RECENT DEVELOPMENTS IN THE LAW OF MARRIAGE AND DIVORCE

This article discusses recent developments in the law of marriage and divorce in Singapore.[1] The law is contained in the Women's Charter[2] which was last amended in 1980 *vide* Amendment Act 26/1980. Since 1990 there have been several significant decisions in this area.[3]

I. MARRIAGE

1. Capacity to Marry: A married man

The Court of Appeal in *Moh Ah Kiu* v *CPF Board*[4] has reaffirmed that there can be no valid polygamous Chinese customary marriage solemnized in 1975 between two Singapore domiciliaries one of whom was already party to an existing monogamous marriage. This is true even if this Chinese customary marriage took place in Penang which, at that time, did permit the solemnization of polygamous Chinese customary marriages.

Choe Inn Hock had properly married Lily Foong in Singapore under the Straits Settlements Christian Marriage Ordinance in 1960. This marriage was, thus, a valid monogamous union.[5] They lived separately from 1970 but did not yet divorce at the time of his next marriage. In 1975 a Chinese customary marriage was celebrated between Choe and Moh Ah Kiu in Penang following which they returned to Singapore and cohabited until his death. Choe and Lily Foong were subsequently divorced in 1980. Choe and Moh did not take further steps to have their union legalised after his divorce from Lily Foong. The question of the validity of the Penang marriage came about when, after Choe's death, the Central Provident Fund Board applied *inter alia* for a declaration as to the validity of this Chinese customary marriage while Moh applied for the CPF's charge on Choe's CPF savings to be withdrawn. The actions were heard together. The High Court decided *inter alia* that there was no valid marriage between Moh and the deceased. Moh appealed against this. The Court of Appeal dismissed the appeal holding that Choe and Moh were plainly not married.

1. This is modified from the paper entitled "Recent Developments in Family Law in Singapore since 1990" presented by the author at the Law Society of Singapore's Weekend of Continuing Legal Education held from 17 – 18 July 1993.
2. Cap 353, 1985 Rev Ed of the Statutes of the Republic of Singapore.
3. The year 1990 is chosen as the law before that year has been presented in some detail in *Family Law in Singapore* written by the author and published in 1990.
4. [1992] 2 S.L.R. 569.
5. See Leong Wai Kum, "Of Christian Men and Polygamous Inclination" (1982) 24 Mal.L.R. 335.

There can be no doubt that this decision is correct. We need only review the argument attempted by counsel for Moh to appreciate its shortcoming. Justice L. P. Thean summarised the argument thus:[6]

> Counsel ... relied on the fact that Choe and Moh had cohabited as man and wife throughout the period from 1975 to 1987 and had thereby acquired the reputation of being husband and wife. In support, there were filed multiple affidavits by friends and relatives of Choe and Moh all deposing to the fact that Choe and Moh had lived together as husband and wife and had been known to be and accepted by them as husband and wife. Moh also affirmed an affidavit deposing to her long cohabitation with Choe as his wife and produced various documents to establish her repute as such. On the basis of the massive affidavit evidence, counsel ... submitted that a presumption that Choe and Moh were married had arisen, that there was no evidence to the contrary and there was nothing to challenge such presumption. Relying on that presumption, he contended that Moh had proved the existence of a valid marriage with Choe on the material date and cited numerous English authorities in support.

The fallacy of this argument lies in its disregard of the principle that a valid marriage results only when it is properly formed by two persons with full capacity to marry each other. The requirements of solemnization of marriage and the requirements of capacity to marry are separate and both have to be fulfilled in order for a valid marriage to result. In trying to discover what the law is as to either of these we need, first, to look to the Women's Charter as this is the marriage law for all non-Muslim Singapore domiciliaries and, then, where the Act is silent (for instance, as to the manner of solemnizing a Chinese customary marriage in Penang and the proof thereof) to other relevant law including the law of the place of formation of the alleged marriage.

Counsel's argument amounts only to this. The alleged Chinese customary marriage was solemnized in Penang in 1975. Although the intended spouses were Singapore domiciliaries and bound by the Women's Charter, the Act is silent on the formalities of such Penang marriage. It is fair to assume that the law of Penang in this regard in 1975 was similar to that in pre-1961 Singapore as both Singapore and Penang were part of the Straits Settlements. By such law a Chinese customary marriage could be proved to have been solemnized either by the performance of the proper rites of marriage,[7] or by the presumption of the formation of marriage from evidence of long

6. See n 4, at p. 574.
7. *The Six Widows Case* (1908) 12 S.S.L.R. 120.

cohabitation and the repute of marriage,[8] or, even, by proof of their mutual intention to marry and the effecting of such intention.[9] The evidence produced proved the solemnization of the marriage in Penang in 1975 by way of the *Ngai Lau Shia* "presumption of marriage".

The problem is that this evidence in no way proves the capacity of the two persons to marry each other. Without proof of such capacity to marry, counsel's argument is incomplete: there might have been a valid solemnization but this is only one half of the equation towards a valid marriage.

The capacity of the two Singapore domiciliaries to marry, in 1975, was dictated by the Women's Charter sections 4(1) and 5(1) of which read:

> Every person who ... is lawfully married ... shall be incapable, during the continuance of such marriage ... of contracting a valid marriage ... with any person other than such spouse ....
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> Every marriage contracted in contravention of the provisions of section 4 of this Act shall be void.

The effect of these is that, as long as the male party remained the spouse of his first wife, he lacked the capacity to marry the female party or anyone else. As Thean J. rightfully said:[10]

> We find it unnecessary to consider the authorities and decide whether the presumption of marriage based on long cohabitation and repute applies in Singapore in the face of stringent and clear statutory authorities ... : see ss 4(1), 5(1), 11, 21 and 23 of the Charter. It is sufficient to say that in this case, on the facts, we do not see how Moh can successfully maintain that on that presumption she has proved that a valid marriage subsisted between her and Choe on the material date. ... we would be shutting our eyes to the reality of the situation ... when plainly they were not legally married.

This decision has not added anything new to the law. It is, however, a strong reminder of the basic principle that the formation of marriage consists in the conjunction of proper solemnization and full capacity to marry each other on the part of the two parties.

2. Capacity to Marry: A post-operative transsexual

The High Court in *Lim Ying* v *Hiok Kian Ming Eric*[11] decided that a female transsexual who went through an operation to acquire more male physical features could not marry as a male.

8. *Ngai Lau Shia alias Low Hing Sian* v *Low Chee Neo* (1921) 14 S.S.L.R. 35.
9. *Re Lee Gee Chong decd* [1965] M.L.J. 102.
10. See n 6.
11. [1992] 1 S.L.R. 184. It should be noted that in the unreported Div. 2879/1991, *Subramaniam s/o Narayarasamy* v. *Kanagavalli*, Selvam J. C. dismissed a petition for nullity where a man had married a post-operative male transsexual. It appears the only difference had been that the transsexualism and surgery were known to the petitioner. His Honour appears to have decided

The facts were unusual and, somewhat, unfortunate. Eric Hiok was born a girl. She was, however, a female transsexual *i.e.* a girl who felt, genuinely and with medical certification, that she was really a male trapped inside a female body.[12] About three years before her marriage she underwent a sex-change operation to acquire male sex organs. The operation involved amputating her female sex organs and creating male ones in their place. Her female sex chromosomes, however, remain unchanged; there is no procedure available to alter chromosomes. To maintain the pastiche of maleness (physical and muscle structure, voice and amount of body hair etc) she would have to ingest male hormones all her life. After the operation, she had her name changed to Eric Hiok and this was recorded into her Identity Card together with a change in her notation of sex to "male". Eric Hiok then proceeded to marry Lim Ying at the Registry of Marriages. Lim Ying claimed to have been unaware of Eric Hiok's transsexualism and sex-change operation. The Registry marriage was uneventful as the fact of the sex-change was never made known since the Registry, at that time, only required parties to produce their I.C.s.

Four months after the Registry marriage, Lim Ying presented a petition seeking a decree of nullity. She claimed (1) the marriage was void ab initio as Eric Hiok remained a female and the marriage between two women was void under the Act; and/or (2) the marriage was voidable at her option as it was never consummated due to Eric Hiok's incapacity. Eric Hiok did not defend the petition.

The High Court granted Lim Ying the decree of nullity she sought holding that the marriage was indeed void ab initio. Judicial Commissioner K.S. Rajah gave alternative reasons for his decision. (1) His Honour agreed that Eric Hiok remained a female despite the sex-change and the notation of "male" in his I.C. and that a marriage between two women was a breach of the requirements of the Act so as to make the marriage void. (2) His Honour also decided that, since Lim Ying did not know of Eric Hiok's transsexualism and sex-change operation, the consent to the marriage she gave was not real consent and the marriage licence was made invalid for this reason. His Honour did not decide on the claim of non-consummation due to incapacity.

This decision has been analysed at some length in my earlier article[13] and a note by my colleague Tan Cheng Han[14] but, because of its importance, several points are worth noting here.

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that to grant the decree would have assisted a fraud on the Registry, and that the petition was against public policy and an abuse of the process of court. This decision could be inconsistent with *Lim Ying* if this difference of fact were not material to the law.

12. See S.S. Ratnam, Victor H.H. Goh & W.F. Tsoi *Cries from Within, Transsexualism Gender Confusion and Sex Change* (Singapore: Longman, 1991) at pp. 1 - 25.
13. Leong Wai Kum, "Reform of the Law of Nullity in the Women's Charter" [1992] S.J.L.S. 1.
14. "Transsexuals and the Law of Marriage in Singapore" [1991] S.J.L.S. 509.

(a) Novel points on capacity to marry

In holding that Eric Hiok was still a female and the marriage was void, several decisions novel to Singapore have been made, (i) That there is a requirement in the Act that the two parties to the marriage must be of different sexes. This is significant as there is no specific provision for this anywhere in the Act although many provisions can easily be said to have been written on this premise. (ii) That breach of this requirement makes the marriage void ab initio. This is significant because this requirement does not appear anywhere in the Act; in particular it is not included within section 99 which sets out the grounds on which a petition for nullity may be presented as follows:

> A marriage which takes place after 1st June 1981 shall be void on the following grounds only:
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> (a) that it is not a valid marriage by virtue of sections 5, 9, 10, 11 and 21; or
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> (b) where the marriage was celebrated outside Singapore, that the marriage is invalid -
>
> (i) for lack of capacity; or
>
> (ii) by the law of the place in which it was celebrated.

This section, in having the phrase "shall be void on the following grounds only", would normally be regarded as exhaustive. The court has thus decided that section 99, despite its words, is not exhaustive of the grounds which make the marriage void. (iii) That, for the purposes of contracting a marriage under the Act, one's sex is determined at birth and is unalterable except by the Registrar of Births on the basis that there was a mistake at the point of registration at birth. That the High Court of England's decision in *Corbett* v *Corbett (orse. Ashley)*[15] to this effect also represents the law in Singapore. This is significant because this decision has been criticised at home and abroad and has not always been followed in countries like Australia, New Zealand and the United States although there have been differences of opinion even there.[16] Also, there have been statutes enacted in several European countries like Sweden, the then West Germany and Czechoslovakia, Greece, Italy, Holland, Switzerland and Finland to accord some legal recognition to the post-operative sex of transsexuals. His Honour referred to many decisions but decided to follow *Corbett*.[17]

15. [1971] P. 83.
16. See n 13, at pp. 9-17.
17. See n 11, at p. 197 where his Honour said: "A person biologically a female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one and one woman under the Charter be regarded as 'woman'."

I have disagreed with his Honour in my article and I should like to briefly repeat those points. First I submit we in Singapore do have a choice whether to follow *Corbett* and we should choose not to. *Corbett* has in fact decided two things *viz.* (i) that sex for the purpose of marriage is determined "biologically" and the "psychological" test should be ignored, at least, where it produces an answer which is incongruent with the biological; and (ii) that the time to apply the biological tests are the point of birth. These two, in conjunction, leads to a post-operative transsexual's sex determined without any recognition whatsoever of the operation. If the same biological tests had been applied to such transsexual at the time of marriage the result would be far short of congruent because the post-operative transsexual would have chromosomes of one sex but genitals of another and may or may not (depending on the extent of the sex-change operation) have the gonads he or she was born with. Where the result is not congruent, even Ormrod J. in *Corbett* conceded that the conclusion might not be as easily reached.

It is submitted that (if we have to fight shy of the psychological test of sex) the proper time to apply the biological test must surely be the time of the marriage, just as it is with any other requirement of formation of marriage. Applying the biological test to Eric Hiok at the time of the marriage, he was much more male than female – he had male sexual organs, his original ovaries had been removed and he looked as much a man as surgery could make him. Only his chromosomes remained female and, even here, we should remember that Eric Hiok would be ingesting male hormones to subdue his female chromosomes. The results of the biological tests should have been determined to be incongruent; more pointed to him being male than being female. It is submitted the correct conclusion on applying the biological tests is that Eric Hiok was a male by the time of his purported marriage.

Moreover, psychologically, he felt he was a man and conducted himself accordingly. Why can we not treat him as a man? Why should his recognised medical ailment be made even more traumatic by the law's failure to accord him the dignity of being recognised as of the sex he has gotten himself made into by way of surgery? The ultimate criticism of the decision must be that it leads to the irony that Eric Hiok, looking male, was adjudged to be a woman and would therefore be allowed to marry another man if he should wish to; there was no suggestion that a transsexual has no capacity, absolutely, to marry anyone. Fortunately for the court, this spectacle would never present itself – Eric Hiok lives as a man and is not a homosexual; he will never feel the desire to marry another man.

(b) A more compassionate view

Second, the decision makes more of the requirement of parties being of different sexes than may be necessary. I submit that it was possible and

desirable to have downplayed this requirement. We should remember that this requirement is not expressly spelt out, it is nowhere required that the fact of the parties being of different sexes must be determined judicially, nor does section 99 require that breach of this requirement must result in the marriage being void ab initio. The assumption that there is such a requirement falls short of demanding that a marriage between a woman and a post-operative female transsexual who has surgically been changed to become a man breaches the requirement and that this renders the marriage null and void.

The issue of a person's sex in relation to capacity to marry is only likely to arise in relation to a very small group of people – the sexually dysfunctional transsexuals and hermaphrodites, and also homosexuals. Transsexuals and hermaphrodites have medically recognised problems. A transsexual has a fixated belief he or she is of the sex opposite to that he or she was born as. The ultimate medical treatment is a sex-change operation to align his or her physical features with his or her belief. A hermaphrodite is a person born with sex organs of both sexes; the medical treatment is an operation to remove those of the "wrong" sex and, if necessary, to create those of the "right" sex. A homosexual, in contrast, has no physical problems but is sexually attracted only to persons of his or her own sex; he or she is included with the sexually dysfunctional in this discussion purely for convenience. Each of these conditions is traumatic and, where treatment is sought, extremely difficult to treat. It should have been thought, then, that the proper legal response is a sensitive appreciation of their condition and to accord them as much dignity as is possible. It is beyond the scope of this article to argue for allowing homosexuals to marry each other but the more compassionate approach to transsexuals and hermaphrodites is fairly obvious. Transsexuals and hermaphrodites who have undergone surgical treatment should be regarded as members of their new sex.

(c) A better approach to the 'sex' requirement

Accepting that there is a requirement that the two parties to a marriage should be of different sexes, it is still more compassionate to implement it only at the level of the Registrar of Marriages. He should ensure that the parties, as they look and noted in their Identity Cards, are male and female respectively; two men or two women strolling into the Registry may be refused a marriage licence because of this requirement. It should, however, not be available to form the basis for a petition for nullity. No court should be asked to strike down a marriage on its basis. Further, where this requirement is invoked in court (e.g. in an application for a declaration of marital status or an action to review the Registrar's refusal to grant a marriage licence) the court need not go beyond the notation of sex in a person's Identity Card.

This approach should suffice to satisfy our conservative nature which stops us from sanctioning homosexual unions and still allow us to treat post-operative transsexuals and hermaphrodites as members of their new sex. This view also does not require reading into section 99 a requirement which is not there and which is not even specifically provided for anywhere in the Act. This approach may not be that adopted in England but, it is submitted, is to be preferred.

(d) Lack of information and effect on marriage licence

The alternative decision, that the apparent consent Lim Ying gave by participating in the marriage solemnization was not real because she did not know of Eric Hiok's sexual dysfunction with the result that the marriage licence was invalid is even more open to criticism. It is submitted that failure to know all the facts about the other party does not, of itself, make one's consent any less real: *C* v *C*.[18] The only operative mistake is a mistake about the actual person as opposed to a mistake about some or even all of his attributes – rather an impossible occurence except where the two parties never met before the day of the wedding. Otherwise, no marriage would ever be valid as there is always something about the other party one does not know. It is further submitted that, even if the consent of one party were vitiated by mistake or any other cause, the marriage licence does not thereby become invalid. A marriage licence granted by the proper authority and which remains within its period of validity is completely valid. The court's view would make the system of solemnization impracticable as we would need to go behind every licence to determine its validity.

3. Voidable Marriage: Non-consummation due to wilful refusal

In *Kwong Sin Hwa* v *Lau Lee Yen*[19] the Court of Appeal decided that a pre-nuptial agreement between spouses that they would not consummate their marriage until Chinese rites of marriage have been performed was valid and may be used as evidence of wilful refusal to consummate within a petition for a decree of nullity.

After the Registry marriage, the wife refused to go through the Chinese rites and said she wanted to become a nun. The husband petitioned for nullity on the ground that her failure to go through the Chinese rites constituted wilful refusal to consummate the Registry marriage so that it became voidable at his option. The High Court had dismissed his petition following *Ng Bee Hoon* v *Tan Heok Boon*[20] where, on a similar pre-nuptial agreement, the wife

18. [1942] N.Z.L.R. 356.
19. [1993] 1 S.L.R. 457.
20. [1992] 2 S.L.R. 112.

who petitioned for nullity when the husband failed to go through Chinese rites was refused her decree. Justice P. Coomaraswamy had decided that a pre-nuptial agreement of this nature was contrary to public policy and the Act and thus void.

On appeal, the Court of Appeal disagreed with the High Court and *Ng Bee Hoon*. The Court of Appeal decided that the pre-nuptial agreement was not void and it could form the basis of the allegation of wilful refusal to consummate. The court preferred instead the 1973 decision of the High Court in *Tan Siew Choon* v *Tan Kai Ho*.[21]

My colleague Tan Cheng Han has critically discussed *Ng Bee Hoon* in an earlier article in this journal[22] and I would not repeat the points he made. Suffice it to say that, through this decision, an agreement not to consummate a Registry marriage until Chinese rites are performed is now settled as perfectly valid. There is nothing in the Act nor in public policy which disallows intended spouses to agree in that manner between themselves. Indeed, Justice L. P. Thean at the Court of Appeal said:[23]

> It is clear to us that not every pre-nuptial agreement regulating or even restricting the marital relations of the husband and wife is void and against public policy. Needless to say, much depends on the relevant circumstances and in particular, the nature of the agreement, the intention of the parties and the objective the agreement was designed to achieve. In our opinion, the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, as long as such agreement does not seek to enable them to negate the marriage or resile from the marriage like the *Brodie* v *Brodie*[24] pre-nuptial agreement did.

Referring earlier to *Brodie* where, upon being pressed by the woman expecting his child to marry her, the man agreed to do so only when they entered an agreement that he would always live separate and apart from her as if they were unmarried and that she would never compel him to do otherwise, Thean J. had remarked:[25]

> The *Brodie* pre-nuptial agreement was intended to enable the husband to resile from the marriage and evade his marital obligations altogether. That agreement if implemented and enforced, would make a mockery of the law regulating marriages. Obviously such an agreement is unquestionably against public policy and void.

21. [1973] 2 M.L.J. 9.
22. "Pre-marital Agreements and Wilful Refusal to Consummate" (1992) 4 S.Ac.L.J. 162.
23. See n 19 at p. 469.
24. [1917] P. 217.
25. Op. cit. at p. 465.

Elaborating further on the legal perspective of pre-marital agreements, Thean J. said:[26]

> ... the law does not forbid [husband and wife] to agree as to how they will live and conduct themselves ..., when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have. Such agreements ... are not illegal or immoral or against public policy.

These words will no doubt will scrutinised and elaborated upon in future when we will have to flesh out what are agreements which "negate" or "resile from" marriage. With them, the Court of Appeal has at least established the principle that pre-marital agreements are not to be frowned upon. That there are requirements of marriage does not mean that the spouses cannot tailor them to their own preferences. That there are obligations which flow from being married, again, does not mean that the spouses cannot choose to live exactly as they wish. It is no doubt true that an agreement between husband and wife may fall foul of considerations of morality, especially those which have been encapsulated into provisions of the Act, but this still leaves a large area untouched and unregulated within which spouses retain autonomy of decision-making.

The law has, thus, been returned to that decided in the 1973 case of *Tan Siew Choon*. Failure to comply with a pre-nuptial agreement to undergo customary or religious rites of marriage before consummation does constitute good evidence of wilful refusal to consummate for the purposes of a petition for nullity.

4. Voidable Marriage: Lack of real consent due to duress

The High Court in *Geetha d/o Mundri* v *Arivanathan s/o Retnam*[27] decided that duress from family members vitiated the consent given by a young woman to marriage. The petitioner was a minor of 20 years at the solemnization of her marriage with the respondent. She was living with and dependent upon her parents. They chose the man for her to marry; the petitioner's mother and elder brother "abused, insulted and scolded" her into participating in the solemnization of the marriage. The brother had also slapped her in relation to this. The marriage was solemnized but the spouses did not cohabit and, indeed, never even spoke freely with each other. Two days after her 21st birthday, the petitioner left home to stay with friends. The girl sought legal advice which led to the petition for nullity on the ground that she did not freely consent to the marriage.

26. See n 23.
27. [1992] 2 S.L.R. 422.

Judicial Commissioner K. S. Rajah granted her the decree of nullity on the ground of lack of valid consent. He found there was coercion of her will and fears of threats of force to her limbs and liberty. Her apparent consent was thus vitiated. His Honour found the High Court of England's decision in *Hirani* v *Hirani*[28] instructive. Summing up the evidence, Rajah J.C. said:[29]

> The marriage would, no doubt, have promoted, in the view of her parents, the future happiness of the petitioner and it was on that basis the parents brought pressure to bear upon her to proceed with the marriage. Many Indian marriages are arranged and many of them live happily thereafter. The fact, however, remains that the petitioner in this case persisted in telling members of the family that she did not wish to proceed with the marriage and that she did not like the respondent. ... When the petitioner stood before the Registrar of Marriages, she believed herself to be in an inescapable dilemma. She had to choose between marriage or possible assaults and abuse which would make it impossible for her to live in the family home and work in peace at her work place, or even leave her home.... She chose marriage.... I therefore found the marriage ... void....

This is the first local case where a marriage was struck down as null and void because one participant's apparent consent was vitiated by undue pressure and duress placed upon him or her. The principle that, where consent is required, it must be freely given and be "real" is general to the law and cuts across areas as diverse as contract, tort and family law. While *Hirani* v *Hirani* is the leading recent decision from the area of family law, the principle is acknowledged to have been elucidated by the Judicial Committee of the Privy Council in *Pao On & Ors* v *Lau Yiu Long & Ors*.[30] Rajah J.C. himself quoted Lord Scarman thus:[31]

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. ... There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent'. ... In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognized in *Maskell* v *Horner*,[32] relevant in determining whether he acted voluntarily or not.

28. [1982] F.L.R. 232.
29. *Ibid*., at p. 428.
30. [1980] A.C. 614.
31. See n 27, at p. 428.
32. [1915] 3 K.B. 106.

It has been suggested, thus, that the test for determining operative duress or undue pressure is whether there has been a "coercion of the will". Professor Atiyah has, however, criticised the use of this or any other label. Writing of the law of contract[33] he opined, convincingly:

> So long as the overborne will theory was accepted a judge had merely to say 'I find as a fact that the [petitioner's] will was (or was not) overborne' and all manner of very difficult questions were swept under the carpet. Once it is understood that the law is not searching for overborne wills, but for improper and unacceptable threats, the very difficult question as to the permissible limits of coercion in our society has to be faced.

Once we have made the critical substantive inquiry of whether the type, extent and manner of persuasion or coercion is acceptable it may be convenient to sum up by finding that it has or has not overpowered the will of the other. We should, however, not mislead ourselves into thinking that the 'overborne will' label is some kind of formula that we can mechanically apply. There is no formula. We have to squarely face the difficult task of deciding if the persuasion, encouragement, pressure, threat *etc.* is acceptable (in which case, we would say that it is not of the nature that would lead to the other's will being overborne) or unacceptable (in which case, we would say otherwise).

Rajah J.C. could well have been alluding to this when his Honour said:[34]

> Parents may invoke culture and tradition, oppose a choice of a partner they think unsuitable, persuade, influence and arrange marriages, but the consent for marriage, even when parents give their consent for the marriage of a minor, must include the free consent of the person who is marrying.
>
> Family loyalties, cultural and religious traditions, arranged marriages, all have their place, and there is nothing in this judgment that seeks to destroy or denigrate them.

What we have here is a decision that the parents and older brother have gone over acceptable limits even if they may well have been doing it for the girl's own good. This decision will be of some guidance in deciding whether a future allegation of duress suffices to vitiate apparent consent for marriage but it does not and cannot work as a formula of sorts.

5. Petition for Nullity: Duty of Court

There has been a timely reminder to all practitioners that our judges will not

33. See (1982) 98 L.Q.R. 197 and (1983) 99 L.Q.R. 353.
34. See n 27, at p. 428.

do less than the duty the Act places upon them to "satisfy" themselves that the ground(s) alleged within petitions for matrimonial relief can and have been proved. In *Chua Ai Hwa (mw)* v *Low Suan Loo*,[35] High Court judgment dated 8 June 1993, unreported, the court reiterated that allegations within petitions for nullity must be proved to the satisfaction of the court. The wife's petition was bare. It alleged:

> 8. That at the date of the said marriage the marriage has never been consummated by reason of the wilful refusal of the Respondent to consummate the same.
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> 9. In the meantime, the Petitioner has discovered that she and the Respondent are really incompatible and that each should go his own way.

No particulars were supplied. The respondent did not defend. At the hearing, the petitioner could only give evidence of one request on her part to the husband to spend the night with her and his refusal. Subsequently, they lived apart for the next two years until this petition.

The petition was dismissed. Justice P. Coomaraswamy first noted the gravity of the role of the judge. Quoting the Court of Appeal of England in *Santos* v *Santos*,[36] which he noted had been approved of by the Court of Appeal in *Kwong Sin Hwa*, he said:

> [I]n uncontested matrimonial causes it is wrong for the parties to assume that the courts merely rubber stamp their petitions and grant the decree sought. It must be remembered that even in such proceedings the material allegations must be proved to the satisfaction of the court.

In summing up the petitioner's case, his Honour said "evidence of refusal by the respondent or that it was wilful was nil" with the inevitable result that his Honour "find[s] that the petitioner has not discharged [the] burden of proof on her." In this case, his Honour conjectured that the parties could have married for the sole purpose of obtaining a flat so that, after this was achieved, it became convenient to end the marriage; his Honour described this as a "limited purpose" marriage. A marriage such as this is nevertheless valid and the correct process for the now unhappy couple would be a petition for divorce in due course of time. The Act requires, under section 87, the spouses to wait until three years from the date of marriage and, under section 88, three years separation as evidence of the irretrievable breakdown of their marriage; the periods could run concurrently. This decision that the petition fails for lack of proof is undoubtedly correct.

35. Divorce Petition 1626 of 1992, unreported. His Honour had earlier in Divorce Petition 2792 of 1991, *Pok Wui Suan (mw)* v. *Loh Lian Seng*, also unreported, similarly dismissed a petition brought on the same ground because the petitioner had failed to satisfy the court that the requirements of law had been fulfilled. See also *Postscript* to this article.
36. [1972] Fam. 247.

6. Voidable Marriages: Is the concept outdated?

The opportunity should not be passed to make an observation about the continuing relevance of the concept of voidable marriages. In *Kwong Sin Hwa* v *Lau Lee Yen, Ng Bee Hoon* v *Tan Heok Boon* and *Geetha d/o Mundri* v *Arivananthan slo Retnam* we have the High Court and, even, the Court of Appeal deciding whether unhappily married people should be allowed to have their marriages annulled; in the first two, for the reason that their marriages were not consummated because the other party wilfully refused to do so and the third because she was forced by her family to marry a man not of her own choosing. It may be thought that these matters, though extremely irksome to the petitioners, are really of a nature far less serious than one would expect in a petition alleging that the marriage be struck down as null and void! They may be said to be more alike the matters one would expect to encounter in a petition for termination of marriage. There are palpable differences between the grounds which make a marriage void ab initio from those which make it voidable. The law on marriage void ab initio continues to retain significance today as we still do not tolerate such marriages (e.g. where the spouses are siblings). The same cannot be said of voidable marriages such as the ones above. Where divorce is available to all, it seems somewhat inconsistent to favour some groups of unhappily married people by giving them the privilege of choosing whether to put an end to their misery by way of annulment or by way of divorce. It is also worthy of note that some judges, like Coomaraswamy J. in *Chua Ai Hwa (mw)*, have noted that some of the grounds making a marriage voidable have tended to be abused by parties who hope the court will grant the petition on fairly skimpy evidence simply because the petition is not defended.

The time may have come for us to seriously consider if we should not abolish voidable marriages altogether and simply require these parties to resort to the law of divorce instead. Would it be oppressive to require the petitioners in the voidable marriages above to resort instead to divorce to relieve their problems of being unhappily married? Does society still regard a marriage that has not been consummated because one party wilfully refused to do the honours as being not completely valid and/or the unhappiness of the other party as being of a nature completely different from the unhappiness of other people who have to look to the law of divorce?

II. DIVORCE

1. Four year separation: Bar to Decree

The High Court in *Cheong Kim Seah* v *Lim Poh Choo*[37] heard a petition for divorce based on the fact of separation. The parties were married in 1964 and

37. [1993] 1 S.L.R. 172.

had two children. In February 1988 the petitioner left the matrimonial home never intending to return. In April 1989 the petitioner filed for divorce on the fact that his wife had behaved in such a way that he could not reasonably be expected to continue to live with her. He supplied numerous particulars of such behaviour which she strenously resisted. In February 1992 the petitioner withdrew this petition and filed a new one using the simple fact of their having lived apart for a continuous period of four years. The wife sought to defend this new petition as well.

The wife's answer consisted of two separate parts. She alleged (1) that the petitioner "at all material times did not possess the capacity and did not and/or was not able to form the necessary intention to divorce" her. She claimed he was immature, that he had an inferiority complex and that he had been receiving psychiatric treatment for 20 years. She further admitted the four year separation but alleged (2) she still loved and cared for the petitioner and was willing to effect a reconciliation. The petitioner applied to have these two allegations in his wife's answer struck out. The Registrar dismissed the petitioner's application. The petitioner then appealed against this to the High Court.

Justice M. Karthigesu allowed the petitioner's appeal. On the wife's allegation (1) his Honour decided that this was, in effect, a challenge on the authority of the petitioner's solicitors. This was serious and there is a special means provided by rules of court for this to be done. The wife using this as a defence to a petition was an abuse of process. On the wife's allegation (2) his Honour decided that, once the fact of four year separation has been admitted, it is irrelevant that she wanted a reconciliation; it would only be material if this wish were mutual. His Honour ordered that the whole of the respondent's answer, except for the paragraph where she admitted the four year separation, be struck out and the petition proceed as undefended. The respondent was also ordered to pay the costs of this appeal and the hearing before the Registrar.

This is the first reported case concerning a petition for divorce based on the fact of four year separation. In the course of his judgment his Honour reaffirmed several aspects of the law on this and of the defence available to respondents in a divorce petition.

His Honour stated that this fact is the successor of the former subsections 82(1)(e) and 82(2)(g) which allowed either husband or wife to petition for divorce on the ground that the respondent "has lived separately from the petitioner for a period of not less than seven years immediately preceding the presentation of the petition and is unlikely to be reconciled with him or her." These subsections had been introduced into the Women's Charter *vide* Amendment Act 9 of 1967. Section 82 and the entire of the law of divorce was overhauled and amended in the law reform exercise of 1980. While our

new law of divorce was modelled upon the Matrimonial Causes Act 1973 of England, which incorporated their new law of divorce brought about by their Divorce Reform Act 1969, it is true that this particular fact merely succeeded to our "no-fault" ground in the former subsections 82(l)(e) and 82(2)(g). Inasmuch as England did not have a similar "no-fault" ground in 1969, our law of divorce then was in fact closer to the "irretrievable breakdown of marriage" basis for divorce.

Then his Honour noted that there are differences between the fact of separation under the Women's Charter and that in England. First, the length of separation is different. In England, the law requires separation for two years where the respondent agrees to the divorce or, otherwise, separation for five years. Under section 88 of our Act, the equivalent periods of separation are three years where the respondent agrees to the divorce or, otherwise, four years. In this petition, as the wife did not agree to the divorce, the petitioner had to rely on four years separation.

Then, in England, where this fact is used, the court, after determining the fact of separation, can still, under the Matrimonial Causes Act 1973 section 5:

> consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other person concerned, and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

In other words there can be a complete defence even if the court is convinced the marriage has irretrievably broken down. This refusal of a decree is applicable only to this fact of five year separation. The bar was incorporated into the Divorce Reform Act 1969 of England to allay the reservations of the more conservative Members of Parliament who saw this particular avenue for obtaining a divorce as being very unfair to a blameless spouse who could be divorced against his or her will.

In our Act, there is no special bar to this particular fact but we do have a general bar. Subsection 88(2) requires the court hearing the petition to inquire, not just into the facts alleged as causing or leading to the breakdown of the marriage but also to satisfy itself that "the circumstances make it just and reasonable to do so" before it makes a decree for its dissolution. Elaborating, subsection 88(4) states:

> In considering whether it would be just and reasonable to make a decree, the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved, and it

> may make a decree nisi subject to such terms and conditions as the court may think fit to attach; but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage, it shall dismiss the petition.

There have been no reported decisions discussing the ambit of this bar. It is submitted that, despite it applying across the board to all petitions for divorce and its theoretical possibilities, this provision is unlikely to be used in any except the most extreme of circumstances. It becomes increasingly difficult to envisage a situation where, the marriage having broken down irretrievably and one spouse petitions for a divorce, it is still "wrong" to dissolve the marriage.

In *Cheong Kim Seah*, in relation to a petition based on four year separation, the High Court decided that there is little room for the operation of this bar. Of the allegations of the petitioner's immaturity and his being under psychiatric care, Karthigesu J. said:[38]

> ... even if proved [they] would not in my view, make it 'just and reasonable' for refusing a decree. This particular is scandalous and clearly intended to embarrass the petitioner and does not to my mind amount to a circumstance for maintaining the marriage ....

Of the allegation that she still loved and cared for the petitioner and was willing to effect a reconciliation, Karthigesu J. said the "respondent's desire to maintain a marriage ... is a meaningless averment and ought to be struck out." It is difficult to envisage when a decree might be refused. It must also be remembered that the divorce court now has, at its disposal, a range of powers to help spouses make adjustments and these powers may well suffice to iron out any unfairness which might otherwise come about as a consequence of the divorce. Perhaps in future we may choose to amend or, even, delete this "bar" which does not appear to serve much purpose.

The main issue in the appeal was as to the respondent's allegation that the petitioner was so immature as to be incapable of deciding whether to divorce her. The seriousness of this can be appreciated when Karthigesu J. repeated this allegation thus:[39]

> This averment impinges on the mental capacity of the petitioner to instruct his solicitors to petition for divorce and more importantly denies the authority of the petitioner's solicitors to bring this divorce petition. It has serious and far-reaching consequences. Although the words 'unsoundness of mind' are not used, the words of the averment, in my view, mean no less. The averment also implies that the petitioner's

38. *Ibid.*, at p. 182.
39. See n. 35, at p. 176.

> solicitors were acting without authority and thus were in breach of their professional duties and responsibilities.

The issue was, thus, one of whether such grave allegation can form the basis for defending a petition and if there were no other better way in which to raise and resolve it. Although this is the first case to have raised this in Singapore, his Honour was able to refer to an old English decision, *Richard* v *Branson & Son,*[40] which was on exactly the same point. There Warrington J. decided thus:

> Is [this allegation] ... a question which can be raised ... in the action ...? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the court, to justify that proposition. The business of this court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.

This judgment has been approved by the House of Lords and referred to in the *Supreme Court Practice (White Book).* Karthigesu J. also referred to an application of this to a matrimonial proceeding in *J (orse B) (by her next friend)* v *J.*[41] Applying this to the instant case Karthigesu J. said:[42]

> Hence, the proper course for the respondent to have taken, if she genuinely believed that the petitioner 'did not possess the capacity and did not and/or was not able to form the necessary intention to divorce the respondent' was for her, by a substantive application, supported by credible evidence, and I should have thought medical evidence as well, to have applied for a stay or a dismissal of the petition and not to have pleaded his incapacity as a defence to the petition. By doing so, the respondent is in abuse of the process of the court ....

This case thus establishes several points of note to the law of divorce and of the proper conduct of matrimonial proceedings. It should be noted that new subsidiary legislation has been prepared and published by the Law Reform Commission as to the conduct of matrimonial proceedings. The Women's Charter (Matrimonial Proceedings) Rules,[43] update and replace the former Matrimonial Proceedings Rules of 1981. It is not expected that these new rules differ in any significant way from the old ones.

40. [1914] 1 Ch. 968.
41. [1953] 1 W.L.R. 36.
42. See n. 35, at p. 178-179.
43. R 4 of the Subsidiary Legislation of the Republic of Singapore 1990.

Lastly, *Cheong Kim Seah* may be interesting for his Honour's decision that the respondent wife should pay the costs of the appeal as well as the hearing before the Registrar. The matter is not completely without controversy as, in the past when women were "the fair sex" under the economic domination of their husbands, the principle was that costs in matrimonial proceedings must always be borne by the husband. With increasing economic independence, this has become something of a relic.[44] While there have been several decisions where our courts have reaffirmed their absolute discretion in the matter of ordering costs, even in matrimonial proceedings, this latest reaffirmation is welcome. It demonstrates, yet again, that the norm is the rule; the court has absolute discretion to order whatever is fair. Here, given that the respondent's answer was misguided and even frivolous in some ways, it was fair to order costs against her.

CONCLUSION

Some of the above cases have done more than reaffirm basic principles. *Lim Ying* v *Hiok Kian Ming Eric* has added one additional requirement to capacity to marry and, thus, leaves the suggestion that there could be even more. This decision requires further thought. The cases on voidable marriages suggest the concept could stand reassessment in these times when divorce is fairly easily available to any unhappily married person. *Cheong Kim Seah* v *Lim Poh Choo* has illustrated that it is difficult to show cause why a decree of divorce should be refused once one of the facts evidencing irretrievable breakdown of the marriage is proven. It raises the question of whether we should retain a "bar" which appears more imposing than it actually is in practice. New challenges within the area of marriage and divorce continue to be posed to our courts. Over time, no doubt, we will develop a even better law of marriage and divorce.

LEONG WAI KUM*

Postscript: While the above article was in press, the High Court has decided that where both petitioner and respondent deceived the court in a petition for annulment of an alleged voidable marriage the decree nisi earlier granted will be rescinded. In *Heng Joo See (mw)* v *Ho Pol Ling*, Divorce Petition 94 of 1993, judgment dated 26 August, unreported, Justice P. Coomaraswamy discovered that the parties had consummated their marriage although the woman had alleged to the contrary in her petition and affirmed it in court while the man had not defended her petition. Coomaraswamy J. acted on his inherent power to rescind the decree nisi. This should serve as warning to the general public not to try to manipulate the law or present untruths to court.

44. See Walter Woon, "The Last Relic - Costs Against Wives in Matrimonial Proceedings" [1985] 1 MLJ cxxxiii.

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