THE RECEPTION OF ENGLISH DIVORCE LAW IN MALAYSIA

OR

The Misadventures of What is Now Section 47 of Act 164

I

Jurisdiction in matters of divorce came late to English courts. Not until the Divorce and Matrimonial Causes Act 1867[1] established the Court for Divorce and Matrimonial Causes could the courts order the dissolution of a marriage. Before the Act of 1857, to obtain a divorce (in the modern sense of the word) required a divorce *a mensa et thoro,* from bed and board, technically a separation, from the ecclesiastical courts, and a divorce *a vinculo matrimonii,* from the bonds of marriage, by an Act of Parliament. Students of family law and addicts of Megarry will remember the ironic remarks of Maule J.,[2] which contributed to the legislation of 1857. Until that time, the law was unsatisfactory indeed.

Its unsatisfactory nature was exported. In the first Charter of Justice of 25 March 1807 we find that, after endowing the Court of Judicature of Prince of Wales's Island with the general jurisdiction of English courts then in existence, the Charter also provided:

> That the said Court of Judicature shall have and exercise jurisdiction as an ecclesiastical court, so far as the several Religions, Manners and Customs of the inhabitants. . . will admit.

Such a generous endowment of jurisdiction was misleading. In a tangle of cases stretching from *Regina* v. *Loon* (1864)[3] onwards, the judges of the Straits Settlements struggled with what was an insoluble problem; confronted by the contradictions inherent in their jurisdiction, yet often anxious to develop an indigenous jurisprudence, they were handicapped by the dichotomy of English law.

In England that dichotomy was resolved by the Act of 1857, which established a divorce court; endowed it with an appropriate jurisdiction in divorce; and by section 22 provided that, subject to its new jurisdiction, the divorce court was to follow, in general, the principles and rules of the

[1] 20 and 21 Vict. c. 85.

[2] *Miscellany-at-law,* 116-7, quoting Maule J. in *R.* v. *Hall* (otherwise Rollins) (1845) Times 3 April, 8.

[3] W.O.C. 39. The cases are set out by Braddell, in his *Law of the Straits Settlements* (1915), 69-70.

ecclesiastical courts. This section provided (it is necessary to quote it *in extenso*) that:

> *In all suits and proceedings*, other than proceedings to dissolve any marriage, *the* said *court shall* proceed and *act and give relief on principles* and rules *which in the opinion of* the said *court* shall be *as nearly as may be conformable to the principles* and rules *on which the* ecclesiastical *courts* have heretofore *acted and given relief*, but subject to the provisions herein contained and to the rules and orders under this Act.

The italicized words indicate those which have survived in local legislation: and it is with the general principles of their interpretation that this essay is concerned. Such a provision as section 22 was, on the face of it, a tidy and necessary piece of drafting, designed to maintain a continuity in the law in spite of the establishment of a new court. As such, it is pertinent to note the importance of the last sixteen words of the section, which affirm the dominance of the new law; and we can now follow the adventures of this section, overseas.

II

The vigilant draftsmen of India perceived from afar off the changes taking place in the divorce laws of England, and in 1869 there appeared in the Indian statute book the Indian Divorce Act No. IV of 1869. In this Act the Indian legislature adopted the English Matrimonial Causes Acts of 1857, 1859, 1860 and 1866, together with (and in particular) a section conferring on the Indian Court certain powers of the English courts. By section 7 of the Indian Act of 1869 it is provided that:

> Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

The section, amended in 1912 by the addition of a proviso (not relevant to our purpose) continues in force (as far as the present writer can determine) and is the subject of some interesting notes in a current commentary,[4] to which we will return.

The issue of jurisdiction in divorce confused the early judges of the Straits Settlements. This is not the place to pursue the exact nature of the jurisdiction conferred at first by the Charters of Justice and then by the Straits Settlements Courts Ordinance of 1878;[5] the case of *Scully* v. *Scully*;[6] and

[4] *The A.I.R. Manual* (Third ed., 1970) Vol. 9, 278-280.

[5] III of 1878. See in particular ss. 10 and 12, and remember the old maxim, *nemo dat qui non habet*.

[6] (1890) 4 Ky. 602.

the Courts Ordinance of 1907;[7] sufficient is it to say that not until the Divorce Ordinance of 1910[8] came into force in 1912 were the Straits Settlements courts endowed with a jurisdiction in divorce. Even then, the lawmakers seem to have been exceptionally nervous in the matter, for a learned commentator, Van Someren, noted[8a] that:

> It is to be observed. . . that [the Divorce Ordinance 1910] *nowhere*, actually says, *divorce* jurisdiction *is conferred* on the Supreme Court, *nor* does it anywhere say, the Supreme Court *shall have divorce* jurisdiction. . . The whole of [the Ordinance] however, proceeds on the hypothesis that *it confers divorce jurisdiction*.

However, in section 4 of the Ordinance of 1910 section 7 of the Indian Act of 1869 — or is it section 22 of the English Act of 1857? — surfaces, as follows:

> Subject to the provisions contained in this Ordinance the Court shall in all suits and proceedings hereunder act and give relief on principles which, in the opinion of the Court, are as nearly as may be conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

While this rich entertainment was being provided in the Straits Settlements, the lawgivers of the Malay States also sought to come to terms with the problems of divorce and the like. In 1928 the Federated Malay States legislature produced a Divorce Enactment[9] designed, according to its long title, "to confer upon the Supreme Court jurisdiction in divorce and matrimonial causes." Section 2(i) of the Enactment — possibly under the influence of Van Someren's tart comments on the Straits Settlements legislation — briskly conferred the necessary jurisdiction. Then, in subsection (ii), by India out of Straits Settlements, as it were, appears a provision on the principles to be applied by the courts.

At this point the principles on which the courts in the Straits Settlements and the Federated Malay States were to exercise their divorce jurisdictions converge: and not to beat about this particular bush any more than is necessary, the weary reader can note:

a. that section 4 of the Straits Settlements Ordinance of 1910 persisted through several revisions of the Laws of the Straits Settlements, survived the constitutional crisis of Malaysia, and has finally emerged as section 79 of the Singapore Women's Charter;

[7] XXX of 1907. See in particular s. 9(5).

[8] XXV of 1910.

[8a] The Courts Ordinance, etc.of the s.s. Annotated (Second ed., 1914) at 1 of the annotated Divorce Ordinance. The italics are those of Van Someren.

[9] 27 of 1928.

b. that section 2(ii) of the Federated Malay States Divorce Enactment of 1928 was swallowed up by the Divorce Ordinance of 1952[10] (where it was of sufficient importance to appear as section 3), and is now section 47 of the Law Reform (Marriage and Divorce) Act 1976.[11]

Such, in brief, is the history of section 47 of the Act of 1976 which, in spite of apparent repetition, had better be set out here:

> Subject to the provisions of this Part, [Part VI, dealing with divorce, judicial separation and nullity] the court shall in all proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

And having come this far, covering a hundred years and more in the compass of a few paragraphs, we may now endeavour to ascertain what such an irrepressible section might mean. In this context we can note, in passing, that there is nothing especially odd in the invocation of contemporary English practice, as is evident from Part II of the Civil Law Act (Act 67); section 100 of the Evidence Act (Act 56); section 10(3) of the Courts of Judicature Act (Act 91); and section 5 of the Criminal Procedure Code (F.M.S. Cap. 6, now in force throughout Malaysia).

III

In seeking to interpret the provisions of section 47 of the Act we may first consider what might be regarded in general parlance as "principles" on which a court might act and give relief. An English case of 1922 offers a guideline. In *McCreagh* v. *Frearson*,[12] on an appeal from Winchester County Court the court was required to interpret section 164 of the English County Courts Act 1888, which read:

> In any case not expressly by this Act or in pursuance thereof provided for, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters.

Shearman J. offered a useful definition:

> A 'principle' denotes a general guiding rule, and has no reference to specific directions, which vary according to the subject-matter.

In consequence, the point in issue on the appeal being the question whether an application was in time, the judge added that "the general question of

[10] 75 of 1952.

[11] Act 164.

[12] (1922) 91 L.J.K.B. 365.

a time limit may be a 'principle', but a particular time limit. . . is not a principle of practice in the High Court."

Interesting as the decision is, it does not take us very far, and we have an authority more close at hand. Writing of the parallel provision in the Singapore Women's Charter (section 79, "one of [its] major puzzles"[13]) Kenneth Wee referred to two meanings given by the Concise Oxford Dictionary as "Fundamental source" and "Fundamental truth as basis of reasoning." Of the Singapore provision, he observed[14] that:

> If this section is interpreted as a continuous reception of the English law at any particular moment of time, there may be difficulties over which English statutes apply in Singapore. This difficulty is aggravated by the fact that in recent years there has been a spate of matrimonial statutes in the family law area in England. But as regards those concepts of family law which are borrowed from English law (e.g. adultery as a ground of divorce) section 79 makes applicable the English decisions on them.

Several years earlier, the same writer had suggested that "section 79 should be interpreted to import only those English principles which are equally applicable in questions other than those arising under Part IX of the Charter".[15] The reason for this proposal lay in the limitations seen to be inherent in section 79, and in section 5 of the Civil Law Act, the writer fearing that English law could be applied in matrimonial proceedings but not in, say, proceedings relating to intestate succession (and the curious reader might then inquire, And why not, if that is the policy of the law?). The writer noted that:

> There is a sense according to which 'principles' acted on by a Court of law may encompass both common law and legislation.[16]

However, he argued against the invocation of English statute law, because "questions of family law do not fall under section 5 of the Civil Law Act" and therefore (? therefore) "English statutes on family law are not, apart from section 79, imported into Singapore". With respect to the writer, this is an odd argument: but then, he was haunted by the problems posed by such legislation as the English Domicile and Matrimonial Proceedings Act 1973. He did conclude that:

> section 79 may be so interpreted as to import automatically a whole lot of English family law statutes, thus equating section 79 to section 5 of the Civil Law Act,

[13] *Family Law* (1976), 24.

[14] *Ibid.*, (1976), 24-5.

[15] The Recognition of Foreign Divorce Decrees: Creativity and Orthodoxy: 16 *Mal. L. R.* (1974), 142. Vol. 16, 142.

[16] *Ibid.*, 149.

> in their respective areas. This present state of uncertainty is surely undesirable.[17]

In consequence he recommended legislation as the solution; he was dealing immediately with the matter of recognition of foreign divorce decrees, and perhaps overlooked or disagreed with that profound comment of Bartholomew,[18] that:

> the. . . mere fact that an English Act has been held to be applicable in Singapore does not imply that the Act is applicable across the board, as it were.

Another writer, Rowena Daw, has also commented on the particular problem of recognition of overseas decrees:[19]

> There are no provisions relating to the recognition of foreign divorce and nullity decrees in either Singapore or Malaysia and the principles of the common law therefore apply.
> The application of the English rules of recognition of divorce decrees poses no particular problems but the position of nullity decrees is more complex.

She saw "no reason in principle" why *Travers* v. *Holley*[20] and *Indyka* v. *Indyka*[21] principles "should not be utilised".

In all, then, there is little comfort to be obtained from comments on the parallel Singapore provision. Times have changed since in commenting on section 3 of the Divorce Ordinance of 1910 of the Straits Settlements ("Principles of law to be applied") Van Someren noted[22] of "the provisions contained in [that] Ordinance" that this, "it is conceived":

> includes the Divorce Rules made under section 50 of this [the Divorce] Ordinance. . .If, therefore, there is any provision of this Ordinance, or in those Rules, inconsistent with any "principle" on which the High Court of Justice, in England, acts, such provision must govern. It is not easy, however, to point to any such inconsistency. . .

Van Someren was not subject to doubt; it must be accepted that section 47 cannot invoke any English principle inconsistent with any provision of local legislation, be it principal or subsidiary, for the section is essentially of an auxiliary nature.

[17] *Ibid.*, 150.

[18] *Table of the Written Laws of the Republic of Singapore 1819-1971*, I. xi.

[19] 'Some Problems of Conflict of Laws in West Malaysia and Singapore Family Law', 14 *Mal. L.R.* (1972), 179, at 204.

[20] [1953] p. 246 ("reciprocity").

[21] [1969] 1 A.C. 33 ("real and substantial connection").

[22] Ordinance No. 123 (Divorce) of the S.S. Annotated (Third ed., 1926) at 1013-4.

Even so, one must feel some sympathy for the Singapore writers. A perusal of, say, Sweet and Maxwell's *Family Law Statutes* (sec. ed., 1976) gives a survey of seventy-one English Acts, dating from the Wills Act 1837 to the Children Act 1975, few provisions of which could be argued as relevant to local conditions.[23] But if an Act *is* relevant to local conditions, why should it not be adopted? Are we to be content with dusty answers, when certainty can be attained?

IV

It is here that we may turn — for once, with relief — to the Indian Act of 1869, with confidence that the Indian judiciary has not left section 7 of that Act in its pristine, enigmatic condition. Summarising some of the comments made in the *A.I.R. Manual* already referred to,[24] we may deduce that section 7:

> 'has been created in order to make the Indian Divorce Law flexible and to facilitate its development alongside English law'. It 'is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act'. . . 'The whole object of s. 7 is to keep the practice of the Indian Divorce Court as nearly as possible in line with that of the English court. . .' The section enables the court to 'take into account latest amendments to English law'. But 'the court cannot give any relief which is contrary to the provisions of the Act.'

These few comments, culled from the Indian *Manual*, indicate clearly enough the policy behind the section, and the Indian judges have not been faint-hearted in applying contemporary amendments to English law, if the interests of justice have been thereby served.

Ah, says the cautious reader, but have they really applied English statutory rules? And can they properly do so? The answer to both these questions appears to be, Yes. Not without some hesitation have the Indian judges adopted English statute law. For example, in 1930 Reilly J. noted[25] that:

> The words 'principles and rules' in s. 7, Indian Divorce Act, mean principles and rules of law, of evidence, of interpretation, of practice, and of procedure, *but not statutory provisions nor statutory rules* (my italics).

However, in 1936, these words were approved by Stone J.,[26] with the ex-

[23] We would not particularly want such a law as the Domestic Violence and Matrimonial Proceedings Act 1976, of which Joseph Jackson says (*Rayden on Divorce*, 13th ed, vi), "Never has such a short Act created such dissension in so short a time as to its fundamental meaning."

[24] See fn. 4, *supra*.

[25] *Iswarayya* v. *Iswarayya* AIR 1930 Mad. 154 at 155.

[26] In *Sumathi Ammal* v. *D. Paul*, AIR 1936 Mad., 324 at 329.

ception of the last seven words. Further, in 1949 Yahya Ali J. reaffirmed the position:[27]

> It was held by the majority in the Full Bench case *[Sumathi Ammal,* 1936] that a distinction cannot be drawn between those principles and rules which are derived from statute and those which are derived from any other source.

That position seems to have been in line with the Privy Council decision on appeal from Reilly J., of 1931,[28] although (as is not uncommon when the reader plunges into the thickets and brakes of Indian case law) the position is not as clear as it might be. Nevertheless, it does seem beyond doubt that English statute law can be and has been invoked under the section.

Such being the Indian practice, is there anything in Malaysian law to prevent a court following the Indian practice? The answer to this question appears to be, No. Anguished readers of the *Malayan Law Journal* will remember the 1963 case of *Martin* v. *Umi Kelsom.*[29] In that case the Chief Justice had occasion to consider section 3 of the Malayan Divorce Ordinance, 1952, similar in content to section 7 of the Indian Act and section 47 of the present Act. Now, whatever the merits of the case of *Martin* v. *Kelsom* (and it can be argued that they are few) Thomson C.J. was, it is submitted, at least correct in affirming:

> that a question of the conflict of laws which arises in relation to a matter regarding which the Court's jurisdiction comes from the Divorce Ordinance is to be determined on the same principles as those on which such a question would be determined by the English courts.[30]

On the authority of this *dictum* we can, I believe, seek to import the general principles of conflict of laws in relation to divorce, judicial separation and nullity, and on the basis of Indian authority (admittedly itself a little confused, and of a persuasive value only) can admit that section 47 invokes statutory as well as non-statutory rules.

And after all, why not? The policy of the law is presumably aimed in this area not only at certainty, but a topical certainty. A parallel provision in the Indian Act has (to paraphrase an Indian comment) made the law there flexible, and facilitated its development alongside English law: to which end it has been given a liberal interpretation. This is, it is suggested, the policy behind section 47 of the present Act, and explains its persistence in local law.

[27] In *Lewis* v. *Lewis,* AIR 1949, 887 at 879.

[28] A.I.R. 1931 P.C. 234, where Lord Russell of Killowen gives a history of the matter.

[29] (1963) M.L.J. 1.

[30] *Ibid.,* 3.

V

In this brief essay I have, then, sought to enlarge the catchment area of section 47. It may be that in Singapore conditions, the arguments to the contrary advanced on the parallel provision in the Women's Charter are there valid. However, in Malaysia it is suggested that a court, in exercising its jurisdiction under Part VI of the Act of 1976 (that is to say, in the areas of divorce, nullity and judicial separation) can look at and apply contemporary English case and statute law (even that relating to the matrimonial home) provided that there is nothing in the Act — or, it is suggested, any other statute — inconsistent therewith. I say, "any other statute", since the auxiliary nature of the section, coupled with the use of the words "conformable" and "as nearly as may be", implies such a dominance of local law, that in case of conflict with such a referential provision it must surely prevail.

It is difficult, without the benefit of the sort of argument offered by counsel, to lay down any guidelines as to what provisions of contemporary English law may be invoked under section 47: but having come this far, the effort must be made. As a basis, then, for further consideration of what is, after all, a fascinating problem, and at the risk of repeating what is all too obvious, let me endeavour to offer what I see as potential guidelines on the use of section 47:

a. The principle to be adopted under the section must be one which is (subject to paragraph *e*) presently accepted and acted upon by the High Court in England, in the exercise of its matrimonial jurisdiction.[31]
b. The principle can have a non-statutory or a statutory origin.
c. The principle must not be inconsistent with the provisions of any Malaysian statute, nor with the circumstances of Malaysia and its inhabitants.[32]
d. The principle must have its foundation in a provision or situation parallel with existing Malaysian law.
e. If for any reason there has been a reform of a principle of English family law not matched by a similar Malaysian reform, it is proper to apply English principles in force immediately prior to such reform.

This last paragraph is prompted by such an issue as that of a wife's independent domicile: although given the intense interest in the matrimonial home now shown by judges and other lawmakers in England, section 47 could play an active part in the development of Malaysian law.

However, what of conflict of laws, I hear you cry. What assistance is section 47 in the realm of, say, the recognition of foreign divorce decrees? The Singapore commentaries suggest an adherence to English case law which, culminating in *Indyka* v. *Indyka*[33] and the notion of "real and

[31] Van Someren, *op. cit.*, 1014, refers to *Brown and Powles* Divorce Laws and Practice and *Rayden's* Divorce laws, as a guide to English principles.

[32] To borrow a thought from the Civil Law Act (Act 67), s. 3.

[33] [1969] 1 A.C. 33.

substantial correction" and the case of *Sivarajan* v. *Sivarajan,*[34] has proved unsatisfactory. What is necessary in this context is, I suggest, a reference to such statutory rules of English law as are consistent with substantive Malaysian law.

Under Malaysian law, it seems that "the domicile of a wife is that of her husband while the marriage subsists, even though the parties may be living apart":[35] such was the view of Rigby J. in a Penang case — although the authority for what may have seemed a self-evident proposition is not at all clear. It may be (the point is now remote) that once upon a time section 47, or its predecessor, could have invoked the provisions of the English Domicile and Matrimonial Proceedings Act 1973. That time is past. What does appear to be generally accepted is that a Malaysian wife acquires the domicile of her husband as a domicile of dependency. In other words, it cannot be accepted that section 47 of the Law Reform (Marriage and Divorce) Act 1974 invokes the provisions of the English Domicile and Matrimonial Proceedings Act 1973, which abolished a wife's dependent domicile and made some consequential changes in relation to jurisdiction in matrimonial proceedings and the law on recognition of overseas divorces and legal separations. On this basis (I appreciate how slender the argument is, how delicately the scales are adjusted) I suggest that the principles of the Recognition of Divorces and Legal Separations Act 1971 can be accepted. When a Malaysian wife is given the capacity for a separate domicile (as has occurred in Singapore),[36] then the amendment made by the English Act of 1973 can be adopted.[37]

For the unfortunate reader who has persevered this far, let me offer a moral by way of consolation. The writer for some time supposed that section 47 invoked only English case law. How did this quaint notion enter his head? Not because any local judge had laid down such a proposition, but because others had asserted that it was indeed so. Well, so it may be: but other authority (as well as ordinary commonsense, which is, alas, seldom ordinary, seldom common) suggests that it is not so, and that it is an odd court, indeed, that can manage to apply only non-statutory principles, without reference to statutory rules.

[34][1972] 2 M.L.J. 231.

[35]Rigby J. in *Charnley* v. *Charnley and Betty* (1960) 26 M.L.J. 29 at 30.

[36]See section 45A of the Women's Charter (*Cap. 47*) in force on 1 June 1981.

[37]In other, and more practical, terms, that the practitioner use as a guide *Dicey and Morris, Conflict of Laws* (Ninth ed.) rule 44, until the law on a wife's domicile is changed, when he (or she) can then use *Dicey and Morris* (Tenth ed.), rule 42.

Incidentally, in a paper presented to the Seventh Malaysian Law Conference (October 31 — November 2, 1983) Professor Datuk Ahmad Ibrahim, Sheikh Al-Kulliyah Undang-Undang, International Islamic University, Petaling Jaya, Selangor, suggested the abolition of a wife's dependent domicile: and this proposal was, it seems, generally regarded as a Good Thing.

It was the Buddha who warned us not to believe anything, because others had said that it was so. 'Only when you have tested it for yourself,' he affirmed (I write without reference to the texts, but I have the gist of it), 'only then can you contemplate believing it. But not until then'. The moral, then, is this: *crede experto* — but only when you must.

R.H. Hickling*

*Visiting Professor of Law,
Faculty of Law,
University of Malaya.