needed to meet the multicultural and diversity of Malaysia, whilst the rest are still substantially the same with English laws. Consequently, the principle of English law is still embedded in the provisions – rendering the "spirit" of the English laws reincarnated in the Malaysian legal framework.

[33] Penal Code, section 494 – Marrying again during the lifetime of husband or wife:
"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife and whether such marriage has taken place within Malaysia or outside Malaysia, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
Exception —This section does not extend to any person whose marriage, with such husband or wife, has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge."
[34] *Alesiah bt Jumil & Anor v Julas bin Joenol* [2015] 7 MLJ 388.

A concluding thought

To summarise in conclusion: In Malaysia and New Zealand, English family law was inherited pursuant to the British colonial era. The application of the law remains substantially intact even after independence. However, changes and modifications had been progressing to meet contextual needs. Changes were influenced and catalysed by many factors. In Malaysia, the presence of a multicultural and multi-religious society demands modifications of the English law. This is made all the more acute by the influence of Islamic law that is applicable to Muslims who form the majority in Malaysia. The preservation of customary laws of the Bumiputeras of Sabah and Sarawak and also the aborigines of Peninsular Malaysia also form a legitimate reasoning that the reincarnation of the "sprit" of the English family law is in the different form of a *modified* "skeleton." In New Zealand, the movement towards liberation and recognition of rights catalysed modifications of the English principle to suit the local context. Recognition of the aborigines' rights and the enjoyment of full autonomy to legislate for their own means that the "spirit" of English family law reincarnates in a different form in New Zealand. Even the definition of marriage in New Zealand had departed from the English common law definition of the term. Notwithstanding, family law in New Zealand – despite some inconsistency with English provisions – is still substantially the same, *i.e.* pointing to a common (law) origin and source.