
***A COMPARATIVE STUDY OF DIVORCE
AMONG MUSLIMS AND NON-MUSLIMS IN
MALAYSIA WITH SPECIAL REFERENCE TO
THE FEDERAL TERRITORY OF
KUALA LUMPUR***



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TO THE FEDERAL TERRITORY OF KUALA LUMPUR**

by

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A Thesis Presented for the Degree of
Doctor of Philosophy
University of London

November 1993

ACKNOWLEDGEMENTS

I wish to convey my sincere thanks first of all to the International Islamic University of Malaysia and the Public Service Department, Malaysia, which, under its Staff Development Scheme, provided most of the funds which made this research financially possible.

My gratitude is also due to all those who so kindly provided me with information and other assistance during the field work in the High Court and Sharia Court in the Federal Territory of Kuala Lumpur, as well as during my stay in London.

To my supervisor, Professor MDA Freeman, I owe a special word of thanks. I gratefully acknowledge the debt I owe him for the invaluable intellectual guidance and moral support, beyond the bounds of his responsibility, which he so willingly and cheerfully provided during the gestation of this thesis. A number of people have read and commented on all or part of my thesis. I am indebted in particular to Elaine Genders, Convener of the Research Methods Seminar at the Faculty of Laws, University College London, M.S Mohamed Said, Adah Othman, Dr.Paul L.Mills and N.A.Aryee.

I would like to express my special gratitude to Dr.Zubair Hassan of the Statistics Department at International Islamic University and Dr.Angelo Marini for their expert help with the statistics in chapter 4. Last but not least, I thank my husband and our three little children, for sharing the ups and downs of my research. They stoically bore with me the burdens of undertaking research at this level. To them I dedicate this thesis.

London, October, 1993

ABSTRACT

The subject of this thesis is a comparison of the law, practice and procedure relating to divorce among Muslims and non-Muslims in Malaysia. This study analyses divorce in the predominantly urban society of the Federal Territory of Kuala Lumpur against the background of changes in the social structure, the family and social norms, with the aim of clarifying of how and why contemporary divorce needs to be rethought and reformed.

Structurally, the thesis is divided into three parts. Part 1, consisting of three chapters, is introductory, and covers the historical and legal background necessary for the proper appreciation of the topics discussed later.

Part 2 is an analysis of divorce statistics for Muslims and non-Muslims in the Federal Territory of Kuala Lumpur and an identification of factors related to it. The discussion of statistical trends and social influences is placed in a smaller context to permit the statistical information analysed in the present study to be refined at the local level.

Part 3, the concluding part, consists of two chapters, and deals with reforms that have taken place in other countries that could serve as models for the reform of divorce laws in Malaysia. Among the areas that are touched are legal reforms to protect women, grounds for divorce under Islamic law and civil law, and also the setting up of family courts and systems of conciliation.

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INTRODUCTION

1. BACKGROUND

The Federal Territory of Kuala Lumpur,¹ the capital city of Malaysia, represents a window on a predominantly urban Malaysian society. In this melting pot, various ethnic groups viz. the Malays, Chinese and Indians are mixed, yet, reaffirm their individual identities.² Kuala Lumpur, like the rest of Malaysia, had a very complex legal framework as far as the laws of marriage and divorce³ were concerned. Each individual ethnic group was governed by a mixture of personal or customary and statutory laws, the roots of which lie in the pages of history.⁴ These differences brought into its train great problems in Malaysian society. Thus, the Law Reform (Marriage and Divorce) Act, 1976 (Act 164)⁵ for non-Muslims was introduced with a view to providing a solution to this malady.

Muslims in Malaysia are governed by Sharia law in all matters relating to the family. However, each of the constituent states of the country is empowered to enact its own legislation on family law. Muslims in Kuala Lumpur were previously governed by the Administration of

¹ Hereafter abbreviated as Kuala Lumpur.

² Malaysia serves as a good example of a multiracial country with little ethnic integration. For further discussion on this point, see Chapter 1.

³ Divorce in the context of this thesis is defined as the formal dissolution of a marriage by a court of law. The reasons which compel a couple to end their union formally, via the courts, are dependant on the nature of the divorce laws.

⁴ For historical development of divorce laws see Part 1.

⁵ Hereafter abbreviated as LRA.

Muslim law of Selangor⁶, but with the separation of Kuala Lumpur from Selangor, a new law was needed. Thus, the Islamic Family Law (Federal Territory) 1984, (Act 303)⁷ was enacted and introduced in 1987 to simplify and to a certain extent improve the administration of family law in Kuala Lumpur. It is timely to investigate the implications brought by this legislation, to see whether it has solved the problems that it set out to answer, or whether it has given rise to new ones instead.

This study sets out to compare the administration of family law among the various ethnic groups in Malaysia. It also describes divorce in a predominantly urban society of Kuala Lumpur in the light of changes in the social structure of the city, and in family and social norms. It is intended to increase our understanding of how and why contemporary Malaysian divorce needs to be rethought and reformed.

2. OBJECTIVES

Few studies have been conducted on divorce in Malaysia, and those studies have concentrated on the sociological nature of divorce without examining the role of law and its effects on divorce patterns.⁸ On the other hand, the study of Malaysian family law has always been concerned with its rules and principles but not the social impact of these rules. It seems self-evident that an examination of statutory law without a contemporaneous evaluation of the same law in action would offer no foundation for constructive reform. A study of divorce, therefore, will not be meaningful without a dual examination of its social and legal aspects. The present study focuses on the Malaysian

⁶ Act A 206 P.U. (A) 44/74.

⁷ Hereafter abbreviated as IFLA.

⁸ In attempting to understand the relationship between law and social structure, it is obviously necessary to go beyond the legal rules and to examine the law in operation.

Law of divorce in action in the city of Kuala Lumpur. This study is an attempt to build a bridge linking the sociological aspects of divorce to the laws relating to it.

With the introduction of the LRA in 1982 and IFLA in 1987, the law relating to divorce in Malaysia has undergone a revolutionary change. These modern pieces of legislation have had many legal and social implications in Malaysian society. This study intends to examine closely and evaluate the law and current divorce practice in Malaysia and contribute to the understanding of the reasons for differences in the divorce patterns between the Muslims and non-Muslims in the urban society of Kuala Lumpur. Due to the historical character of the development of divorce laws in Malaysia, specifically in Kuala Lumpur, this study has to be made against the backdrop of former and present divorce laws. It focuses on the significant changes in divorce patterns in Kuala Lumpur both before and after LRA and IFLA had been in force. Extensive analysis of divorce trends and differentials in Kuala Lumpur are made with a view to discovering how changes in the law have affected these patterns of divorce.

It is highly appropriate to examine the precise consequences of the LRA ten years after it has been in force to determine its reception, implementation and effect on the non-Muslim populations in Malaysia. It is also necessary to study, from the sociological point of view, whether the persons involved who have been brought up with Asian personal laws in keeping with their culture and customs, could be trained and compelled to accept and adopt a whole new set of alien concepts influenced by western patterns in relation to their matrimonial practices.

This study has been further prompted by the lack of recent research in this field in Malaysia especially on the basis of comparative analysis. Therefore, I will attempt to investigate divorce behaviour and find out

to what extent the results of research carried out by other sociologists are similar to the Malaysian divorce scene. An objective observer may contend that there is no basis for comparison when considering the different social and cultural values between a relatively conservative Asian society like Malaysia and western society. Hence, the comparison is only made within Malaysian society itself. It involves the comparison of the divorce laws of Chinese, Indians and Malays. This exploration thus seeks to understand divorce within the larger framework of the Malaysian system. It is hoped that the research findings presented in this thesis will enrich general knowledge in this field and further improve the formulation of future policy alternatives in Malaysia.

3. ANALYSIS OF STUDIES ON DIVORCE IN MALAYSIA.

Some of the most profound social changes among the three major ethnic groups (Malays, Chinese, and Indians) in Peninsular Malaysia arose after independence in 1957⁹. These occurred mainly in the patterns of marriage and divorce among the Malay population. Most of the studies in these areas were, on the one hand, macro-demographic studies (Smith, 1961, Palmore and Marzuki, 1970, Jones, 1980 and 1981, Lee Kok Huat, et.al 1985, Hassan, 1984, Tan 1987) and on the other, anthropological case studies (Djamour, 1965, Swift, 1958, Badur, 1963, Firth, 1966, Downs 1967, Strange 1976, Kutchiba et. al, 1970, and Wilder, 1982).

There have also been similar studies, mainly in the form of graduation exercises, in partial fulfilment for the degree of Bachelor of Economics at the University of Malaya (Abdullah, 1980, Che Mat 1980, Mat

⁹ Peninsular Malaysia at that time was called the Federation of Malaya. Malaysia was formed in 1963 comprising the Federation of Malaya, the other two Borneo States of Sabah and Sarawak, and Singapore. Since then the Federation of Malaya has been called Peninsular Malaysia or West Malaysia. In 1965, Singapore left Malaysia to become a separate independent republic; Malaysia, 90-91 Official Year Book, Vol.28, Department of Information Malaysia, Kuala Lumpur, Publication Division, pp.16-21.

Saman, 1980, Ibrahim 1980, and Karim, 1980) and also in the form of project papers submitted in partial fulfilment for the degree of Bachelor of Law. The project papers, which were mostly written in Malay, concentrated on Malay Muslim divorce (Hj. Haron, 1976, Mahmood, 1982, Abas, 1981, Wan Ibrahim, 1981, Katar, 1983, and Mahmud, 1984). There were only a few written on divorce and its relation to Adat law (Muhammad Wahi, 1977, Johen, 1978 and Ewon, 1979). Divorce among non-Muslims is not a popular area of study amongst the law students; so far, there is only one (Tong, 1985). There is only one Masters thesis written on Muslim divorce (Md. Nor, 1978), and this focused on marriage and divorce according to the four Sunni Schools of thought in Islam, that is Shafi'i, Maliki, Hanafi and Hanbali.

Project papers on divorce from the Islamic Academy at the University of Malaya were mostly socio-legal studies concentrating on Muslim divorce (Ismail, 1986, Abdul Hamid, 1987, Bahrin, 1989, Bahari, 1990, Hj. Bujang, 1990, Zainal, 1990, Mohamed, 1991, Syed Abdul Rahman, 1991, Husin, 1992 and Mat Said, 1992)

Most of the macro-demographic studies emphasised the differentials in age at marriage and fertility among the three major ethnic groups. Some of them also examined rural urban differences and the extent to which divorce correlates with age at marriage and some other social and economic factors. Among them, however, Jones (1980, and 1981) and Sidhu and Jones (1981) provide an excellent explanation of ethnic as well as regional differences, the dynamics of change and some of the common factors which have affected the changes in patterns of marriage and divorce over the last three decades.

As far as Malay marriage and divorce are concerned, macro-demographic studies which relate to the three main ethnic groups and which separate the approach into rural and urban subdivisions are of

relatively limited value. This is not only because the Malay population is large enough to merit a separate study of its own,¹⁰ but also because the laws and customs governing Malay marriage and divorce differ from State to State. Apart from that, each State has different levels of social and economic development. For example, the State of Kelantan in the east coast of Peninsular Malaysia, with its history of geographical isolation, separate dialect, and the strongest degree of Islamic religiosity (Roff, 1974) is different from the rest of the country, particularly Negeri Sembilan and Johor on the west coast. Negeri Sembilan has a strong Minangkabau influence, while Johor is heavily influenced by Javanese and Buginese customs (Swift, 1958, Badur, 1963, and Chan and Jones, 1983).

Some states, particularly the two east coast States of Kelantan and Trengganu, have lagged very far behind in economic and social development. As recently as in 1975, the age at first marriage among women was the lowest in Peninsular Malaysia and the divorce rate was the highest not only in Malaysia but also in the world (Mahmood, 1982, Jones, 1980, Jones, 1981 and Hassan, 1984).

Most of the research done on divorce in Malaysia concentrates increasingly on the social aspects of divorce. It seeks to answer questions such as who divorced and why, the main causes and signs of stress in dissolved marriages, and the differences between these marriages and those that did not end in divorce. Such questions reflected not only a broadening of historical enquiry, but also current concerns about marriage and divorce, the family, and the status of women in modern society. Answers to them usually demanded intensive investigation of judicial and other legal records, and for this reason

¹⁰ Of the total 8.8 million in Peninsular Malaysia in 1980, the Malays accounted for 53 percent; 1980 Population and Housing Census of Malaysia: General Report of the Population Census, edited by Khoo Teik Huat, Department of Statistics, Kuala Lumpur, Government Printer, 1983.

much of the recent work cited above on the history of divorce is restricted in terms of location and time frame.

This research goes beyond the ambit explored in the above works. It focuses on the comparative nature of Malaysian family law. In view of the diversity of customs and socio-economic conditions, there is a need to do a comparative study in this area among the Muslim and the non-Muslim populations in Malaysia through the socio-legal perspective.

4. OUTLINE OF THE THESIS

Structurally, I have divided the main text of this thesis into three parts. Part 1 begins with an examination of the laws, procedures and attitudes of Malaysian society to divorce. It traces the development of divorce laws from early colonial times to 1990, drawing upon a wide range of divorce laws, statistics, divorce records, newspapers and journals, essays, legal and sociological studies, exploration and exposition of the causes of divorce.

Chapter 1 of Part 1 is a general appraisal of Malay, Chinese and Hindu customary divorces and associated problems which leads inexorably to an examination of the reasons why LRA was mooted. Divorce clauses under the LRA and their implications are further analysed in Chapter 2. Muslim divorces are dealt with in Chapter 3 of this part. Except for Chapter 3 which deals specifically on IFLA, Part 1 is generally national in scope since the law applicable to non-Muslims in Kuala Lumpur is the same as that of other States in Malaysia.

Part II is an analysis of divorce statistics for Muslims and non-Muslims in Kuala Lumpur and an identification of factors related to it. The discussion of statistical trends and social influences is placed in a smaller context in Chapter 4. A case-study such as this is desirable

because it permits the statistical information to be refined at the local level, rather than confining it entirely to aggregated national data.

Finally, Part III deals with reforms that have taken place in other countries that could serve as model for the reform of divorce laws in Malaysia. This part is divided into two chapters: Chapter 5 discusses the policies relating to family life and Chapter 6 the proposals towards reform of divorce laws in Malaysia.

5. METHODOLOGY

This research project called for two kinds of information. First, there was a need for up-to-date data on the divorce laws in Malaysia, and secondly, we needed data that would link divorce to a set of correlates and help to explain discernible patterns in the divorce process. The analysis of the information so collected had to test the strength of relationships posited in theories already available and, if possible, provide avenues to new explanations.

Various methods have been resorted to in the process of collecting this information. Besides library research, official statistics have been obtained from the High Court Registry, Sharia Court, Department of Religious Affairs, Islamic Centre, Statistics Department and National Registration Department to determine the rate of divorce.

Books for basic reading were obtained from the law library of the University of Malaya, International Islamic University, Pustaka Peringatan Kuala Lumpur, Malaysian National Board of Family Development, Institute of Advanced Legal Studies, University College London, London School of Economics and Political Sciences, School of Oriental and African Studies, and University of London. As the above libraries do not hold many of the reports, seminar papers which are in the main unpublished, I have had to keep abreast of recent

developments through the mass media in order to track down these materials. The National Board of Family Development Library's press cuttings on divorce were useful as developments in the area of divorce are fast-moving and ever-changing.

As many observers have pointed out, in divorce law, there is a wide gap between the "law according to the books" and "law in action". In an attempt to ascertain not only what the law says but also what it does, I undertook extensive interviews with experts involved in the administration of divorce. Interviews were conducted either on an informal or formal basis but with no set format. This was intended to give the flexibility and freedom to field questions as they came to mind. However, some pertinent questions were prepared prior to the interviews as answers to them needed to be obtained.

The High Court and Sharia Court judges dealing with divorce cases were interviewed to ascertain their attitudes and experiences in dealing with divorce cases. A number of senior lawyers were also contacted since lawyers are usually the first members of the legal system that prospective parties to divorce suits meet, and often remain in contact with the party throughout the action for divorce. The various processes and proceedings stipulated by the courts in regard to cases for divorce from the time of the filing of the petition to the time of the pronouncement of the decree of divorce, including efforts for reconciliation, were also discussed with the lawyers and valuable suggestions were also noted. For observation of court proceedings, I have attended a number of court hearings in both the Civil¹¹ and Sharia Courts.

Apart from this, all other possible means of collecting material have been utilised. These include case-study of divorce records in the High

¹¹ Including one in the chamber of Judicial Commissioner Rahmah Hussein in December, 1992.

Court and Sharia Court in Kuala Lumpur. The case-study method is essentially chosen to discover the divorce trends and patterns in the selected area and also factors which are associated with divorce propensities among the Muslims and non-Muslims. Each divorce case in Kuala Lumpur has a file in the judicial court. These files are consigned to the record room of the court in bundles according to year and category. Each file normally consists of divorce petition, the answer to the petition if the cause is defended, the marriage certificate, and other related papers.

A survey form was used to expedite the perusal of data.¹² The survey method was used, even though it is tedious, because it is scientific and systematic. To reduce errors, sampling was carried out for 1980-1990 because of the large number of files except 1975-1979. The sampling was made systematically to cut out bias. Much time, energy and patience were however needed to locate, segregate and to go through the individual case files for random sampling. In my selection criteria, files with even numbers (after renumbering) were selected after setting aside files relating to other family matters. Data were coded and reduced to measurement so that dominant patterns and statistically significant variations could be identified. The statistics compiled are from petitions to which decrees absolute have been granted. Analysis is not done based on petition filed, as apart from the time lag between petition being filed, there are some petitions which are not granted. There are circumstances where a petition may be withdrawn on account of reconciliation or death or because it is judged not to satisfy the necessary legal conditions.

Some of the information on the divorce records refers to the position at the time the petition is filed and is not updated when the decree is

¹² See Sample in Appendix III.

granted, in particular occupation of both parties which is referred to in the marriage certificate.¹³

As to accuracy of information, much of the information is supplied by the petitioner to fulfill the legal requirements for filing a petition. Certain of the items of information are usually taken from the marriage certificate, but others are extracted from statements by the petitioner in affidavits. Since the information is required for a legal process it may be presumed that the quality of data is good. To ensure accuracy, editing checks are carried out to detect clerical, and coding errors.

The use of divorce records permitted penetration beyond the generalisations to the realities of family life and investigation of the characteristics of marital breakdown. However, it is absolutely imperative to retain the distinction between divorce and marital breakdown, and to remember that the rate of divorce is not a guide to the extent of marital unhappiness, or marital breakdown. It is obvious that not all cases of adultery, desertion or incompatibility come before the divorce courts. Many unhappy marriages simply endure, separation being continuously accepted, others end in desertion, or some form of formally or informally agreed upon separation.

Divorce is as much a guide to marital breakdown as nuptiality rates are a guide to the extent of de facto marital cohabitation in society at any given time. Both marriage and divorce are primarily legal procedures, recording a social event. There is no way of knowing whether a rise in divorce rates betokens an increase in the dissolution of marriages or whether it is simply the result of a growing proportion of de facto dissolutions going through the legal formalities of divorce.

¹³ The occupation of a person refers to the kind of work performed by the person at his/her place of employment. Occupations have been classified here according to the classification method used by the Statistics Department.

Once this critical distinction between divorce and marital breakdown is made, it becomes clear that divorces are a consequence of marital breakdown. Evidence from divorce records is exploited to shed some light on those areas of family life which are generally obscure and under-researched.

The reasons for choosing Kuala Lumpur were almost all practical. First of all, funds were limited so that the more grandiose plan of covering the whole of Malaysia was simply not feasible. Kuala Lumpur was chosen primarily because the sources were conveniently located and because the divorce records are comparatively more organised and up to date. These obvious practical advantages aside, Kuala Lumpur had other clear merits as the loci of a case study; it offers the largest single sample of divorces for analysis. Secondly, the society and law chosen for study, that is IFLA and LRA was one that I had worked with previously, and this existing knowledge allowed for quite detailed research designing before field work began. Thirdly, because I am already familiar with the language, culture, and history of the area, I could more easily maintain the probing quality of the work. However, Kuala Lumpur should not be regarded as in any way typical of other Malaysian cities, and it should certainly not be thought of as representative of non-urban Malaysia.

The time span of sixteen years of divorces studied would reflect the divorce trends and patterns under the former laws and the present law. The study is restricted to divorce per se and does not cover post-divorce settlements. Cross-national comparisons of divorce rates of other countries are also not included, the reason being simply that such comparisons are usually superficial at best, and misleading at worst, because divorce rates depend so much on divorce legislation which varies from country to country, and even within countries. Beyond this, the extent of divorce is heavily influenced by demographic

and social structures and processes. For these reasons, the study is confined to the Malaysian divorce experience.

In this study, the sources structured the potential results. An explanation of the records used in this study and some further points should be made here. First, a condition of access to the trial records was the protection of the privacy of the individual parties. Any study of marital dissolution in a jurisdiction where divorce is legally highly restricted must acknowledge that those marriages that were dissolved through the formal or legal process represent only a fraction of the marriages that actually ended through human behaviour rather than death, extra-legal or quasi-legal processes.

The aim of this study is not to establish the differences between the divorced and the non-divorced populations and to draw conclusions as to the causes of or proneness to divorce, but rather to explain the quantitative and qualitative variations and changes in the incidence of divorce.

6. PROBLEMS

Generally speaking, statistical documentation in Malaysia is woefully inadequate. The absence of comprehensive official data on divorce in Malaysia, specifically in Kuala Lumpur constitutes a serious deficiency. Many divorce records of previous years were either misplaced or untraceable due to shifting of court premises and the flood in 1971. It seemed important, therefore, to construct the pattern, even if this had to be estimated by piecing together whatever data could be obtained from the divorce records. A great deal of work over a period of years will be needed before the divorce statistics programme can reach the stage of development already attained in United Kingdom and United States.

In view of the foregoing, it seems that studies of the type undertaken here have to surmount great difficulties, particularly in the matter of data collection which is a mountainous task that involves time, energy and money. Unless and until people are better enlightened, they will not bother to give any assistance. Likewise, the Courts and the Statistics Department should collect and maintain primary data concerning divorce.

Each of the primary sources used in this study has inherent strengths and weaknesses. Legislative debates and law reports reveal the ideas and the parameters of discussion of divorce and family in two of the most important institutions of the period - Parliament and the Courts. The ideas that circulated within those institutions demand examination because the institutions themselves were powerful and authoritative, not because the ideas were in any way necessarily representative of the society or elements of the society.

The files of judicial divorces present their own problems. This material was produced through a complex procedure in which the demands of the judicial system, the views of the lawyers, and the actions of the parties all played a significant role. The files cannot be taken to represent fully the views of the parties, since the articulation of their attitudes and knowledge was being filtered through counsel and was potentially highly structured in response to the requirements of the judicial process. Although I have used divorce files extensively, caution is exercised in assessing the extent to which the parties were able or willing to expose their marriage to public examination. The divorce records themselves allow only a limited view of the individuals' social characteristics since they only provide information relevant to the granting of the divorce. Information which is interesting from sociological point of view is unfortunately not included. As a result, details like education and income are not stated. The duration of the marriage was revealed only incidentally, by subtracting the age at

marriage from age at divorce. This of course is not the most accurate way of assessing the real duration of the marriage since it limits it to de jure duration. Occupations, although recorded, were occupations when the couples got married and not necessarily the same occupations at the time of divorce. Although this was taken as indicator of social class, it need not be conclusive. The age of the parties was always revealed, since it was fundamental to the divorce process. Place of marriage was revealed through the marriage certificate but the clue to the ethnic origin would lie in the person's name.

Another difficulty in determining the exact rate of Muslim divorce is that although some of the marriages are registered in Kuala Lumpur, it is likely that some may have migrated after marriage and possibly got divorced elsewhere. This situation rendered it difficult to find out the exact number of marriages and divorces that occurred in the area of study. No attempt was made to estimate them as there would be many divorces registered in Kuala Lumpur due to in-migration subsequent to marriages contracted elsewhere outside Kuala Lumpur.

The difficulties of interpretation of data are compounded when we seek to generalize using case studies at any level, (for example from small groups to national) that differ in the quality and character of their data, employ different methodologies or criteria of evaluation, and that produce divergent conclusions.

Another great handicap was the absence of any sociological study on divorce in Malaysia from which guidelines could be followed. Studies elsewhere could not be depended upon much since they have been in entirely different socio-cultural set-ups.

Much of sociological and anthropological researches in Malaysia so far has been on rural areas. Not much research has been done on urban social institutions and their various aspects. This may be due to the

fact that Malaysia is still predominantly rural. Yet, we have to inquire into the impact of urban way of life on institutions like marriage and divorce.

It would hardly be possible to attempt a complete survey of the trends of these studies in this thesis, since considerable background knowledge is needed of the peculiar characteristics of the Malay, Indian and Chinese family system and of the special concepts employed. Nevertheless, some of the more important aspects are discussed.

PART ONE

HISTORICAL DEVELOPMENT OF DIVORCE LAW

Family law is one aspect of the law that treats Malaysians differently according to their race, religion and custom. It is not the intention of the legislature to segregate them according to their creed. The present situation came about as a result of history and the development of Malaysian society.

Malaysia has always been under the influence of various religions and races¹. Prior to the English occupation, there was no uniform system of law, domestic or otherwise in Malaysia, although a Malay Legal Code existed since the fifteenth century. Malay customary law mixed with Hindu law and Muslim law were also in existence but these were mainly confined to the Malays.² The Chinese and Indian customary laws were introduced with the large scale immigration of Chinese and Indian labourers to assist in the economic development of the then Malaya. Nevertheless, in many cases, the judges had to take local customs into consideration.³

Although Islam is, constitutionally, its official religion, other religions are permitted.⁴ Each individual ethnic group was governed by a mixture of personal or customary and civil law. Islamic law applies to Muslims, the Malay Adat to certain sections of the Malay people,

¹ For further details see Ibrahim, Ahmad bin Mohamed and Joned, Ahlemah bt, The Malaysian Legal System, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1987, pp.7-32.

² Ibid, p.3.

³ See, for example the case of Rahmah bt Ta'at v Laton bt Malim Sultan (1926) 6 F.M.S.L.R 128.

⁴ The Malaysian Constitution, Article 3(1).

Hindu law to those who are Hindu by religion and Chinese law to the ethnic Chinese. However, the substance of the personal laws was confined to family law only. The limitation of the personal laws to such a narrow field was a heritage of colonial legal policy. Therefore, in terms of divorce, the Chinese and Hindus could divorce according to their own law or customs. The civil law on divorce,⁵ that is the Divorce Ordinance, 1952⁶ which was applicable only to monogamous marriages, did not apply then to Chinese or to most Hindu marriages which are by nature polygamous. These differences brought about great problems in Malaysian society. Thus, the Law Reform (Marriage and Divorce) Act, 1976 was introduced with a view to providing a solution to this malady.

In the case of *Re Ding Do Ca deceased*,⁷ Thomson L.P said,

“The whole question of personal law in this country particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race, the law the courts are administering is probably different from any law which exists or ever existed in China - The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955.”

As for the Muslims, in all matters relating to the family, they are governed by Muslim law.⁸ Although the then Lord President stated

⁵ The Malaysian legislation regarding marriage and divorce was greatly influenced by British common law as the colonial administration drew the law from British models, Hooker, M.B. The Personal Laws of Malaysia-An Introduction, Kuala Lumpur, Oxford University Press, 1976, p.xxx.

⁶ No.74 of 1952.

⁷ [1966] 2 M.L.J 220.

⁸ The Federal Constitution provides that the Muslim personal and family law and Malay custom are matters within the legislative and executive competence and jurisdiction of the states. The Muslim law applied in Malaysia is modified by Malay custom; Ibrahim, Ahmad bin Mohamed, Islamic Law in Malaya, Singapore, Malaysian Sociological Research Institute, 1965, p. 147.

that the position as regards persons professing Islam is tolerably clear,⁹ there were also defects in the administration of the Islamic family law in Malaysia. Islamic family law is felt to be inadequate to serve the present needs.¹⁰ As Islamic law falls within the purview of the State authorities, each state in Malaysia had its own law for the administration of the Islamic family law.¹¹ Each state had its own system of courts for the administration of the Islamic law and for the most part the law was administered at the state level in the state qadhi's courts. The provisions on divorce in the various enactments were somewhat similar as they were all based on the Hukum Shara'.¹² Although the enactments followed the same pattern and had much in common, there were sometimes important differences between them. Differences in administrative procedures exist and these gave rise to the diversity and complexity that became the feature of Muslim family law in Malaysia.¹³ Furthermore it contains numerous loopholes and weaknesses which are taken advantage of in certain quarters. The differences enabled the stricter provisions of one State enactment to be circumvented by moving to another State which did not have a similar provision.¹⁴

⁹ See note 7.

¹⁰ Ibrahim, Ahmad bin Mohamed, "Recent Legislation on Islamic Law in Malaysia", Law Seminar, International Islamic University, Petaling Jaya, July, 1986.

¹¹ Art.74(2), Federal Constitution, The State List or List II, 9th Schedule.

¹² Abdul Rahman, Sheikh Ghazali bin, Perlaksanaan Amalan dan Permasalahan Undang-Undang Keluarga Islam - Pengalaman Wilayah Persekutuan, Kursus Perkahwinan, Kekeluargaan dan Islam, Jabatan Agama Wilayah Persekutuan Kuala Lumpur, 1989.

¹³ In some instances, the administrative machinery was deficient and consequently was unable to resolve some of the matrimonial problems even though procedures were provided for in Islam. In other instances, adequate rules were not being enforced thus resulting in hardship for women to seek relief in the Qadhis courts. This in turn gave rise to misconceptions about the wisdom and justice of Muslim law; Siraj, Mehrun, Development in Muslim Family Law, Seminar on Family Law, Faculty of Law, University of Malaya, January 1987.

¹⁴ Some States required the consent of the first wife before a subsequent marriage could be solemnised. Men who could not or would not get this consent would marry in another state that did not have this requirement, see Siraj, 1987 see also STAR, August 15, 1990.

The high divorce rate among Muslims in the country was particularly alarming and this led to the demand by various organisations for a revision of the law, to consolidate and improve its provisions, thereby making them more or less uniform among the States. There is a need to update and streamline the laws and to provide for greater uniformity between the states.

An attempt had been made by the Federal Government to draw up a model law for the administration of the Islamic family law.¹⁵ In drafting the law, the committee relied on the LRA, but necessary modifications were made to bring the law into line with the teachings of Islam. There was also some borrowing from legislation in Singapore, Egypt, India and Pakistan. The draft was then submitted to the Conference of Rulers and when it was approved in principle it was sent to the individual states for their comments and adoption.¹⁶ In Kuala Lumpur, a committee was set up to consider the legislation. The legislation produced by this committee was enacted as the Islamic Family law (Federal Territory) Act, 1984 (Act 303).¹⁷ Although the original intention was to have uniformity of the law among the various states, this has unfortunately not been possible. There are in fact differences between the laws.¹⁸

In any study of Malaysian divorce law as it is today, some knowledge of the history of the subject is desirable. The Malaysians' divorce

¹⁵ See Ibrahim, Ahmad bin Mohamed, Recent Legislation on Islamic Law in Malaysia, Law Seminar, International Islamic University, Petaling Jaya, July, 1986.

¹⁶ Among the earliest states to consider the draft were Kedah, Kelantan and Kuala Lumpur. As a result the Islamic Family Law Enactment 1983, Kelantan (No.1 of 1983), Islamic Family Law (Federal Territory) Act, 1984 (Act 303), Islamic Family Law Enactment, 1979(Kedah) No.1 of 1984 were enacted. This has been followed by other States, Negeri Sembilan by the Islamic Family Law Enactment 1983 (No.7 of 1983), Malacca Islamic Family Law Enactment 1983 (No.8) of 1983, Perak Islamic Family Law 1984 (No.3 of 1984), Penang, Islamic Family Law Enactment 1985 (No.2 of 1985), Administration of Islamic Family Law (Trengganu) Enactment 1986.

¹⁷ Herein abbreviated as IFLA.

¹⁸ The Kedah legislation, although the first to be passed by the State legislature, was published after the legislation in Kelantan and Kuala Lumpur which has been followed in other States.

customs vary to such a degree that it is very difficult to make any general statement about them. Therefore, it is proposed in this part to examine the two sets of laws that prevail in the regulation of divorce in the multi-cultural society of Kuala Lumpur.

Chapter 1 emphasizes the history of the major ethnic group in Kuala Lumpur, and also attempts to discuss the former laws relating to customary divorce among Malaysian non-Muslims and how conflicts have arisen out of the application of these laws. The discussion on these conflicts is intended to provide the necessary background to Chapter 2. Chapter 2 will examine the LRA which imposes a uniform set of marriage and divorce laws on all non-Muslims in Malaysia. The study will be made against the backdrop of the former and present divorce laws of Malaysia with the view to investigating the changes that have taken place since the present law came into force. Chapter 3 will be a discussion of Islamic divorce. This chapter is divided into several sub-sections. The first section is a brief review of the Islamic law on divorce, and serves as preface to a detailed study of its implementation in the distinctive cultural setting of Kuala Lumpur. In a subsequent sub-heading of that chapter, an attempt will be made to explain the various forms of Muslim divorce and the law as practised in Kuala Lumpur.

CHAPTER 1

DIVORCE IN THE CONTEXT OF MALAYSIAN SOCIETY

1.1 INTRODUCTION

Divorce, or the dissolution of marriage, as a recognised institution of family law, is in any society a natural corollary of the theory and practice of marriage, for it pre-supposes marriage. Marriage is a psycho-physical relationship of such intimacy that law can only register its beginning and its end and is powerless to effect its satisfactory continuance. Law may on the other hand, check hasty divorce and prevent injustice in marital dissolution.¹⁹ Voltaire expresses their sequential order thus:

*"Divorce is an institution only a few weeks later in origin than marriage."*²⁰

Lord Westbury said in *Shaw v Gould*,²¹

"Marriage is the very foundation of civil society and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary, of dissolving the marriage contract. If this is true, and it seems to be more true now when so many of the other props of civilisation have been weakened, it follows that any legal doctrine which may operate to render uncertain the status of divorced persons, and which

¹⁹ Encyclopaedia of Social Sciences, Vol V, edited by Seligman, E.R.A and Johnson, A, New York, 1951, p.183.

²⁰ Voltaire, quoted in Alvarez, A, Life After Marriage: Love in an Age of Divorce, New York, Simon and Schuster, 1981.

²¹ (1868) L.R 3, at p.55.

may, therefore, prejudice the stability of a later marriage by either party, is a social ... and that calls for the intervention of the law reformer. Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the family than to wreck the future happiness of the parties by binding them to a companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children, but though divorce is unavoidable, we can at least do our best to ensure that there is no uncertainty in the status of the members of the family after the decree absolute."

It is a paradox freely accepted that the possibility of dissolution of marriage is essential to its permanence. The family is the basic unit of human society and the foundation of a family is laid through marriage. Therefore, if marriage is not stable enough society may be in danger. It is also very well said that "none should divide whom God has united", but serious temperamental disharmonies or some contagious or incurable diseases or some acts of infidelity by either of the spouses might develop a strong and serious aversion to each other, thus making the marriage burdensome. This tense situation is individually intolerable and socially catastrophic. When wedlock has degenerated into deadlock and when the relationship between the spouses is too bad to be cured, its dissolution is preferable to its continuance in the interest of the parties and for the welfare of society in general. This is because it is undeniable that divorce is primarily designed to relieve the hardships imposed in individual cases.

Society should be constituted of peaceful and dutiful families. Where peace and duty no longer exist, the family unity must be lawfully and peacefully broken so that its elements may seek peace in new unities and try other sources of harmony in other spheres.²² It is incontrovertible that the dissolution of marriage has far-reaching

²² Abdul Hakim, Al-Khalifa, Islamic Ideology: The Fundamental Beliefs, Lahore, Sh. Muhammad Ashraf, 1965.

consequences and disintegrates family unity, but it has to be tolerated for the avoidance of greater evils.

Westermarck writes that:

*"It is a widespread idea that divorce is the enemy of marriage, and, if made easy, might prove destructive to the very institution of the family. This view I cannot share. I look upon divorce as the necessary remedy for a misfortune and as a means of preserving the dignity of marriage by putting an end to unions which are a disgrace to its name."*²³

The emergence of the industrial era, the assertions of individualism, the passion for freedom and liberty, the change in the cultural and social climate, and the women's liberation movement, have all contributed in moulding the attitudes of western society towards divorce. The revolution that has taken place in the recent past in this branch of the law is a striking example of how the law is keeping pace with the needs and aspirations of modern society.²⁴

There are a number of interpretations of the relationship between divorce and marriage breakdown. Some see divorce as little more than the death certificates of marriages that have already ended. Others argue that the very availability of divorce is responsible for the supposed tendency of modern couples to terminate their marriage readily when they experience difficulties. As far as the extent of marriage breakdown, some commentators claim that a rising divorce rate reflects a rising rate of marriage breakdown while others argue that this merely reflects the extent of marriage breakdown more

²³ Westermarck, E., A Short History of Marriage, London, Mac Millan, 1926, p.308.

²⁴ Hussein, S.J., Marriage Breakdown: Comparative View, International Islamic University Law Journal, Vol.1, No.1, 1989, p.21.

accurately since an increasing proportion of broken marriages is now being dissolved legally.²⁵

The family unit was seen as the basis of social stability, and there was a widespread fear that too liberal an approach to divorce would bring about social disintegration and moral collapse. The possibility of divorce also raises other important issues such as female and male roles and relationships within the family and society, sexuality, the place of children, and religion. Because it is the focal point of many perspectives, divorce can be studied from many points of view: legal, familial, social, economic, demographic, political and religious. In addition, it is inseparable from the other broad issues which have already been mentioned here. In the final analysis, the resort to divorce and the rate of divorce must be the results of complex interplay of factors such as the legal availability of divorce,²⁶ its social availability²⁷, social attitudes towards divorce, the material conditions of family life, and the frequency of marital disharmony serious enough to warrant one spouse's petitioning for divorce.

Divorce is a consequence of marital instability and a form of family disorganisation. It is, of course, as pointed out by William Goode, only one of many indications of marital instability in a society.²⁸ Goode has summarised a number of variables related to divorce proclivity which are, among others, urban background, marriage at a very young age, short acquaintanceship before marriage, short or no engagement, marital unhappiness of parents, non-attendance at church, mixed religious faith, disapproval by kin and friends of the couple,

²⁵ Phillips, R., Putting Asunder: A History of Divorce in Western Society, Cambridge University Press, 1988, p. xii.

²⁶ Whether the law is permissive or restrictive.

²⁷ Whether it can be obtained easily, in terms of availability, expense and procedure.

²⁸ Goode, W.J., World Revolution and Family Patterns, New York, The Free Press, 1970, p.137.

dissimilarity of background, and different definitions by spouses of each other's mutual roles.²⁹

In the continuing debate on social and moral stability in modern Malaysia, the family unit is consistently a prominent focus. Despite the wealth of other institutions which create and reinforce values and behavioral norms - schools, work, churches, mosques, peer groups, the mass media-the family is still regarded as the fundamental focus and agent of socialisation. If children become involved in what is considered anti-social behaviour, the cause is often sought in their family background, particularly in what are called "broken homes."³⁰

The following sub-section will discuss divorce in the Malaysian context with emphasis on Kuala Lumpur.

1.2 THE RESEARCH AREA

Kuala Lumpur was originally an obscure settlement at the junction of the Klang and Gombak rivers. It emerged after the 1850s to become a thriving community of Chinese tin miners.³¹ The continuing demand for tin in the second half of the nineteenth century made Kuala Lumpur the busiest and most populated centre in Selangor. As a result of its strategic and economic importance, it became the scene of some of the fiercest fighting during the Selangor Civil War.³² The war was effectively ended when the British took over the state in 1874. They soon realised that Kuala Lumpur would make the ideal centre for the

²⁹ Goode, W.J., Family Disorganization, in Contemporary Social Problems, edited by Robert Merton and Robert Nisbet, New York, Harcourt and Brace, 1961. p. 425.

³⁰ Ibid, p.15.

³¹ Although there was also Malay presence symbolised by the existence of a fort on Bukit Nanas.

³² The long sequence of battles and sieges from 1867-1873 had its origin in economics, political and strategic circumstances; for further details see Middlebrook, S.M. and Gullick, "Yap Ah Loy, 1837-1885" J.M.B.R.A.S. Vol 24, 21, 1951, pp.6-7.

new administration, and moved there from Klang in 1880. This overshadowed the authority of Yap Ah Loy, the "Kapitan China"³³ who had been the virtual ruler of Kuala Lumpur for the previous decade, and led to the rapid modernisation of the town. His influence was so profound that Gullick writes, "Kuala Lumpur in 1880 was Yap Ah Loy's Kuala Lumpur".³⁴

Kuala Lumpur grew as the state's administrative capital and was the natural choice as capital of the newly formed Federated Malay States in 1886, which enhanced its growth still further. It became the capital of the new Federation of Malaya established in 1948 following the Japanese Occupation and Malayan Union, and naturally of the new nation on the achievement of independence in 1957. It was to correct the anomaly of the situation where the federal capital was sited on the territory of a member state of that federation that cession of Kuala Lumpur from Selangor was negotiated in 1974.

Records showed that on 1st day of February 1974, Kuala Lumpur was ceded to the Federal Government of Malaysia by the state of Selangor. It was established as a Federal Territory with the passing of an Act³⁵ by Parliament in 1973,³⁶ upon the allocation of land totalling

³³ Due to lack of an official supervision from the British, the Chinese organised themselves into small clans with headman or "captain" to act as a representative of the community to the government as well as an arbiter of justice, in common with customs in China; Buxbaum, D.C., *Chinese Family Law in a Common Law Setting*, in *Family law and Customary law in Asia*, Netherlands, The Hague, 1968, pp.151-2.

³⁴ Gullick, J.M, "Kuala Lumpur, 1880-1895", *J.M.B.R.A.S.*, Vol xxvii, pp.4-8. For further details, see Middlebrooke, 1951, pp.12-127.

³⁵ This Act is cited as the Constitution (Amendment) (No.2) Act, 1973, was presented and read for the first time in the *Dewan Rakyat* (House of Commons) on 9th July, 1973 and was enacted and published in the *Government Gazette* on 19th July, 1973.

³⁶ Section 2 of the Act provides that, except in respect of Part 1 and the Schedule, the Act shall come into force on the date of the publication of the Act in the *Gazette*. Section 3 however provides that Part 1 and the Schedule shall come into force on the 1st day of February, 1974, that is on the establishment of the Federal Territory.

approximately 243,65 square kilometres from the state of Selangor³⁷ were declared as belonging to the Federal Government. The Yang DiPertuan Agong (King) was declared as its Head, but the execution of these responsibilities remained the task of the Datuk Bandar (Lord Mayor).³⁸

Before the passing of the Constitution (Amendment) (No.2) Act, there had been an agreement in principle between the Federal Government and the Government of Selangor that Federal Territory be established and that the area which constituted the Federal Territory would cease to form part of the State of Selangor. Since then, the Legislative Assembly of Selangor has already passed an Enactment adopting the provisions contained in the Constitution (Amendment) (No.2) Act, 1973. Thus pursuant to Article 2 of the Federal Constitution, the Legislative Assembly of Selangor consented to the passing of the Act and the Conference of Rulers also gave their consent to the establishment of the Federal Territory and the alteration of the State of Selangor.³⁹

The necessary provisions to give legal effect to the establishment of the Federal Territory are contained in Part 1 and the schedule of the above mentioned Act. It is also provided that the Federation shall exercise sovereignty over the Federal Territory and all power and

³⁷ Information Malaysia, 1990-1991 Yearbook, Kuala Lumpur, Berita Publishing Sdn. Bhd., 1990 p.726.

³⁸ Sub-section 2 of Section 6 states that " where any such law in force in the Federal Territory any power or function is vested in the Rules of the State of Selangor or in any authority of the State, that power or function in relation to the Federal Territory shall be vested in and exercised or performed by the Yang DiPertuan Agong or the Minister responsible for the Federal Territory or such other person or authorities as the Yang DiPertuan Agong may direct.

³⁹ In part 2 of the Act, it is provided that the Federal Territory shall cease to form part of the state of Selangor and the Ruler of the state of Selangor shall relinquish and cease to exercise any sovereignty over the Federal Territory and all power and jurisdiction of the Ruler and the Legislative Assembly of the state of Selangor shall come to an end; Section 3, Constitution (Amendment)(No.2) Act, 1973.

jurisdiction in or in respect of the Federal Territory shall be vested in the Federation.⁴⁰

More important however, in respect of the legal effect of the present existing state laws of Selangor, is Section 6 of the Act. Subsection (1) of Section 6 states that:

“Without prejudice to the provisions of the sub-section and subject to the following provisions of this section, state laws existing and in force in the Federal Territory shall continue to be in force there in until repealed, amended or replaced by laws passed by Parliament.”

In terms of administration, up until the Cabinet reorganization of 20th May 1987, Kuala Lumpur was under the control of a separate Ministry of the Federal Territory. However, since that date the Ministry has been abolished and the affairs of Kuala Lumpur placed under the control of a new division of the Prime Minister’s Department, responsible to a Deputy Minister in that Department.⁴¹ The day to day administration of Kuala Lumpur continues to be carried out from the City Hall of Kuala Lumpur.⁴²

A separate system for the administration of Muslim law was set-up on the 1st. February 1974 in Kuala Lumpur, even though the law applied is that of the State of Selangor. As provided under section 5 of the 1952 Enactment, a “Majlis Ugama Islam and Adat Istiadat Melayu, Wilayah Persekutuan” (Council of Religion and Malay Custom, Federal Territory) was set-up, consisting of a President and not less than seven members all of whom with the exception of the President, are appointed by the Yang DiPertuan Agong for such period as deemed fit.

⁴⁰ Section 4, Constitution (Amendment) (No.2) Act, 1973.

⁴¹ Federal Territory Development Division.

⁴² Information Malaysia, 1990.

The main role of the Council is to aid and advise the Yang DiPertuan Agong on all matters relating to Islam and Malay custom. The “Majlis”, being the chief authority on all matters relating to Islam and Malay custom, is empowered to take notice of and act upon all written laws in force in Kuala Lumpur, the Hukum Shara’, and any Malay customary laws.

The day to day running and the administration of Islamic affairs in Kuala Lumpur is the concern of the Religious Affairs Department, a body which is set-up by the “Majlis”. Another body concerned with the administration of Muslim law in Kuala Lumpur is the Legal Committee.⁴³ The main role of the Legal Committee is to consider any request to the Majlis on any ruling on any question of law.

1.3 SOCIAL STRUCTURE OF THE SOCIETY

Malaysia, with its complexity of peoples and culture, is a melting pot of several important traditions, stemming from the Malay Archipelago as well as from China, India, the Middle East, and the West. Malay culture is indigenous to the area. It is strongly marked by pre-Islamic Indian and early Islamic influence. Indian contact with the Malay Peninsular extended over a period from about the 4th century to the late 14th century, exerting a profound influence upon religion. Islam, introduced to Malacca in the 15th century, soon became the dominant religion of the Malays. The introduction of western cultural influences in the 19th century affected many aspects of Malay life, especially in technology, law, social organisation, and the economy. Contemporary Malay culture is thus mult faceted, consisting of many strands - animistic, early Hindu, early and modern Islamic, and, especially in the

⁴³ Section 40 (1) of the Enactment provides that there shall be a Legal Committee of the Majlis consisting of the Mufti, not more than two members of the Majlis, and not less than two other fit and proper persons who may be members of the Majlis or not. The Mufti, who shall be the Chairman of the Legal Committee, is appointed by the Yang DiPertuan Agong.

cities, western. The collective pattern thus established is distinct from other cultures and recognisably Malay.

Unlike the early Chinese traders who settled in Malacca and Penang and were partially assimilated, the Chinese who emigrated to the Malay Peninsular in the late 19th and 20th centuries in large numbers were usually transients who established self-contained communities. The Chinese immigrants themselves, moreover, did not form a homogenous group. Their culture in Malaysia today is inherited from the culture and civilisation in prerevolutionary China, with modifications brought about by local circumstances and environment.

The Indians are either immigrants or descendants of immigrants, most of whom originally came as labourers to work in the coffee and rubber plantations. Like the Chinese, they too, until World War II, were mainly transients, living in closed communities and remaining virtually unassimilated.

The communities of Malaysia have all been affected by past British colonial rule and present western modernising influences. Western influences have been greatest in the areas of educational and cultural institutions. Traditions and cultural institutions have been least affected in the rural area while the cities have been the focus of the most rapid cultural changes.

The major migrant groups of Chinese and Indians are today found physically intermingled with the Malays of the Peninsular Malaysia. However, the most salient feature of the multiethnic society is that colonialism of almost a hundred years has contributed greatly to a situation in which, until the recent development plan periods (1971-1975 and 1976-1980), each ethnic group has remained almost entirely culturally distinct from the others. In short, the Chinese and Indians have managed to preserve their own social and cultural identities

within a new common environment and this has been made possible through a network of overlapping cleavages in the society in the form of each group's own social institutions, religious institutions and educational system. This view is supported by Freedman:

*"The Chinese and Indians who arrived in Malaya have remained Chinese and Indians, not only in the eyes of census-takers but also in culture, social organisation and political status. In contrast, the "Indonesian" immigrants have found their way into that part of the population which British policy regarded as enjoying primary occupation and political rights."*⁴⁴

In tracing the beginnings of plural society, Nagata says,

*"Little opportunity or encouragement was offered by the colonial masters for members of the three groups to interact socially, and indeed their separation was preserved and enshrined in the deliberate colonial policy of maintaining a division of labour along ethnic lines... In the political realm, many traditional Malay institutions were preserved by the practice of indirect rule. Each of the Sultans and Rajahs (Kings)... retained his formal position and title within his own state over matters of Islamic religion and Malay culture. The creation of a Malaysian Civil Service abrogated most of the Sultan's real power, but not from the Malays since the latter played an important role in this bureaucracy through a series of preferential quotas... Although it is often said in Malaysian society that the Malays are in the ascendant politically, that the Chinese dominate commercial life and the Indians constitute the rural proletariat, this statement must immediately be qualified for there are numerous exceptions in every case."*⁴⁵

Nevertheless this popular stereotypical model of Malaysian society is commonly observable and it forms the basis of many interethnic attitudes, perceptions and behaviour. Each of the major groups is subdivided into subgroupings that have important differences in dialect

⁴⁴ Freedman, Maurice, "The Growth of a Plural Society in Malaya", Pacific Affairs, Vol.33, No.2, 1960 p.159.

⁴⁵ Nagata, Judith, "Perceptions of Social Inequality in Malaysia," in Contribution to Asian Studies, Vol VII, 1975, p.118.

and custom but each also shows internal solidarity in confrontation with the others. Only at the highest level of government and professions, is there extensive, effective contact between members of the three racial groups and even then, it is largely on the common grounds of the adopted British culture. Within each of the major ethnic societies of Malaysia, this westernised elite remains aloof from the more traditionally united ethnic communities that make up most of the urban and virtually all of the rural population.⁴⁶

According to the 1980 census report, the population tends to be concentrated in the rural rather than urban areas. The predominant race in Peninsular Malaysia are the Malays, who are randomly distributed around the country but are mainly found in the rural areas. The next race of major importance are the Chinese who tend to be concentrated in the more developed states on the West Coast of Peninsular Malaysia. Their presence is minimal in the largely rural or agricultural states such as Kelantan, Trengganu and Perlis.

The Indians make up the smallest majority group in the country. The Chinese tend to be concentrated in certain states for historical or economic reasons. They are mainly found in Johore, Selangor, Perak, Kedah, Penang and in urban areas such as Kuala Lumpur.⁴⁷

The population of Kuala Lumpur today is estimated at nearly one million, with an increase of about 4 percent per year.⁴⁸

⁴⁶ Ginsburg, Norton and Chester, Roberts, Malaya, Seattle, University of Washington Press, 1958 pp.225-6.

⁴⁷ Ibid, p.69.

⁴⁸ Malaysia 1980, Official Year Book, Vol 20, Kuala Lumpur, Government Printers, 1984, p.71.

TABLE 1.1

Composition of the population of Kuala Lumpur

Malay	320,000
Chinese	507,487
Indian	140,166
Others	9,409
Total	977,102

Kuala Lumpur's society is made up of various ethnic groups, the most dominant being the Chinese (52 percent), followed by the Malays (33 percent), Indians (14 percent) and Others (1 percent).⁴⁹

For all three of the major communities, the family has been the basis of their traditional social organisation, although there were differences among their original forms. Social and economic changes have involved profound alteration affecting, again somewhat differently, all three family systems. The situation for Chinese and Indians is further complicated by their removal from the parent culture and their reestablishment in alien surroundings.

1.4 THE MALAYS

A Malay is defined by the Constitution as;

"A person who professes Islam, habitually speaks Malay, conforms to Malay customs and was born before Merdeka Day,⁵⁰ in the Federation or born of parents, one of whom was born in the Federation or was on Merdeka Day domiciled in the Federation; or is the issue of such a person."⁵¹

⁴⁹ Ibid.

⁵⁰ Malaysia received its independence in August 1957. The day in which it received its independence is called the Merdeka day.

⁵¹ Article 160 (2) of the Federal Constitution.

The origin of the Malays has not been well documented and is the subject of controversy.⁵² However, it has been postulated that they originated from the mainland of South Asia. Evidence suggests that a migration from the area now known as the Southern Chinese province of Yunan, took place around 2000 B.C into the coastal region of the Peninsular and beyond the Indonesian archipelago. By the first century A.D. these migrants had developed an agricultural way of life with domesticated animals. They brought with them their customs and traditions which are still observed, although much modified and their roots lost in antiquity.⁵³

Other immigrations into Peninsular Malaysia from the Indonesian Archipelago also helped to increase the diversity of the Malays. One important migrant group were the Minangkabau group from Sumatra who migrated to Malaysia in the fourteenth century into the Malacca kingdom, finally settling in the present day states of Negeri Sembilan and Malacca. In the eighteenth century, the Bugis from Celebes undertook a mass exodus from the island and established themselves in the present day states of Johor and Selangor.⁵⁴

These settlers brought with them their customary practices and these customs still survive today, albeit in a modified form. This is especially pronounced in the matriarchal system of Adat Perpatih still to be found in the states of Negeri Sembilan and Malacca.⁵⁵

Therefore, in addition to local born Malays, the Malay population comprises a mixture of immigrant groups from Indonesia,

⁵² Ginsburg, 1958, p. 192.

⁵³ Andaya, Barbara Watson, and Andaya, Leonard Y., A History of Malaysia, New York St.Martin's Press, 1982, pp 7-36.

⁵⁴ The New Encyclopaedia Britannica, 15th ed., Vol II, Encyclopedia Britannica, 1980 p.366.

⁵⁵ For further details see Chapter 3.

Minangkabau, Aceh, Mandiling, Rawa, Kerinci, Batak, Bugis and Javanese. There are also Arabs who form a small but very influential group in trade and religion. These groups have different cultures and customs. For example, apart from the differences in dress and language, there are also distinctions along occupational lines.⁵⁶

Traditional Malay society organises itself under the patronage system which is analogous to the medieval feudal systems found in Europe in the middle ages. However, there are important differences, the main ones being the interdependence of the rakyat (common people) with the Ruler and the relative autonomy given to individuals. Subjects pay taxes to their Sultan or ruler on agricultural produce, use of the river as a means of communication and the right to engage in trade. In return, the Sultan will guarantee freedom to engage in economic activities and protection from enemies. The delegation of power is via a single step approach where the Sultan's edicts are carried out on a local level by a Penghulu (village chief) who is an informal figure and very much part of the local community.⁵⁷

This pattern was protected and even confirmed by the colonial policy which safeguarded and confirmed the pre-colonial Malay aristocracy (royalty). Birthright determined social rank in the aristocracy and this was the only form of rigidity in Malay society. It was from this group that the civil service and the Malay political leaders were derived. Thus, with a numerical majority in the country, and their political leaders reaffirming their hereditary rights, the Malay sphere of power was in politics with wide grass roots support.⁵⁸

⁵⁶ Gullick, J.M., Indigenous Political Systems of Western Malaya, New York, Humanities Press, 1965, p.25.

⁵⁷ Ibid.

⁵⁸ Nagata, 1975, p.121-2.

Until the mid 1970's Malay society was rural and agriculturally based. The reliance on subsistence cultivation of rice and other food crops on a small scale reflected the general tendency of the Malays to shun commercialisation of their economy. The accumulation and show of wealth as evidenced in a capitalist economy were alien to the Malays. Instead, great value and emphasis was laid upon co-operation, consensus and community harmony rather than confrontation and competition.

As a result, the participation of the Malays in estate agriculture, mining, lumbering and extraction of natural resources under colonial economic interests was relatively small. Mistaken for laziness, this attitude indirectly brought about the immigration of Chinese and Indian labour which subsequently led to the emergence of an economically powerful ethnic group after independence. As Freedman puts it,

*"Western and Chinese enterprise turned the country into a hive of economic activity, but Malays took no conspicuous part in it. They refused generally to sell their labour in mines and estates. But even so, their role was by no means unimportant; the peasantry adapted itself to producing cash crops (especially rubber and coconuts) on smallholdings. Also, by taking advantage of the limited educational opportunities offered, some peasants' sons were able to move into the lower ranks of the civil service and something of a rudimentary Malay middle class emerged on the basis of administration."*⁵⁹

With independence in 1957, and the transition of the economy from subsistence to a consumer economy, more and more Malays have migrated to urban areas. With relatively few changes, they have brought with them the culture and traditions of the "kampongs" (villages), mirroring the rural communities from which they originate. The coffee shops and prayer houses which are the focus of social

⁵⁹ Freedman, 1960, p.161.

interaction have been transplanted to the city where they serve exactly the same function except to a bigger community.

One of the changes which has taken place is the establishment of the nuclear rather than the extended family as the basic social unit in the city. Another is that of the need to adapt to the density of urban life and interact with many unfamiliar people. On the whole, however, Malay communities have not changed perceptibly beyond the early twentieth century patterns of social interaction, even though technically advanced.

1.4.1 The Malay Family

The primary social unit of Malay society is that of the family. Often, this is the extended family rather than nuclear family as found in the West. Malay society is unusual in that there is almost a complete lack of formal structure binding the Malays together. The only substantial social organisation is that of the village, often made up of closely related individuals on an extended family basis. The interaction manifested is that of small close knit communities in which organisation, administration and other social and cultural activities are regulated on a communal basis.

The family is a basic component of a loosely-structured kinship system. A complex series of linkages based on blood, marriage and other putative relationships brings together a number of individuals into a common universe of kinship containing various categories and groups of kinsmen. The Malay kinship is governed by two adat, that is Adat Perpatih and Adat Temenggung.

Adat or custom is an indispensable institution in Malay sociological analysis. It represents the formal and conscious beliefs of the Malays from which one could trace cultural and social production of ideas and relations in the wider society.

Formerly there are two customary systems of adat in Malay society, one is patrilineal called the Adat Temenggung and the other is matrilineal called the Adat Perpatih.⁶⁰ The latter is firmly established in Negeri Sembilan and the Naning district of Malacca. The former is practised in other parts of the country. Both represent Malay conceptions of law and the legitimacy of these traditions can be said to derived from moral principle as well as from custom and long usage. The tradition of the Temenggung has been described as more autocratic and less democratic because it places power and authority solely in the hands of the ruler. The latter tradition centres on the principle of collective responsibility; the ruler is sovereign but the authority and power of the ruler is within the limits that have been laid down in its code.⁶¹

The matriarchal Adat Perpatih can be distinguished from the other Malay customary laws in its traditional statement which is known as "Perbilangan" or customary saying.⁶² It has been handed down from generation to generation. Originally unwritten, the customary has now been put into writing. The Adat Perpatih governs land tenure, lineage and the election of various traditional chiefs. As far as rules relating to marriage and divorce are concerned, this community follows Islamic law.⁶³

Adat Temenggung comprises of six main groups. The digests dealing with Adat Temenggung are fundamentally based on Malacca law.⁶⁴ The Malacca Laws, although entitled "Risalat Hukum Kanun" (A Tract

⁶⁰ The adat law is still very much alive at present in Negeri Sembilan and Naning.

⁶¹ Wilkinson R.J., Law: Introductory Sketch in Papers on Malay Subjects, Kuala Lumpur, 1908, p.2.

⁶² Minnatur, J. "The Nature of Malay Customary Law", No. 2, Mal.L.R. Singapore, 1964, p.331.

⁶³ For further details, see Hooker, M.B. Adat Laws in Modern Malaysia, Kuala Lumpur, Oxford University Press, 1972.

⁶⁴ Winstedt, R.O., The Malays: A Cultural History, 6th edn., London, Routledge and Kegan Paul, 1961, p.99.

on Customary Law) are actually a digest “grafting the Islamic law of the new Sultanate (of Malacca) on to the earlier law of the Hindu court.”⁶⁵

The important parts of these laws are rules relating to marriage, divorce, inheritance and succession. In respect of the first two aspects of law, rules of Islamic family law are widely used. Islamic law, however, does not fully apply in matters relating to inheritance⁶⁶ and succession.⁶⁷ It has been shown that these Adat are really the offshoot of the other. Taylor in his Malay Family law states that:

*“The Adat Temenggung is a derivative from the basic tribal organisation in Sumatra (the Adat Perpatih) which as a result of the Hindu monarchia influence of Palembang was shorn of its tribal organisation, its exogamous system and its matrilineal law of property.”*⁶⁸

However, when one speaks of Malay adat, one is more inclined to think of Adat Perpatih than of Adat Temenggung. Wilkinson wrote in 1908;

*“The difference between adat perpatih and adat temenggung is visible in these days of British administration. Whenever a miscarriage of justice occurs in Perak, Pahang and Selangor, the Malays take it very calmly; but in the Negri Sembilan the whole population is excited by any non-recognition of the local adat.”*⁶⁹

⁶⁵ See Ali, Haji Mohd. Din bin, Two Forces in Malay Society”, Intisari, Vol. I, No.3, at p. 15, where he says in regard to the inheritance of Malay holdings in the “Islamic-cum-Temenggung States”; Take away the Hukum Shara’ and the residual adat which is Temenggung would be beyond recognition ... At present the amalgamation of Islam and the Adat Temenggung is so complete that it is well nigh impossible to separate one from the other.” *ibid*, pp.19-20 .

⁶⁶ Tijah v Mat Ali (1890) 4 Ky. 124.

⁶⁷ In the Goods of Abdullah (1835) 2 Ky. Ecc.8.

⁶⁸ Taylor, E.N. “Malay Family Law,” Journal of the Royal Asiatic Society - Malaysian Branch, 15 (1937), 1-78.

⁶⁹ Wilkinson, 1908, at pp. 19-20.

Malay customary law is either enforced by the Sharia Court as Islamic Law, or by the Adat Court in Negeri Sembilan as Adat Perpatih. Customary law consists of Malay customs and traditions which in the course of time have acquired the stature of law. It can be enforced by the chiefs and elders. In that it is the living law at a given time in a given place, customary law can be adapted to changing social needs, and is therefore not suited to codification. This, the so-called Malay Law Codes on Digests should not be taken to represent the customary law of a certain state; a more accurate picture would be given by the decisions of local tribal chiefs. In this respect, it bears resemblance to English Common law, which is also based on decisions or case law.⁷⁰ Family structure under the Adat Perpatih, is explained in the following sayings:

*"The world has its kings,
The luak has its chief,
The tribe has its headman,
The family has its elders."*⁷¹

The matrilineal system of Negeri Sembilan and Northern Malacca is composed of traditionally corporate groups of increasing inclusiveness viewed from the smallest unit, the family. A family is normally composed of parents and their children. A group of families, interlinked by descent from a common female ancestor constitute the group called "perut" (lineage). A group of "perut", filiated to each other by actual or putative descent, constitutes a "suku" (clan). There are twelve-named clans⁷² but about only four or five may be found in

⁷⁰ Ibrahim, 1987, p.33.

⁷¹ Wilkinson, 1908, p.10. In dealing with Malay customary law, the rules of Adat Perpatih could be gleaned from their traditional sayings. The sayings are handed from generation to generation so that the ignorance of law cannot be an honest or valid excuse.

⁷² Anak Acheh
Anak Melaka
Batu Belang
Batu Hampar
Biduanda or Waris

any village. District and State traditional political and administrative organisation was based on this larger kinship structure.

These factors therefore have varying normative and moral influences on the behaviour and organisation of a family group, being a small unit within a whole corporate system, without, however, impinging on the basic autonomy of the family. More often than not, extended family type has greater influence on the running of its component family units, thus affecting the internal process of decision-making, for example in marriage and divorce. It is therefore useful to be aware of the larger frame of kinship structure in any evaluation of a family system to understand fully some of the background factors affecting its organisation and function.⁷³

The family as a unit runs its own affairs, although on certain occasions mainly during life crises or family ceremonies such as birth, marriage and death, come together to lament the loss, to find solace and to comfort each other, or to provide material support in ceremonies or gatherings. All these events help to renew kinship ties and reinforce kinship solidarity.

The Malay family therefore has a reciprocal kinship or moral obligation with other groups of kinsmen. This network affects the family in varying degrees depending very much on various factors of closeness or remoteness, in terms of descent, residence and generation status. The closer the link, the greater the degree of influence.

Mungkal
Paya Kumboh
Sri Lemak
Sri Melenggang
Tanah Datar
Tiga Batu
Tiga Nenek.

⁷³ For further details, see Hooker, 1992.

The marriage system under the Adat Perpatih is a system of exogamy within their tribes. This means that the preference is for a person to marry outside the clan but within the tribes.⁷⁴ It is also matrilocal, that is, it is compulsory for a husband to live in the wife's place, if not with the wife's family.⁷⁵ It is said;

*"Warder of the wife is the husband,
Warder of the husband his wife's family."*⁷⁶

The husband among his wife's relations is naturally expected to observe the customs of their family;

*"When you enter a byre, low;
when you enter a goat's pen, bleat;
Follow the customs of your wife's family.
When you tread the soil of a country and live beneath its sky,
Follow the customs of that country."*⁷⁷

It is said that if the wife's relations exercise some control over him, it seems to be justified for two reasons. The well-being of the family is mainly their concern, and it is their responsibility to see that the husband of their sister or niece contributes to that well-being. Further, they have taken upon themselves a good deal of responsibility for him.

⁷⁴ For further details on marriage within tribe see Selat, Nordin bin, Sistem Sosial Adat Perpatih, Kuala Lumpur, Utusan Melayu Berhad, Jabatan Penerbitan, 1976, pp.124-6.

⁷⁵ Haji Mohamad, Abdul Rahman bin, Dasar-Dasar Adat Perpatih, Kuala Lumpur, Pustaka Antara, 1964, p.39.

⁷⁶ Kunci bini laki; Kunci semenda tempat semenda. The translation quoted is that of Caldecott, A, "Jelevu Customary Songs and Sayings", J.M.B.R.A.S. Vol. 78, 1918, p.3-41.

⁷⁷ Masuk kandang kerbau, menguak;
Masuk kandang kambing, membebek;
Bagaimana adat tempat semenda, dipakai
Bagai bumi dipijak, langit dijunjung
Bagaimana adat negeri itu dipakai, Ibid, p.8.

For the adat stipulates;

*“to unravel disputes,
to pick up the fallen and search for the lost, to pay debts and
receive dues, is the business of a man’s wife’s family.”⁷⁸*

However, contrary to popular belief, the husband is not under his wife’s influence in Adat Perpatih society. His high position in the family is guaranteed to him under the adat. He has his own “province”, his sphere of influence and power within the four corners of his house, and he also has a cherished place in his own family and clan. His importance in the home is acknowledged in the saying:

*Slaves can offend against the masters,
Pupils against their teachers,
Children against parents,
Wives against husbands.⁷⁹*

This clearly indicates that wives are expected to be obedient and faithful to their husbands. In his capacity as uncle or brother, he may be the manager of the family and it is not unlikely that he is or he becomes an elder or chief in his clan.

The prohibitions of marriage include not only the prohibitions of Hukum Shara’ but also the prohibitions of Adat Perpatih.⁸⁰ Thus, while the children of brothers of the same father may intermarry in

⁷⁸ Ibid.

⁷⁹ Salah hamba kepada tuan,
Salah murid kepada guru
Salah anak kepada bapa
Salah bini kepada laki
Caldecott, 1918, p.30.

⁸⁰ Ali, 1968, p.44.

Islam, marriage between parallel cousins⁸¹ through the same grandmother is not allowed in custom. Thus, the scope of marriage prohibition is enlarged by prohibiting intra-tribal marriage due to the presence of common female blood. Custom is insistent that the parties to the marriage should be of the same generation. Thus marriage is arranged preferably between cross-cousins.⁸²

In a customary marriage, it is forbidden to take another wife within the same tribe, and is considered incestuous.⁸³ Custom thus reduces the incidence of polygamy and encourages monogamy.⁸⁴

It is stated in the customary sayings that;

*Two familiar spirits in one household
Two ladders to one sugar palm⁸⁵
Sprouts without seed⁸⁶
Are offences against morals
Custom looks for signs of guilt,
When custom declares the offence proved,
It is not a peccadillo to be mildly corrected
Nor can recourse be had to religious law
for this crime of taking two brides when a man has been given one.⁸⁷*

⁸¹ Parallel cousins are first cousins whose related parents are of the same sex, for example mother's daughter or son and mother's sister's son or daughter. Sometimes the term otho-cousin is used instead; Mitchell, G.D., A New Dictionary of Sociology, Routledge and Kegan Paul, London, 1979, p.129.

⁸² Cross cousins are the children of siblings of the opposite sex. Thus, an individual's mother's brother's children and his father's sister's children would both be his own cross-cousins; Mitchell, 1979, p.46.

⁸³ Haji Mohamad, 1964, p.39.

⁸⁴ Ali, Hj.Mohd. Din bin, Malay Customary Law in Family Law in Asia: A Contemporary Legal Perspective edited by David Buxbaum, the Netherlands, the Hague, 1968, p 198.

⁸⁵ These two lines according to Minnatu signify a man's union with another woman of the same clan as his wife during the wife's life, Minnatu, 1976, p.31.

⁸⁶ A euphemism for bastards; see Minnatu, Joseph, The Nature of Customary Law in Family Law and Customary Law in Asia, edited by David Buxbaum, Netherlands, the Hague, 1968, p.32.

⁸⁷ Pelesit dua sekampung
Enau sebatang dua sigai
Mata tumbuh tiada berbenih
Sumbang kepada tabiat
Adat menuju kepada tanda
Bila "sah" kata adat tiang,

Islam on the other hand allows plurality of wives and marriage is understood as being only a legal contract, which also does not insist on such meticulous rituals to validate a marriage. However, the Perpatih tradition had made it an institution whose rules do more than merely bring individual parties to a lawful union. Marriage is the institution through which the whole host of relations and tribal organisations are bound into a cohesive whole.⁸⁸

The Adat Temenggung, which is said to have originated from Palembang, is patrilineal in character.⁸⁹ The marriage system is a system of endogamy although, like the marriage system under Adat Perpatih, it is very much influenced by Islam. The marriage prohibitions, in fact, follow fully the prohibition of Hukum Shara'.

In both Malay societies that practice Adat Perpatih and Adat Temenggung, the position of primary authority in a family falls on the man. The father is head of the household. The woman may manage the actual running of the household but the Malays' image of their society is such that the husband is regarded as the primary authority. Not only do they maintain that this should be so, but also seem to believe it is so.

It has to be pointed out that even in Malay rural life the nuclear family of husband, wife and children is the most important unit. As Swift stated;

Janggal tak boleh dipatuh lagi,
Salah tak boleh dihukum, Iaitu suatu diberi, dua diambil;
Selat, 1976, p.122.

⁸⁸ Ali, 1963, p.26.

⁸⁹ Ibid, 1963, p.16.

*"Husbands attempt to build their own house as soon as possible after the birth of their first child and to establish their own family of procreation as an independent unit."*⁹⁰

The Malay family, which forms the main social structural nucleus, is not only a household but a society of man and wife or parents and children in which there are normative determinants of behaviour. Although, there is a distinction between the lives of the peasants and the urban dwellers, the majority of the Malays live a rural existence.

In the customary peasant Malay family, the men and women participate in productive work. Raymond Firth, in a landmark study on Malay peasant life in Kelantan, stated that one of the remarkable features he saw was the freedom of women, especially in economic matters. He wrote:

*"Not only do they exercise an important influence on the control of the family finances, commonly acting as bankers for their husbands, but they also engage in independent enterprises which increase the family supply of cash... From the material of our census, it was clear that at least 25 per cent of the adult women of this community have some definite occupation which yields a regular income. And if casual or intermittent work be also taken into consideration-such as selling husband's fish, ...probably some 50 per cent of the adult women are gainfully employed from time to time."*⁹¹

Generally, women show a greater degree of independence and autonomy. Most women gradually assume a position of equality with their husbands. This, however is not true in all instances. While women in Kelantan may have enjoyed more economic freedom and even controlled the market place, women elsewhere have been restricted in terms of what they can do in public. Swift observed that women in

⁹⁰ Swift, 1963, p.279.

⁹¹ Firth, Raymond, Malay Fisherman: Their Peasant Economy, Hamden Connecticut, Archon Books, 1968, p.80.

Negeri Sembilan often worked in the rice fields but her main work is first of all the ordinary domestic duties of the household. The same writer also recorded that the husband wishes to retain control of the financial side of the household management and what is more, going to the shops or the market exposes a woman to too free a contact with the public.⁹²

The traditional Malay family conformed more to the norm of extended family whereby two or more family units, together with other kin members, lived together as a domestic or household unit. However, internal developments within the family, economic ability, conflict of interests and optimum residential capacity have split the family and thus a new domestic, autonomous and independent family unit develops. Recent studies have shown the increasing prevalence of the nuclear family, which has been observed since after the Second World War when individual and familial geographical mobility was necessitated by economic and political conditions. Urbanisation, industrial and educational development, have pushed and attracted younger families into urban areas.

Industrial and general economic development have exposed young men and women to wider sections of the population as a "field of choice". According to traditional norms of close agricultural societies, selection was more or less set within the general organisation of the family, kinship or community at large. Marriage was regulated by religious teachings. While this remains true now, the "field of choice" depends on individual contacts and preference. At the present time, marriage is increasingly based on romantic love and customs are not fully

⁹² Swift, M.G., "Men and Women in Malay Society" in Women in the New Asia: The Changing Social Roles of Men and Women in Southeast Asia, edited by Ward, B.E, New York. UNESCO, 1963, p.277.

adhered to in every case. But the Malays are, compared with the Chinese, believed to be more traditional in this respect.⁹³

The traditional function of marriage brokers in the arrangement of marriage has almost died out except in the rural setting. While no general data are available on the current general pattern of spouse selection, the present situation has affected the age at marriage, which has risen from seventeen to twenty years. The delay in marriage is closely related to the current family structure. High mobility and higher cost of maintenance have encouraged the formation of nuclear families, living away from parents and free from kinship constraints. This will eventually force households to be founded on conjugal relations rather than on kinship linkages, especially when the married partners are strangers to each other prior to marriage.⁹⁴

The urban setting greatly stresses the need for greater social mobility, higher attainment and comfortable living. The strong family constraint which was once highly regarded does not operate anymore. As a response to the general pattern of development, the erosion of traditional values and the radical change occurring in the family, a kind of socio-cultural reaction has emerged. Materialistic affluence has led to the breakdown of a more familiar pattern of social relations, aspirations and beliefs.

1.4.2 Divorce Among the Malays

It has been a common practice amongst Malay parents to arrange an early marriage for their children whenever the opportunity arises, especially for a mature girl. There is no doubt that in doing so they sincerely wish to see that the marriage is successful and long lasting.

⁹³ Aziz, Norlaili, Culture and Fertility - The Case of Malaysia, Research Notes and Discussions Paper No.19, Institute of Southeast Asian Studies, 1980, p.32.

⁹⁴ The Malays tend to marry early; Taylor, 1973, p.1.

In other words, a marriage once it is celebrated, is intended to be final. This primary notion is perhaps most clearly expressed in the first marriage ceremony, which is usually elaborate, because a second marriage is not normal, particularly for a girl. A customary marriage ceremony is very elaborate and incurs a lot of expense and takes much time to go through. But the readiness of the parents and guardians to shoulder these responsibilities in spite of their awareness of the heavy material involvement, indicates their wishes clearly. In practice however, not all the parents have their wishes fulfilled as divorce from time to time occurs in the society.⁹⁵

It is believed that incompatibility between the two spouses and their inability to adjust to each other's temperament is one of the major factors. Childlessness can also be listed as another reason for divorce, especially when it is accompanied by other factors. These are, for instance (a) if there is a permanent quarrel due to incompatibility; (b) if there is no strong reason to keep the couple together; (c) if there is a definite pull on one of the couples to separate; or (d) if the wife wishes to return to her own home, particularly when she is of the kind that has a strong attachment to her parents and is married to a person who normally resides in another state or district. In all these circumstances, it means that childlessness can be used as a good excuse for divorce.⁹⁶

It is also not unusual to note that apart from the above mentioned reasons which can be taken as a general indication of grounds for divorce there are other factors which can easily cause a broken home. For example, if a husband is deeply attracted to another woman and

⁹⁵ Haji Hassan, Abdul Jalil bin, *The Influence of the Shafi'i School of Muslim Law on Marriage and Divorce in the Malay Peninsular, with Special Reference to the State of Trengganu*, Ph. D Thesis, University of St. Andrews, 1969, p.255.

⁹⁶ Firth, Rosemary, *Housekeeping Among Malay Peasants*, London School of Economics, Monographs and Social Anthropology, London, The Athlone Press, 1966, p.36-37.

does not want to have the additional responsibilities of a polygamous marriage, or if he is willing to do so, but the first wife refuses to share him with the second, he divorces her and embarks on a new marriage. On the other hand, if the wife is attracted to another man and wants a divorce, she creates serious difficulties which finally force her husband to release her. Such circumstances often occur when a woman is forced by her guardian for the benefit of the latter to marry a person against her wishes, for example when a young girl is given away in marriage to a wealthy old man.

Among the Malays, the actual divorce takes place by the actions of the parties and the question for the qadhi is not whether they ought to be divorced but whether they have actually brought about a divorce. The qadhi therefore, is in substance a registering official with certain powers of investigation rather than a judge. He has only quasi-judicial powers.⁹⁷

Divorce in Rembau is necessarily of the same nature as marriage is that it is based on Islamic forms, its validity depends on registration, and questions of property are governed by adat. There are three rules which are common to all kinds of divorce. Firstly, religious law requires the woman to observe 'iddah'.⁹⁸ Secondly, the adat confers on the woman in every case an absolute right and duty to take custody of all the children, both sons and daughters, because they are of her tribe. Thirdly, following the divorce, the man invariably returns to his own tribe and family until he marries again.

⁹⁷ Taylor, 1937, p.6.

⁹⁸ A period of purification, normally one hundred days, and in every case this period runs from the date of the qadhi's certificate even though the husband has already been absent for many months. Under the Muslim law the period of 'iddah' generally consists of three periods of purity after menstruation but it would appear that according to the Malay custom, the period of 'iddah' on divorce is three months and ten days; Kempe, J.E and Winstedt R.O, "A Malay Legal Miscellany (1952) JMBRAS, Part 1, p.4.

The husband, can effect a divorce simply by pronouncing talaq in the presence of two witnesses and leaving the house. If he is away from home, he may give talaq by letter to the wife or her nearest male relation. Such a divorce may be revocable or irrevocable, and in either case it must be reported to the qadhi within seven days. At any time within iddah, the husband may return to his wife (this act is called ruju') - otherwise the divorce automatically becomes absolute on completion of 'iddah.⁹⁹

Malay custom however, to some extent helps to protect the woman who is forced to return to her husband against her will. According to the Ninety-Nine Laws of Perak, the law applicable in the case of a woman who was divorced and whose husband wanted her back within three months and ten days was that if she was unwilling she might be forced to return to her husband, but the husband must give her settlements in cash. If he was forcibly rejected, the woman must pay the amount of the marriage settlement.¹⁰⁰

There are three kinds of divorce which are open to a woman; “tebus talak”, “pasah nikah” and “talak gugor”. The former, divorce by redemption, can be granted by the husband at the wife’s request if she pays him a sum of money.

“Pasah nikah” can be given to deserted wife. According to Parr and Mackray¹⁰¹ a woman in this situation is entitled to this in compensation for the lack of conjugal rights (Nafkah batin), even if she has been provided with sufficient maintenance. The qadhi however,

⁹⁹ Under the Muslim Law, a husband who has repudiated his wife in a revocable manner has a right to take her back as long as she is still in her period of 'iddah, provided the marriage has not in the mean time become illicit for any other reason.

¹⁰⁰ The Ninety-Nine Laws of Perak, edited and translated by Rigby, J., Kuala Lumpur, 1908, p.48.

¹⁰¹ Parr, C.W.C. and Mackray, W.A., Rembau - Its History, Constitution and Customs, J.S.B.R.A.S., 56, 1910, 1-157.

denies this, claiming that the sole grounds for “pasah” are lack of maintenance, acting as proof that the husband may not have ceased to visit his wife for the purpose of conjugal relations.

“Talak gugor” on the other hand, can be used only for the dissolution of the special form of marriage called “nikah taklik”. At the celebration of such a marriage the bridegroom adds to the usual formula the words;

*“If I shall be absent from my wife for six months ashore and a year over the sea, without being heard of or sending word, provisional (or irrevocable) divorce shall come to pass of itself.”*¹⁰²

This phrase is usually employed at the marriage of a Rembau woman to a man from another State but may also be used where the bridegroom is a local man. On proof that the clause was read and that the specified period has elapsed, the qadhi will grant a certificate of divorce in accordance with the stipulation.¹⁰³

Jones writing in 1981 stated that Malay marriages were very unstable. The study by Smith in 1961 found, using the 1947 and 1957 census data, that divorce was common among the Malays but not among the Chinese or Indians. In 1970, Jones found that the Malay-Muslim population is perhaps the most dramatic feature of nuptiality in Malaysia. According to his study, the Malays, especially those living in the east coast states-Kelantan and Trengganu, have been characterised by one of the highest rate of divorce anywhere in the world. In Kelantan, the state with the highest rates of divorce, it was found that the two main causes of divorces among the Malays are early marriages

¹⁰² “Talak gugor” appears to be covered by “cerai taklik” in Negeri Sembilan; see Negeri Sembilan, Marriage, Divorce and Reconciliation Rules No.3 of 1963, where the period given was four months.

¹⁰³ Taylor, E.N., The Customary Law of Rembau, in Readings in Malay Adat Laws edited by M.B. Hooker, Singapore, Singapore University Press, 1970, pp.114-5.

and economic difficulties.¹⁰⁴ Che Hassan stated that Kelantan lagged very far behind in economic and social development because Kelantan was formerly ruled by the Pan Malayan Islamic Party, the opposition party which was in power in Kelantan from 1959 to 1978. Due to this, the Federal Government, under the Alliance Party, withheld support for development projects for Kelantan during those periods, thus leaving Kelantan far behind economically and socially.

Studies made by Jones also found that the highest divorce rates in Peninsular Malaysia are found in those states which are most backward economically and educationally, where the influence of Islam is generally held to be strongest. However, he found that divorce amongst Malays is culturally rather than religiously determined. The highest divorce rates are found in those states which are poorest, most rural and least educated, and where age at marriage is lowest. High divorce rates are also found where marriages are most strictly arranged by parents, where the rate of polygamy was highest, the law of divorce, left most loopholes and where the administration of those laws was loosest.¹⁰⁵

The ease with which divorce can be granted is said to be one of the factors responsible for high rate of divorce. Among Malays, the tradition of high divorce rates may pre-date the coming of Islam. Tsubouchi notes that the kinship structure of Malay society readily allows for divorce. In support, he cites the Jakun proto-Malays,

¹⁰⁴ See Mahmood, Nik Ramlah bt Nik, *Socio-legal Study of Divorce in Kelantan*, Academic Exercise, Faculty of Law, University of Malaya, 1982, p. 124; see also Hassan, Che Hashim bin, *Marriage and Divorce in Kelantan, Malaysia*, M.A Thesis, Department of Demography, Australia National University, Canberra, 1984, p.78.

¹⁰⁵ Jones, G.W, "Malay Marriage and Divorce in Peninsular Malaysia: Three Decades of Change" *Population and Development Review*, 7, (1981) 263.

*"Whose kinship structure is almost identical to that of the Malays but who have not been influence by Islam, (and among whom) divorce is quite common, though not as common as in Malay society."*¹⁰⁶

However, the study of Jones in 1981 showed that divorce rates of Malays have declined over the last two decades. The reasons for this are not very clear, but Jones cited modernisation and westernisation as being widely held as reasons for the decline. He stated that rising age at marriage in itself is undoubtedly a major reason for declining divorce rates. Couples are more mature at the time of marriage and, with the swing toward self-arranged marriages, have a greater stake in the success of the marriage. Spouses have been becoming progressively not only older but also better educated, and more likely to stress the husband-wife relationship bond than other bonds to kinsfolk, which are important in Malay tradition. Polygamy, a frequent cause of divorce amongst Malays, is becoming less common.¹⁰⁷ There also appears to be increasing shame in the Malay community about high divorce rates and their effects on wives and children. Westernisation and Islamic reform movements are said to have greatly accelerated the change of the family in modern Malaysia.¹⁰⁸

1.5 THE CHINESE

Evidence from archaeological traces have served to confirm that the view that contact between the inhabitants of Peninsular Malaysia and the Chinese took place from as early as the 4th. century A.D. when Chinese pilgrims, travellers and good-will missions visited the Malay

¹⁰⁶ Tsubouchi, Yoshihiro, *Islam and Divorce among the Malay Peasants in Southeast Asia in Nature, Society and Development* edited by Shinichi Ichimura, Honolulu, University Press of Hawaii, 1976, p.28.

¹⁰⁷ Jones, 1981, p.270-271.

¹⁰⁸ Ibid, see also Hassan, 1984; see also Haji Abdul Aziz, Hj. Wan Mohammad bin, *Suatu Pengamatan Umum Terhadap Isu Kekeluargaan: Kajian Kes di Kuala Lumpur, Seminar Tata cara Kekeluargaan*, Institut Sains Komputer, Unversiti Teknologi Malaysia, Sept., 1990.

and Indonesian archipelagos. Chinese contact with Southeast Asia was relatively slight until the Sung dynasty (960-1127 A.D). With the establishment of the Malacca Sultanate, the influence of China and the success of her traders increased. The first king, Parameswara, obtained Chinese support and “protection” as a counter-weight to Thai pressure on his emerging state. After the death of Parameswara, Chinese interest in overseas adventurism declined but a small group of Chinese traders became permanently established in Malacca. Their influence and numbers were much inferior to those of the Indian traders, mostly Muslim Tamils, whose role was progressively heightened with the spread of Islam to the local population.

It was only around the mid-fourteenth century that they were known to have established a settlement in Temasik or Old Singapore. In the fifteenth century, a Chinese delegation led by the famed Admiral Cheng Ho visited the Malacca kingdom and established diplomatic relations with the kingdom. This resulted in the establishment of the first permanent Chinese settlement in Malaysia which prospered even under colonization by the Portuguese, Dutch and the English. The descendants of this small settlement are known as the Baba and are still found in Malacca today.¹⁰⁹

The presence of Chinese traders persisted from this time, and small merchant communities grew. By 1750, the Chinese population in Malacca had reached 2,161 persons. A visitor to Trengganu in 1838 noted that the Chinese appeared to be mixed Hokkien and Hakka, most of them speaking Malay in preference to their own dialect. Many had married Malay women.¹¹⁰

¹⁰⁹ Purcell, Victor, “Chinese Settlement in Malacca”. J.M.B.R.A.S. XX, Part 1 (1947) pp.115-125.

¹¹⁰ Ryan, N.J. The Making of Modern Malaya: A History from Earliest Times to Independence, Kuala Lumpur, Oxford University Press, 1965, pp.104-5.

The next record of Chinese immigration was in the 19th. century when British colonial policy instituted mass migration in order to fill the demands of the burgeoning industry in Malaysia. The vacancies in the tin mining industries as well as in the agricultural sector such as pepper growing meant that a large number of Chinese migrant workers were rapidly wanted and absorbed. Motivated by commercial pressures, the British placed no restrictions and even encouraged the emigration of vast numbers of workers from mainland China despite the reluctance of the Chinese government to allow this.¹¹¹

Despite official discouragement from their government, thousands of Chinese had managed to arrive in Peninsular Malaysia by the 1850's. The majority of them obtained employment as labourers in the tin mines of Perak, sugar cane plantations and pepper and gambier farms in Johor.¹¹² By this time, the immigration of Chinese labourers had become a well-organised operation and the recruitment of migrant workers became a specialised skill. Potential immigrants were targeted from the economically depressed provinces of Kwangtung and Fukien by an appointed agent also known as Kheh Thau. The Kheh Thau often carried out his recruitment in his village especially of persons known to him as it would put a more personal and favourable viewpoint on the transmigration experience. He would often accompany his sin kek (new charges) to their final destination in Peninsular Malaysia before handing them over to his client.¹¹³

Until 1877, there were practically no laws which were applicable to the Chinese migrant workers, consistent with the colonial government's

¹¹¹ Purcell, Victor, The Chinese in Southeast Asia, London, Oxford University Press, 1951, pp.248-256.

¹¹² Campbell, P.C., Chinese Coolie Emigration to Countries Within the British Empire, London, P.S. King and Son, 1923, pp.2-25.

¹¹³ Blythe, W.I., "Historical Sketch of Chinese Labour in Malaya", J.M.B.R.A.S., XX, Part 1 (June 1947) pp.47-125.

policy that the internal affairs of the Chinese should not be interfered with. The responsibility for the administration of a community would often be given to an appointed headman or “Captain” who acted as a link between government and the community, and used the customs of China as a basis for the administration of the laws and regulations of the community.¹¹⁴

Another attempt to translocate Chinese culture in Malaysia was via the formation of associations meant for the benefit of its members. These associations, set up along the lines of clan, locality, language and business interests have persisted to the present day even though the establishment of a formal court system rendered the system invalid.

However, this situation was changed after the British colonial government introduced the Chinese Immigration Ordinance on 23 March 1877.¹¹⁵ The Colonial government also appointed Chinese Affairs Officers to supervise and bring some order to the Chinese communities. Improvements brought about by this change included official recognition of various Chinese customs and practices including that of succession. The Secretary for Chinese Affairs was bound by the Secretary of Chinese Affairs Enactment 1899 which directed him to take into account Chinese law and customs when settling cases and to appoint assessors to assist him if necessary.¹¹⁶ These changes, although beneficial, restricted the smooth running of Chinese law. The

¹¹⁴ Buxbaum, 1968, p.151-152; see also Hooker, M.B. The Personal Laws of Malaysia: An Introduction, Kuala Lumpur, Oxford University Press, 1976 p.124, see also Ibrahim, 1987, pp.14-16.

¹¹⁵ Under this Ordinance, a Chinese Protectorate Office under the charge of a Protector of Chinese Immigrants was set up in 1887.

¹¹⁶ Purcell, 1948.

associations were later used for criminal activities. This process was described in the following manner:¹¹⁷

“The history of government of the Chinese by the British in Malaya may be described as a transition from indirect to direct rule. This is made clear in the legal history of the Straits Settlements. The process was from rule by Chinese custom, administered by Chinese headmen, to rule by English criminal law side by side with Chinese custom administered by British judges, then, as the law was interpreted, to rule by the law of England, taking account of Chinese custom. The interpretation of the law meant progressive restriction in the operation of the custom of the Chinese. At the same time, a body of statute law was growing up in the colony itself which was further to restrict this custom.”

The Aliens Ordinance was replaced in 1953 with the more comprehensive Immigration Ordinance which served to exercise a tighter control on the immigration of foreigners to Malaysia.¹¹⁸

This Ordinance was subsequently replaced by the Immigration Ordinance, 1959 which came into force on 1st. May 1959. The principal objectives were to safeguard the employment and livelihood of residents and,

“To bring about a more balanced and assimilated Malayan population whose ties and loyalty are to this country alone without which the foundation of a true Malayan nation cannot be laid.”¹¹⁹

Chinese society in Malaysia was characterised by the relative uniformity of its class origins. Even though from a geographically limited area, the Chinese migrant workers were sufficiently different to be able to distinguish them from their speech. There are nine major

¹¹⁷ Ibid., p. 143.

¹¹⁸ Malaya, Federation of Malaya Annual Report, 1953, Kuala Lumpur, Government Printer, 1959.

¹¹⁹ The Straits Times, November 3, 1959.

linguistic groups with a few minor ones, all originating from different areas. The predominant group is the Hokkiens who are the natives of Amoy followed by the Cantonese. The third biggest group are the Hakka who came from northwestern Guandong and southwestern Fujian followed by the Teochew. The other, much smaller dialect groups are the Kwongsai from Guangxi province, the Hokchiu from Fuzhou, the Hokchia from the immediate area of Fuzhou and the Henghua from Fujian. However, it is the first five groups which constitute the bulk of the Chinese population.¹²⁰

Most were peasants from poor rural villages in a very small region of China. Therefore, a real community spirit had already been established at the grass roots level. The reasons why the immigrant workers should be derived from such a limited area is unknown but according to Purcell, poverty in central Fujian and eastern Guandong was possibly a driving factor.

Malaysian Chinese have come to be organised into small communities along the lines of common place of origin in China and common dialect. The ties are often even stronger as the majority of residents in a South China village would often be members of the same kin group. These ties, which play such an important role in China, seem to play an even more crucial role in Malaysia as a means of reaffirming their cultural and historical roots.¹²¹

This is further strengthened by the well-organised social groupings which are often related to their economic activities. These “kongsi gelap” (secret societies) had their own systems of internal

¹²⁰ Purcell, 1948, p.250.

¹²¹ Ibid, pp. 192-193.

regulations.¹²² These institutions represent an attempt to transplant Chinese systems of regulatory affairs into a new environment, which served to reinforce the ethnic consciousness of the Chinese and to support them in their bid to assert themselves amidst the indigenous people of their new homeland. Even after the establishment of the formal court system in the colony and the outlawing of secret societies the tradition of internal regulations persisted within the Chinese communities.¹²³

The social cohesiveness which is the direct result of these various activities has led Purcell to remark that the Chinese in Malaysia are,

*"More ethnologically exact than in any other country in Southeast Asia because since large scale immigration from China began over half a century ago, there has been no miscegenation of any importance. Before then, it was comparatively small."*¹²⁴

1.5.1 The Chinese Family

Until the beginning of the present century, the ideal Chinese family was patriarchal, patrilineal, patrilocal, and extended. It is located within the broader social organisational form of clan, and integrated within a system of ethico-religious belief centering around ancestor worship.¹²⁵ A man's duty was first and above all to his parents and a married woman's duty was primarily towards her parents-in-law. The essence of marriage was a social arrangement between two families and the main family function was perpetuation of lineage. As only males

¹²² Comber, Leon, The Traditional Mysteries of Chinese Secret Societies in Malaya, Singapore, Eastern Universities Press Ltd., 1961, p.56-9.

¹²³ Hooker, 1976, p. 124-5.

¹²⁴ Purcell, 1948, p.319.

¹²⁵ Yeh, Kuo Hwa, Chinese Marriage Patterns in Singapore, Ph.D Thesis, New York University, University Microfilms, Ann Arbor, 1969, pp.3-4.

could carry on the family line, there was tremendous pressure for a male heir. The importance of an extended family of kith and kin, connected by blood marriage or friendship, made it possible for the formation and maintenance of formal associations meant for mutual benefit.¹²⁶

Marriage within the clan was prohibited. Also prohibited were marriages which violated the generation - age order, marriages with persons of exceedingly low social status and those resulting from adultery. In the past too, polygamous marriages and mistresses were common.

Considerations of marriage arrangements took into account the social standing of the family, moral prestige, the man's integrity and ability, the woman's willingness to serve her parents-in-law, the capacity to bear children, economic advantage, together with astrological and calendrical compatibility rather than any preference the subjects themselves might have had.¹²⁷ Marriages usually took place at a somewhat later age than in many other traditional societies, notably those in India. Males were often some years older than the wives. Another disincentive which possibly worked to delay marriages was their cost. While both sides incurred expense, the weight was born much more by the groom's family. The "contract" was usually regarded as being much to the advantage of the family of the groom since, although the "bride-price" might be substantial, it was never adequate compensation to the bride's family for the loss of their daughter on whom wealth had been spent and who would subsequently "belong" to the other family.

¹²⁶ Ibid p.7-8.

¹²⁷ Id.

Within Chinese marriages, fertility was usually high. Until the wife had produced a child, preferably a son, she was not really accepted into the husband's family but as the number of her off-spring grew, so did her prestige and value. The strong need to have sons is to serve their parents in life and to honour them in death. The Chinese believe that no ancestor can exist without having living, preferably male descendants. The daughters acquired were usually perceived as a burden.¹²⁸

The traditional Chinese family unit must be viewed as sociological phenomenon providing stable, supportive conditions for marriage, frequent child-bearing and secure nurturing.¹²⁹ However, migration to Malaysia undoubtedly disrupted this balance. The major obstacle to reasserting the traditional structures and values of the Chinese family in the first decade of the Chinese influx was the acute shortage of eligible wives. In 1823, it was recorded that only 361 Chinese women lived in Malaya, however, in 1850, this figure had grown to 2,239.¹³⁰ Data for Peninsular Malaysia is deficient but a male to female ratio of at least 10:1 may be assumed for the end of the nineteenth century. By 1911, the ratio had decreased to 5:1. The census of 1931 showed a further improved situation, the sex ratio was then 2:1. A sign that increasing stability was becoming characteristic of the Chinese community showed in the proportion locally born-31 percent. In the 1930's although immigration of adult males was severely limited, female migrants were permitted or even encouraged, and a migrational surplus of 190,000 Chinese women occurred between 1934 and 1938.

¹²⁸ Aziz, 1980, p.25.

¹²⁹ Wong, A.K. The Modern Chinese Family - Ideology, Revolution and Residues in The Family in Asia, edited by Man Singh Das and Badis, P.D., London, George Allen and Unwin, 1979 p.251.

¹³⁰ Lebra, J. and Paulson, J. Chinese Women in Southeast Asia, Singapore, Times Publishers, 1980, p.6-7.

Nevertheless, in some areas, among some communities and for some age groups, female shortages persisted until after World War II.¹³¹

The traditional "ideal" rural Chinese family of up to five generations living together as one economic and social unit, with the wives of the sons of each generation included, was extremely difficult to replicate in Malaysia, for economic reasons quite apart from the length of time needed to develop such a unit. The other factor was that most Chinese in Malaysia, as a result of their migration, ceased to be rural peasants and became urbanised living in towns or mining settlements. The change in occupation from rural peasant employment to urban commercial occupations or mining lessened the advantages of a large extended household, and in most cases the single family or three generational families became the most common form.¹³²

There is now a wide variation in the degree to which Malaysian Chinese adhere to the traditional family customs, with the degree of modification related to such variables as the length of time since migration, the level and type of education, residence (rural or urban), social class and income. While many of the traditional ideas have remained, a profound change has actually occurred. The role of two families in arranging a marriage for their children has largely fallen away. Mutual attraction by the couple is now the commonly accepted basis for the match. Young Chinese now have much more freedom than was traditionally the case. Rarely, however, do the young Chinese, females particularly, aspire to the degree of independence accepted in western countries.

¹³¹ Ooi, Jin Bee, Peninsular Malaysia, London, Longmans, 1976, pp.116-118.

¹³² Aziz, 1980, pp.146-8.

It is not clear how widely the "ideal" described in the previous discussions was actually practised. Evidence provided by Palmore,¹³³ suggested that even in China, the simple conjugal family was the most common. In Peninsular Malaysia, the majority of the Chinese population during the nineteenth century and early twentieth centuries consisted of immigrants who were young single men or married men who left their families behind with the idea of ultimately returning home or of later bringing their families to Malaysia. Hence, Palmore suggested that extended family participation would be limited by availability of appropriate marriage partners as well as relatives, many of whom remained in China.

Today, male authority has also declined and with economic independence, women are gaining recognition as individuals. Marriage is becoming not just a social arrangement and is based more on romantic love. Family ties are also not so strong and many Chinese couples now live on their own.¹³⁴

1.5.2 Divorce Among the Chinese

The migrant Chinese workers who had settled permanently in Malaysia brought with them their culture and customs as well as their laws. Originally, these were the same as they had practised in China but as the newer generations grew up in Malaysia and adapted themselves to local conditions, so too, Chinese laws and customs changed. Hence, early attempts to adjudicate divorce among the Chinese were difficult and controversial.

¹³³ Palmore, J.A and Marzuki, A, "Marriage Patterns and Cumulative Fertility in West Malaysia, 1966-1967", Demography, 1970, Vol. 6, No. 64, p.383 .

¹³⁴ Tan,Poo Chang, The Study on Marriage and Marital Dissolution in Peninsular Malaysia, The Divorced Men and Women, A Final Report submitted to The National Planning and Development Board and United Nations Fund for Population Activities, Kuala Lumpur, 1987 p.47.

In *Dorothy Yee Yeng Nam v Lee Fah Kooi*,¹³⁵ Thomson C.J. said:

*"In the Straits Settlements, however, whatever may be the position as regards other races, the only conclusion that can be drawn from the Six Widow's case,¹³⁶ which is the classical case on the subject, is that as regards Chinese the question of personal law is based on race. The courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race and it would seem that the case is the same in those portions of the present Federation, which were not formerly part of Straits Settlements or, perhaps more accurately which were part of the former Federated Malay States."*¹³⁷

There is, however, a difference between the Colony and the Federated Malay States in matters relating to Chinese custom, on the basis whereby the law is generally administered in two jurisdictions. In the Colony the early settlers were deemed to have brought with them the Common Law of England and all that it implied. Then there were the three Charters of Justice in 1807, 1826 and 1855, which specifically provided that the administration of justice was to be adapted as far as circumstances would permit to the religious manners and customs of the several classes of litigants. As a result of these Charters, the English rules of law have been modified in the case of persons of alien race and custom. In the Federated Malay States there were no Charters of Justice, and the Common Law was not introduced until the passing of the Civil Law Enactment No.3 of 1937.¹³⁸

¹³⁵ [1956] M.L.J. 257.

¹³⁶ *Choo Ang Chee v Neo Chan Neo* (1908) 12 S.S.L.R. 120 (popularly known as "The Six Widows Case") *Re Ding Do Ca* [1966] 2 M.L.J. 220.

¹³⁷ *Ibid.*, p.263.

¹³⁸ For further details, see Hooker, 1976, pp.1-4.

The former Perak Order in Council,¹³⁹ declared the Chinese laws and customs set out in the Order to be the law in the State of Perak, and this was also adopted in other states, on the grounds that the Order was declaratory of the laws and customs of the Chinese. The Perak Order in Council was repealed on the 1st January, 1930 when the Distribution Enactment, 1929, came into force. It was held in *Woon Ngee Yew v Ng Yoon Thai*,¹⁴⁰ that with the introduction of the English common law by the Civil Law Enactment, 1937, the courts could act on the wide principle laid down by Sir Peter Benson Maxwell in *Reg v Willans*¹⁴¹ where he said:

“But where the law of the place is inapplicable to the parties, by reason of peculiarities of religious opinion and usages, then from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion.”

Therefore, the determination of whether the courts were empowered to grant divorces depended upon whether the couple were married under custom or Ordinance. The only essential legal requirements of a Chinese customary marriage is that the marriage must be consensual, proven by long continued cohabitation and repute of marriage. The requirements of a ceremony and formal contract are deemed evidential only and not essential. This was held in *Re Lee Siew Kow*¹⁴² which followed the principle in the Singapore case of *Re Yeow Kian Kee's Estate*.¹⁴³ It is interesting to note that the sole requirement for a

¹³⁹ No. 23 of 1893.

¹⁴⁰ [1941] M.L.J. 37 at p.45.

¹⁴¹ (1858) 3 Kyshe 16, at p.32.

¹⁴² [1952] M.L.J. 184.

¹⁴³ [1949] M.L.J. 171.

valid customary marriage is mere consensus. Parties to a customary marriage can dissolve their marriage without recourse to the courts.

If a Chinese couple were to contract a civil marriage, which provided that their marriage was a monogamous one, its solemnisation created a status which carried with it the obligations which the law imposed on parties having such status. If they entered into a marriage under the Civil Marriage Ordinance, such a marriage could only be dissolved under and in accordance with the Divorce Ordinance.¹⁴⁴ Hence, they are not entitled to divorce each other through customary law.

However, in *Chan Bee Neo v Ee Siok Choo*¹⁴⁵, it was held that section 1(2) of the Matrimonial Causes Ordinance which provided that the Ordinance did not apply to “marriage by Mohamedan law or custom, native law or custom, Chinese law or custom or other law or custom repugnant to English law” by necessary implication recognised Chinese customary law relating to divorce and matrimonial causes ; and therefore the court had the power to apply the Chinese customary law in such cases.

This was subsequently upheld in *Lieu Kui Tze v Lee Shak Lian*¹⁴⁶ where the High Court ruled that it had jurisdiction to grant divorces to persons married according to Chinese custom. According to Chinese customary law, divorce could be obtained by mutual consent. When petitions were presented on other grounds the judge was empowered to call in the assistance of one or more suitable persons as assessors to decide whether such grounds were recognised by Chinese custom.

¹⁴⁴ *Soon Hai San v Wong Sue Fong* [1961] M.L.J.221.

¹⁴⁵ [1947] S.C.R. 1.

¹⁴⁶ [1953] S.C.R. 85.

Furthermore, in *Chien Mau Ong v Wong Suok Ing*¹⁴⁷ it was held that the High Court had jurisdiction to grant a decree of judicial separation where the parties were married according to Chinese custom.

The courts in the Borneo States have also differentiated between the customs of the various Chinese groups (Hakka, Foochow and Henghua) and have thereby upheld certain ancient customs. In Sarawak particularly, where there is a much more numerous Chinese community than in Sabah, there were a number of cases where the courts had the power to make a decree of judicial separation, with due consideration being taken of local custom. In *Chong Foong v Chan Hwe Seng*¹⁴⁸ Briggs J. said:¹⁴⁹

“Now cases such as this must be governed to some extent by custom. Not however, custom which is outdated, outmoded and is not in line with modern Chinese thought. Custom is always changing, never more quickly perhaps than today among the expatriate Chinese people. I find as proved in this case that the petitioner was not treated as the wife of the respondent would have expected to be treated, that is, she was treated by the parents of the respondents as a menial rather than a wife of the son of the house; that the respondent knew of this, and may have resented the position; but that he was under the domination of his mother to such extent that he did not stand up for his wife, and behave towards her as a husband should behave towards a wife. Rather he acquiesced in the treatment of his wife accorded to her by his mother.”

The criteria upon which the court determines Chinese “customary law” seem to be the customs of the Chinese people living in the Borneo States at the time of the decision. For example, the courts upheld as “within the modern Hakka custom,” a divorce by a wife who had deserted her husband, where the husband has failed to get her back,

¹⁴⁷ [1956] S.C.R. 97.

¹⁴⁸ [1959] S.C.R. 33.

¹⁴⁹ *Ibid.*, at p.35.

there is no hope of reconciliation and the husband cannot support the children adequately.¹⁵⁰

The courts in the Borneo Territories have jurisdiction over questions of divorce of a customary marriage¹⁵¹ and unlike the Malay States, a court procedure is required to effect such a divorce although a mutual petition for divorce will suffice. There are a few cases¹⁵² which indicate that Chinese customary marriages can only be dissolved by Chinese custom and not under the Divorce Ordinance, 1952.

In the past, marriage under customary law for the Chinese was primarily polygamous. The courts recognised such polygamous unions as long as they were consensual. There was no legal requirement to register such marriages. Under English law, the concept of marriage has laid emphasis on its Christian nature. In *Hyde v Hyde*¹⁵³, Lord Penzance dealing with a Mormon marriage in Utah where polygamy was then lawful, held that such a marriage did not entitle the parties to remedies or relief under the matrimonial law of England. Lord Penzance held that marriage as understood in Christendom should be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

The conception of the marriage bond among the Chinese as far as secondary wives are concerned was something very different. In Imperial China, divorce of a Tsai (Principal wife) under traditional

¹⁵⁰ Lo Siew Ying v Chong Fay (1959) S.C.R.1.

¹⁵¹ Liu Kui Tze v Lee Shak Lian [1953] SCR 55.

¹⁵² Wong Chu Ming v Kho Liang Hiong [1952] SCR 1; Soo Hai San v Wong Sue Fong [1961] MLJ 221.

¹⁵³ (1886) L.R.1 P&D 130.

Chinese law was somewhat restricted.¹⁵⁴ On the other hand, the secondary wife had practically no status.¹⁵⁵ She could be dismissed and left destitute. Her position was a little better if she had borne a son, as then apparently, she could not be divorced without cause

Although still infrequent today, divorce is more usual and accepted in Malaysia. It appears to be more common than official statistics suggest. Many couples are divorced by "custom"; that is the marriage is recognised as broken by the families of the parties concerned but not necessarily officially registered. A similar "customary" situation may exist with regard to marriage, particularly remarriage after a divorce. It is now not unusual in Malaysia for widows to remarry. The possibility of adding other wives to the marriage has decreased, due mainly to economic constraints but the traditional practice of keeping a "concubine", in a separate house persists particularly among more affluent males.¹⁵⁶

Both marriage and divorce seem to have been regarded primarily as private matters, only coming within the jurisdiction of the courts in case of abuse. Divorce was recognised, but it was at the instigation of the husband, who was entitled to divorce his wife. However, divorce was very rare traditionally. The possibility of taking other wives meant that divorce of the first or even later wives was seldom necessary.

The courts in Malaysia seem to permit divorce of a secondary wife providing there is the necessary intent.¹⁵⁷ However, the problems which arise from polygamy have included the recognition of secondary

¹⁵⁴ Freedman, M., "Colonial law and Chinese Society", Journal of the Royal Anthropological Institute, 80, 1952 p.109.

¹⁵⁵ Valk, Marc Van Der, Outline of Modern Chinese Family Law, Peking, Henri Vetch, 1939, pp. 23.

¹⁵⁶ Aziz, 1980, p.43.

¹⁵⁷ In the Estates of Sim Siew Guan decd [1932] M.L.J. 95.

wives married under Chinese customary law. In *Cheang Thye Pin v Tan Ah Loy*,¹⁵⁸ it was held by the Privy Council that a secondary wife was entitled upon a partial intestacy to share in the estate of the deceased husband.

Divorce of primary wives by mutual consent was an accepted practice in Malaysia. This clearly contradicts the traditional Chinese customary law which gave the wife almost no opportunity for divorce. While the court has assumed a substantial burden in determining what modern custom is, it has retained a flexible position so as to permit itself to be responsive to social change.

On the general principle of divorce, the courts have held that Chinese may only divorce according to custom so long as they marry under custom. If they marry under the provisions of any Ordinance, then the grounds of divorce must be as determined by the Ordinance.¹⁵⁹ The courts will not allow a woman to divorce her husband unilaterally.¹⁶⁰

However, there was still the difficulty of deciding how the Chinese customary laws should be applied.¹⁶¹ In the case of *Woon Ngee Yew v Ng Yoon Thai*¹⁶², Murray-Ansley J. after referring to textbooks on Manchurian Codes said,

¹⁵⁸ (1920) A.C. 369.

¹⁵⁹ *Soo Hai San v Wong Sue Fong* [1961] M.L.J. 221.

¹⁶⁰ *Cheng Ee Mun v Look Chun Heng and Anor* [1962] M.L.J. 411.

¹⁶¹ It is said that Chinese Customary Law in this country is, to some extent, quite different from that practised in China, the country of its origin; *In Re Tan Soh Sim dec* (1951) M.L.J. 21.

¹⁶² [1941] M.L.J. 37.

*“...whatever the position as regards divorce may have been in China it by no means follows that the custom of China as it existed under the Manchu dynasty is suitable for the Chinese population of Perak today.”*¹⁶³

The learned judge in this case underlined the necessity of obtaining evidence of local practices from expert witnesses.¹⁶⁴ The judge also stressed that allowances must be made for changes in local customs in comparison to those in Imperial China. On subsequent appeal to the Court of Appeal, Terrel, J. stated that in determining questions of Chinese custom in Malaysia it is permissible to look for findings of other Supreme Courts in Malaysia, but special weight must be given to evidence indicating that some particular custom differs in different parts of the country. He also asserted in strong terms that:

*“The customs of the Chinese in Malaya are not based on those of Republican China,... The present customs are no doubt derived from the customs prevailing in the time of the Manchus, but have been adopted in Malaya with considerable modifications, ... The customs of Imperial China have accordingly a certain historical interest but nothing more.”*¹⁶⁵

Mc.Elwaine C.J. went even further to suggest that local Chinese custom may differ in different parts of Malaya.¹⁶⁶ The case ultimately turned on expert evidence of Chinese divorce custom in Perak. Translations of both the Imperial and Republican Chinese laws were referred to but none was regarded as more than useful background material.

¹⁶³ Ibid., p. 33-34.

¹⁶⁴ Id.

¹⁶⁵ Ibid, p.39-40.

¹⁶⁶ Ibid., at 37.

In *Mary Ng v Ooi Gim Teong*¹⁶⁷ there was nothing to show that the expert witness was testifying on the custom of the Chinese in West Malaysia. From the judgement, it seems that he was restating Chinese custom as recorded in the Ta Ching Lu Li (Laws of the Ching Dynasty). This law was restated by Maurice Freedman¹⁶⁸ and Vermier Chiu.¹⁶⁹ But neither of these authors was directing their attention to Malaysia.

In fact, Freedman, after field research in Singapore in 1949, concluded that;

“... the dissolution of marriage, Li-Hun, is common enough in Singapore and is recognised to be so... Li-Hun normally refers to a signed agreement between spouses to end their relationship. Chhut-chhe, the unilateral repudiation of a primary wife, has little relevance to Singapore and exists mainly in the minds of those sophisticates who are aware of its status in traditional Chinese law.”

Since the social custom of the Singapore Chinese does not, as a matter of common knowledge, differ radically from that of Malaysian Chinese, this testimony speaks strongly against accepting for the Malaysian Chinese the tenets of traditional Chinese law.

A further point for discussion is the status of the expert witness. Although qualified to testify on classical Chinese Law, the expert witness does not seem to be especially qualified to speak on West Malaysian Chinese custom. In the absence of comprehensive sociological surveys, the usual assistance a judge gets is from Chinese text and people learned in them. Neither of these sources accurately

¹⁶⁷ [1972] 2 M.L.J. 18.

¹⁶⁸ Freedman, 1952, p. 97.

¹⁶⁹ Chiu, Vermier Y., Marriage Laws and Customs of China, Institute of Advanced Chinese Studies and Research, New Asia College, Chinese University of Hong Kong, 1966 pp.75-107.

state the practice of calling up prominent people in the local Chinese community to describe local Chinese practices. It can be seen from Woon Ngee Yew's case¹⁷⁰ that this does not seem to guarantee sounder results.

The term "Chinese custom" is far too general to describe any but the widest possible agreed forms of customary behaviour in Chinese society. Chinese customs differ from community to community. This is exemplified in the following cases. In *Loh Chai Ing v Lau Ing Hai*¹⁷¹ the court applied the Foochow custom that the failure of the husband to maintain the wife was a ground for granting divorce; but it held that the fact that the husband was below normal intelligence was not a valid reason for divorce by that custom. This was upheld in *Ling Han Liang v Ling Ming Sieng*¹⁷² where the parties were married according to Foochow custom. The petitioner alleged that the respondent left the matrimonial home without reasonable cause and he prayed for a decree of restitution of conjugal rights. The wife in her defence alleged that the husband had committed adultery and had failed to provide his wife with proper maintenance and therefore the petitioner had failed to discharge the onus of establishing that the wife had deserted him without reasonable cause.

In *Siew Moi Jea v Lu Ing Hui*¹⁷³, the court was prepared to apply Henghua customary rules for divorce under which a divorce would be granted if the petitioner could prove that the respondent maltreated her and in addition that he failed to maintain her for a year or more. It was held however that the petitioner and the respondent had come

¹⁷⁰ Woon Ngee Yew v Ng Yoon Thai [1941] M.L.J. 37.

¹⁷¹ [1959] S.C.R. 13.

¹⁷² [1966] 1 M.L.J. 169.

¹⁷³ [1959] S.C.R. 16.

to a settlement under which she had received a sum of money as expenses and they had signed an agreement, which was binding according to custom. Moreover she did not satisfy the court that the respondent had failed to maintain her and support her adequately and therefore her petition was dismissed.

However, this contrasted strongly with the case of *Kong Nyat Moi v Leong Sing Chiang*¹⁷⁴ where the wife applied for divorce alleging cruelty, desertion and failure to maintain. The respondent opposed the application for divorce, denied all allegations and stated that he wanted the wife to return to him. The witnesses were unable to assist the court as to what specifically constitutes Khek customary rules for divorce. They could only say that if both parties agreed to mutual divorce it might be granted. It was held on the fact that the petitioner had failed to satisfy the court that she was entitled to divorce on good grounds according to the customary law of her community, and therefore the petition was dismissed.

Even though Chinese customary law varies according to the sub-ethnic origin of the parties concerned, all customary laws stem from an original, agreed upon and settled series of codes which are regarded as typical and representative of all Chinese customary laws. Under Chinese customary law, with regard to divorce, it is generally agreed that there are only two ways in which divorce may be granted, that is by mutual separation or via unilateral repudiation of the wife by the husband.

Divorce by mutual consent or agreement between the wife and husband is a more simple and less contentious procedure than unilateral divorce. In theory, divorce by mutual consent may be either contained in a deed or agreement of divorce, including inter alia a declaration

¹⁷⁴ [1965] 1 M.L.J. 73.

that the husband and wife respectively are free to contract any other lawful marriage with any other man or woman, or may appear as a newspaper notice of the declaration of their marriage.¹⁷⁵

The other method of divorce, unilateral repudiation of the wife by the husband, has its roots in long-standing and ingrained ideas of the superiority of man over woman which have given the husband the exclusive right to dissolve a marriage. A trite Chinese expression illustrates the position:

*"When the husband beckons her to come, she has to come, when he waves her away, she has to go away."*¹⁷⁶

In principle, a tsai (principal wife) and a tsip (secondary wife) are for the purpose of divorce in the same position even though there have been differing views that unilateral repudiation occurs more frequently in second marriages. According to Hooker, the customs in China and in Malaysia and Singapore are more or less similar where a Chinese husband can divorce his secondary wife if she disobeys the orders of the principal wife or if she violates the rules of the family, or for immorality or disobedience to her husband. The prevailing custom amongst Chinese is for the husband to inform his clansmen or his relations that he has divorced his secondary wife. A public declaration, it is believed, is essential to the validity of divorce.¹⁷⁷

Lee Siow Mong, the prominent expert on Chinese customs in Malaysia states that there are seven grounds of divorce by unilateral repudiation, namely:-

¹⁷⁵ Ibrahim, Ahmad bin Mohamed, Family Law in Malaysia and Singapore, 2nd Edition, Singapore, Malaysian Law Journal Pte. Ltd, 1984, p.114.

¹⁷⁶ Chiu, 1966, p.59.

¹⁷⁷ Hooker, 1976, p.134, Re Lee Gee Chong decd [1965] MLJ 102; Re Sim Siew Guan decd [1932] MLJ 95, Wong Ngee Yew and Others v Ng Yoon Thai and Others [1941] M.L.J. 37.

- (a) inability to bear a son or barrenness¹⁷⁸
- (b) immorality
- (c) disrespect to husband's parents
- (d) loquacity.¹⁷⁹
- (e) theft or some serious offence against property
- (f) jealousy¹⁸⁰
- (g) malignant disease

Against the above grounds for divorce stand three reasons for non-divorce which serve to constrain the husband from frivolously exercising his exclusive right to divorce his wife. These three grounds cover the following situations :

- (a) if the wife has kept three years mourning for either of the husband's parents
- (b) if the husband having once been poor is now rich and
- (c) if the wife has no home to go to.¹⁸¹

These three reasons which nullify the grounds of divorce are according to Lee Siow Mong the greatest protection for Chinese woman. There are however three grounds on which a divorce is imperative notwithstanding the above three exceptions. They are¹⁸² :

¹⁷⁸ The inability to give birth to a son is inevitably related to Chinese belief of "the interrupted continuation of the patrilineal lineage"; see Chiu, 1966, p.62.

¹⁷⁹ Loquacity or talkativeness is synonymous to quarrelsome conduct, carrying tales, lies and generally talking when one should be silent, thereby causing disharmony in the home; see Lee Siow Mong, Chinese Customary Marriage and Divorce [1972] M L J iii.

¹⁸⁰ Jealousy ranges from jealousy in love matters to jealousy in the wealth or well-being of other people, and action or behaviour arising out of such jealousy; *ibid.*

¹⁸¹ See also Valk, 1939, p.22.

¹⁸² *Id.*

- (a) adultery
- (b) assaulting the husband's parents and
- (c) desertion

It is interesting to note that the ground of adultery and desertion are also grounds for modern divorce legislation. The most unsatisfactory element in the concept of unilateral divorce lies in the fact that a woman has no right to divorce the husband, notwithstanding the injustices and wrongs committed by him against her. This fact is well illustrated in the case of *Cheng Ee Mun v Look Chung Heng*,¹⁸³ where it was held that according to Chinese custom a married woman could not divorce her husband unilaterally.

Desertion is a valid reason for the dissolution of marriages under both Chinese customary law and English law. In *Tan Sui Ing v Goh Tiew Liong*¹⁸⁴ the petitioner asked for the dissolution of her marriage on the grounds of desertion, cruelty, lack of maintenance and on the general ground that the circumstances which had arisen made it just and reasonable that the marriage should be dissolved. The evidence of the Foochow Chinese headman in Sibu was that a marriage contracted under Foochow Chinese custom could be dissolved if;

- (a) there was an absolute desertion by one party or the other for at least two years
- (b) there was absolute failure on the part of the husband to maintain the wife or children for at least two years or
- (c) the parties were incompatible and found it impossible to live reasonably together as man and wife despite genuine efforts to resolve their differences.

¹⁸³ [1962] M.L.J. 411.

¹⁸⁴ [1964] M.L.J. 406.

On the facts, it was held that the husband had failed to maintain his wife and children for more than two years and therefore the wife was entitled to a decree for dissolution of the marriage and the custody of the children.

In *Low Wan Kwong v Lau King Ting*¹⁸⁵ the petitioner applied for an order of dissolution of marriage on the grounds (a) that the respondent had left the matrimonial home without the petitioner's consent or knowledge and with the intention of never again cohabiting with the petitioner and (b) that the petitioner and the respondent were incompatible and found it impossible despite genuine efforts to live together as man and wife. The parties had married under Foochow custom. It was held that on the evidence the petitioner had failed to prove that the respondent had deserted him and that even if the respondent had been guilty of desertion, the petition was presented prematurely as it was presented less than half a year after the desertion.

It was clear on the authority of *Tan Sui Ing v Goh Tiew Liong*, (supra) that where desertion was alleged against the respondent, it had to be for a period of at least two years before a petition can be presented. It was also held that on the evidence the petitioner had not proved the second ground alleged against the respondent and in any event the period for which this ground could be canvassed (according to the expert evidence) was two years. As the respondent in this case was living apart from the petitioner and not without sufficient reason, she was entitled to maintenance for herself and the children.

This was upheld in *Lee Yung Kiang v Ling Yun Tie*¹⁸⁶ where both Chinese customary and English law were utilised to settle the dispute.

¹⁸⁵ [1975] 1 M.L.J. 217.

¹⁸⁶ [1965] 2 M.L.J. 87.

The petitioner left his family in Sibü and went to work in Kuching but took no steps to set up a matrimonial home there. Subsequently the wife also left the family house and went to work in Sibü without the petitioner's consent. The petitioner then applied for the dissolution of the marriage on the ground of desertion and asked the court for the custody of the children. The respondent denied desertion and claimed maintenance and the custody of the children. The parties were both of the Foochow community. Lee Hun Hoe C.J. applied the English rules as to desertion and held that on the facts the petitioner failed to establish that the respondent had the intention to desert and therefore the petition was dismissed. The learned judge also gave custody of the son to the petitioner and the daughters to the respondent and ordered the petitioner to pay maintenance for the respondent and the daughters.

As to the procedure of Chinese customary divorce, it was observed by Shaw, C.J., in *Re Sim Siew Guan*, and Terrell, J. in *Re Lee Choon Guan*, that the principal points on divorce are that there must be an intention to divorce and that it must not be kept secret, and it should be publicised. A man may divorce either his primary or secondary wife unilaterally; provided she was guilty of the above-mentioned crimes by declaring publicly to his clansmen or relatives that he had divorced her.

This was also found to be the case in *Woon Ngee Yew v Ng Yoon Thai*¹⁸⁷ where it was held that there was sufficient evidence that the deceased had divorced his wife according to Chinese custom, when he refused to return to her and informed various friends and relatives that he had done so; and that these facts were sufficient to constitute a divorce of a secondary wife according to the custom among Chinese as recognised in Perak.

¹⁸⁷ [1941] M.L.J. 37.

In Chinese customary law, divorce, like marriage, depended upon intent. Ceremony was deemed evidential, not essential and so no ceremony of divorce was required for it to be absolute. This was held to be so in *Law Ah Lui v Choa Eng Wan*¹⁸⁸ and in *Re Lee Choon Guan*.¹⁸⁹

However, a distinction was made between customary Chinese law and customary Chinese practice in *Wong Chu Ming v Kho Lieng Hiang*.¹⁹⁰ In that case, it was held that any Chinese customary practice whereby divorce could be effected by a joint declaration or advertisement in a newspaper without any court process did not apply in Sarawak where all non-native divorces could only be granted by and in accordance with the recognised procedure of the High Court.

It has been suggested, as in *Khoo Hooi Leong v Khoo Chong Yeok*¹⁹¹ that a secondary wife cannot be divorced by her husband if she has borne him a son during the marriage. However, the judgement in *Mary Ng v Ooi Kim Teong*¹⁹² upheld the view that under Chinese customary law a husband could divorce even his principal wife unilaterally for cause, even if she had borne him a son, provided the divorce was publicised. On the facts of the case it was held that the respondent was entitled to divorce his wife because of her disrespectful and disobedient behaviour to him and his mother and that in fact he had done so in accordance with the Chinese custom by announcing the fact to a family gathering, making it known to the wife's solicitors and making it known publicly in a local Chinese newspaper.

¹⁸⁸ [1935] S.S.L.R. 116.

¹⁸⁹ [1935] M.L.J. 78.

¹⁹⁰ [1952] S.C.R. 1.

¹⁹¹ [1930] A.C. 346 at 353.

¹⁹² [1972] 2 M.L.J. 18.

The exclusive right of the husband unilaterally to divorce his wife is, besides being an archaic practice, also non- protective of the rights and status of the Chinese woman even though in practice the seven grounds for divorce¹⁹³ are not usually evoked.

The vulnerability of a Chinese wife is further highlighted by the fact that the consequences of a customary divorce do not favour her in many instances. Unilateral divorce by the husband puts an end to the wife's relationship with the husband's family, the children remain the man's property and she is not entitled to any maintenance. In a divorce by mutual consent, maintenance may not be included in the terms of the deed at all. This may be a form of inducement to the man to agree to the divorce in cases where the wife desires a divorce from her husband but the latter is not wholly agreeable to it. In conservative Chinese communities, traditional public opinion has always considered divorces as sad, tragic and to be frowned upon. The requirement that a divorce must be made known has an adverse effect on the wife.

A further disadvantage of Chinese customary divorce is reflected by the inapplicability of some of the grounds of divorce to the modern day context. As a point of illustration, the inability to bear a son is scientifically proven as never the fault of a female. Without doubt, some of the grounds are frivolous and according to Azmi J., it would amount to giving "thousands of Chinese husbands a gun in their hands."¹⁹⁴

As discussed, Malaysian courts administering Chinese customary law constantly face the difficult task of deciding whether a particular custom is valid for the local Chinese community. Much depends on what the expert witnesses produce in the case. The complexity of

¹⁹³ See p.80.

¹⁹⁴ Per Mohd. Azmi J. in Mary Ng v Ooi Gim Teong [1972] 2 M.L.J. 18 p.20.

communal Chinese customs has caused much confusion and inconsistency in the application of the law with regard to divorce. One solution is to say that the moment a custom is proved to have existed in China, then the burden falls on its opponents to prove that it does not exist in West Malaysia. This seems to be in Murray-Aynsley J's mind when he said,

*"I think that the effect of the previous law and custom of China is this; if the authorities have shown that divorce did not exist in China, then I think that Courts here would be reluctant to admit that such a custom had originated in Malaya. But when it has been shown that divorce existed in China, then the Courts will only require slight evidence that the custom has continued."*¹⁹⁵

Kenneth Wee is of the opinion that there is the danger of assuming classical Chinese writings to be descriptive of local Chinese practices. He commented that this erroneous assumption was in fact made to the disadvantage of the wife concerned in the case of *Mary Ng v Ooi Kim Teong*. One wonders if this technical approach serves the purposes of justice. According to him, this approach ignores the conclusion of anthropological evidence that profound changes took place when the Chinese migrated to the Malayan peninsula, and that the local Chinese cannot be understood simply as a branch of society in China.¹⁹⁶

A case in point was *Thia Whee Kiang v Kueh Eng Seng*¹⁹⁷ where the trial judge had granted a dissolution of marriage on the grounds that there was no possibility of a reconciliation. On appeal the order was set aside and Williams C.J. said a married women should not be deprived of her status except on good grounds supported by acceptable

¹⁹⁵ Wong Ngee Yew v Ng Yoon Thai [1941] M.L.J. p.37.

¹⁹⁶ Wee, Kenneth, Chinese Law and Malayan Society: A Comment on Mary Ng v Ooi Gim Teong, M.L.R., Vol.15, 1973, p.113.

¹⁹⁷ [1955] S.C.R. 75.

evidence. This was in contrast with the judgement given in *Lo Siew Ying v Chong Foy*¹⁹⁸ where the court granted a divorce according to modern Hakka custom. Evidence was given by a former Registrar of Chinese Marriages that it would be within Hakka custom to grant a divorce to a wife who has deserted her husband and where he had failed to get her back provided the separation was considered to be final. In other words, where there was no possibility of reconciliation. If there was a reason for the wife to leave her husband, it would strengthen the case in her favour. One important factor was whether the husband could support the wife; if the husband could not support the wife and the children adequately and provide them with education then the wife was justified in asking for a divorce from her husband. Due to this conflict, Williams C.J. stated that it would be greatly in the interests of the Chinese community if questions relating to Chinese divorce, judicial separation and the like were regulated by Ordinance, rather than by Chinese custom, as an Ordinance would make for greater certainty in law.

The foregoing judicial decisions show that the courts, while using the words "Chinese custom" as a general term, have in fact made judgments on the basis of somewhat localised rules. Hooker pointed out that this point emerges clearly if a comparison is made between the various Orders in Council (Perak Orders 23/1893 and 26/1895) and Reports on Chinese custom (Straits Settlements 1926). But the courts have sometimes been misled into regarding "expert evidence", or that body of laws known as the Ta Tsing Lu Li as representing a body of regulation common to all Chinese.¹⁹⁹ According to Lee Siow Mong, there has been some misunderstanding, especially among the Chinese, in that the law of the Manchu Dynasty (Ching Dynasty) was mentioned in court and it would appear that Manchu law had been made

¹⁹⁸ [1959] S.C.R. 1.

¹⁹⁹ Hooker, 1976, p. 129.

applicable to the Chinese in Malaysia. He further stated that the General Code of Laws of the Ching Dynasty was in fact based on, (if not an actual replication) of the law of the previous Chinese Dynasties ending with the Ming Dynasty (1368-1644) just before the conquest of the "Manchus". He proposed that the remedy for the local situation seemed to be that all the Chinese who were married according to Chinese custom should avail themselves of the protection given by the law relating to civil marriages, and get themselves registered instead of having to face a similar problem in the future. He even suggested that the Government should enact a law to make it compulsory for all customary marriages to be registered and thereby put an end to all these squabbles on whether a Chinese couple married according to custom had in fact contracted a valid marriage, or when the Chinese husband came to divorce his wife whether he could in fact do so, and, if he could, whether he had done it in the proper way. Such a law according to Lee Siow Mong would benefit both man and woman and put family life on a proper footing in contemporary society.²⁰⁰

A survey carried out by the 1926 Marriage Committee found that there is practically unanimous opposition among Chinese residents born in China to any divorce legislation, which is shared by many Chinese born in the Colony. Chinese ladies of Penang were the only group in favour of divorce as a means of obtaining the prohibition of concubinage. This showed that even though the attempt at law reform was well-intentioned, it was not welcomed by prospective norm-addressees who construed it as an attack upon their culture.

Kenneth Wee has suggested that one way to avoid further complications, is to codify local Chinese custom after an exhaustive survey, or abolish it and lay down new norms to govern Chinese

²⁰⁰ Lee Siow Mong, [1972], p.iii.

customary marriages.²⁰¹ Whether the LRA managed to settle the above complications will be discussed in the following chapter.

1.6 THE INDIANS

The term “Indian” is applied to people of ethnic groups that are indigenous to the Indian sub-continent and the surrounding states such as Pakistan and Sri Lanka.²⁰² Contacts with Indians began as trading contacts in ancient times but it was not until the seventh century when the Hindu Sri Vijaya kingdom was established in Sumatra that there was formal contact with Indian religion and culture.²⁰³

The first Indian settlements were started upon the establishment of Malacca sultanate and led to frequent and direct contact between the two cultures.²⁰⁴ This relationship persisted through the Portuguese and Dutch occupation of Malacca. However, with the arrival of the British, this two way traffic of contact and trade became a one way flow of migrants from India to Malaysia. Initially, the migrants were of a transient nature as they were convicts brought in by the East India Company to labour in the construction of public works.²⁰⁵ Convict immigration was rather controversial and in 1860, was finally prohibited due to adverse public sentiment, and the remaining convicts were repatriated in 1873.²⁰⁶

²⁰¹ LRA, Section 4 & 8.

²⁰² See Appendix III.

²⁰³ Hall, D.G.E, A History of South-East Asia, London, Mac Millan, 4th ed, 1981 pp.47-73.

²⁰⁴ Kennedy, J., A History of Malaya, A.D. 1400-1959, London, Mac Millan, 1970, pp.6-17.

²⁰⁵ These convicts who were often merely petty criminals were usually repatriated to India after completing their sentences but a few chose to stay and seek employment in Malaysia.

²⁰⁶ Straits Settlements, Annual Report on the Administration of the Straits Settlements, 1860-1961, p.28.

With demand for workers in the new rubber estates, the kangany²⁰⁷ system was introduced in the late nineteenth century and flourished until it was replaced by an organised system of recruited immigration. As well as assisted immigration, there has always been a system of independent immigration involving people who came to Malaysia of their own free will and were attracted by prospects for trade and employment. They were often of financial means. Since the introduction of the Immigration Act, 1953 and 1959, the quality and quantity of Indian immigration have been tightly controlled.

The Indians who came to Malaysia were mainly from the Tamil speaking region of South India but a minority was made up of North Indians. In 1931, the Southern Indians accounted for 93 percent of the total Indian population and by 1947, they made up 90 percent of Indians in Malaysia.²⁰⁸ There is a close correlation between the ethnic subgroups with their occupation and distribution in Malaysia.

The South Indian Tamil speakers were mainly unskilled labourers who were employed in the private sector on rubber estates. They also found employment in the public works department of the government.²⁰⁹ The mainly business community of the North Indians as well as the Sikhs, Chettiars and South Indian Muslims are to be found in urban areas, namely Singapore, Kuala Lumpur and Penang. The Ceylonese

²⁰⁷ Variouslly spelt as "kankany" which derives from a Tamil word for foremen or supervisor of workers. It was similar to the Chinese method of employing an agent who recruited labourers for their employers; for further details on the method of migration see Sandhu, K.S, Indians in Malaya, Some Aspects of their Immigration and Settlement, 1786-1956, London, Cambridge University Press, 1969, pp. 21-30.

²⁰⁸ Ginsburg, 1958, p.319.

²⁰⁹ Asaratnam, Sinnapah, Indians in Malaysia and Singapore, Kuala Lumpur, Oxford University Press, 1979, pp. 33-39.

Tamils were mainly found in urban areas as well though some could be found as subordinate staff in estates.²¹⁰

The present Indian population in Peninsular Malaysia comprises mainly Tamils and Telegus (83.4 percent), Malayalis, Punjabis and Others about 12.5 percent and Ceylon Tamils about 3 percent. Over 80 percent are Hindus, 8 percent Christians (mostly Roman Catholic) and about 7 percent are Muslims.²¹¹

The discussion in the following section will focus on the marriage and divorce customs of the Hindu Tamils since they comprise almost four-fifths of the Indian population in Malaysia.

1.6.1 The Indian Family

The ideal type of family desired in the Indian society is the “filial-fraternal” joint-family (except among Nayars who are a sub-group of the Malayalee sub-community). Such a family type contributed to the economic, social and religious well-being of the individual.

Relations between members of the family were governed by the rules of rank, age and sex. Thus, relations between parents and children were one of authority and submission while that of husband and wife were based on subordination. These rules were later extended to the societal level where authority and submission according to age and male superordination were emphasised.

Each member of the family had a distinct role to play. It was the duty of the father to look after the economic well-being and other general

²¹⁰ Ampalanavar, Rajeswary. The Indian Minority and Political Change in Malaya, 1945-1957, Kuala Lumpur, Oxford University Press, 1981, p.2.

²¹¹ Ramasamy, R and Daniel, J.R , Indians in Peninsular Malaysia: A Study and Bibliography, Kuala Lumpur, University of Malaya Press, 1984, p.5.

welfare of the family. When sons grew up, they were expected to cooperate on all family matters and also contribute to the family purse. At the death of the father, the eldest son took over the responsibilities.²¹²

The woman's role was largely confined to domestic chores and attending to the needs of the children. A woman's contact with the outside world was very restricted. Thus, a woman's world revolved very much around her natal family before marriage and her husband and children after marriage.

Although all classes and categories of Hindu society cherished these ideals, there appeared in practice to have been variations. These ideals were the values of Hinduism and Hindu culture and as such were emphasised more by the upper classes and castes than among the lower classes and castes. The economic status of the lower classes made many of these values impractical. For instance, as agricultural labourers, the commoners were not able to maintain large families and keep up with the values of the joint-family system. Hence, they usually maintained smaller, nuclear families. The sons gained more independence and they soon broke away from their parents and set up their own families. Again, unlike the women of the upper classes, the lower class women had to work in the fields to add to the income of the family. This appeared to have given them some degree of equality of status with their husbands. Moreover, unlike the women of the upper classes, lower class women had an opportunity to mix with the outside world. Furthermore, divorce, separation, and remarriage, although theoretically not possible, were also not altogether absent among the lower classes. This clearly shows the different patterns that may persist in the husband-wife relationship and child up-bringing between the two

²¹² Mandelbaum, D.G, Society in India: Continuity and Change, Vol.1, Berkeley, University of California Press, 1970, pp.33-41.

levels of the Hindu/Indian society. But whenever a lower class family moved upward in the economic ladder, it usually followed the life-style of the upper classes on these matters.²¹³

On arrival in the then Malaya, the Indians reconstructed their social organisation on a modified scale to suit the local conditions. Coupled with other migration factors, there followed a process of adaption and adjustment. There were, however, many obstacles that stood in the way of the reconstruction of a healthy family structure.

First, until the 1920's the migration of Indians was predominantly a male phenomenon. For example in 1901, there were only 171 women to every 1000 Indian males in Malaya.²¹⁴ Religious taboos and cultural barriers prevented Indian men marrying outside the Indian community. Even those who had already married left their wives behind with their families in their native villages as a result of family norms, ignorance and fear of uncertainties in the new land. Moreover, until World War II, most Indians never considered their stay in Malaya as permanent. Many of them who went back to India to get married did not bring back their wives. Though the situation was much better in the middle urban class Indian community, the male-female ratio among the estate workers in particular improved only from the 1930's when the workers began to arrive together with their families.

Secondly, the movement of Indians in this period was transitory in nature. While the attitude of the Indians, especially among the estate workers, was one reason, the policy of the employers towards the workers also greatly contributed to this. For example, during the Depression years of 1929-1932, some 373000 Indians were repatriated

²¹³ Gough, K. The Social Structure of a Tanjore Village, in Village India, Studies in the little Community, edited by Marnot M., Chicago, Chicago University Press, 1955, p.51.

²¹⁴ Sandhu, 1969, p.185.

as a result of the sharp drop in the price of rubber in the international market.²¹⁵

Thirdly, during the Japanese Occupation in Malaya (1941-1945), the plantation workers suffered owing to famine, starvation and disease. Although all the communities suffered in this period, the estate community became highly vulnerable. The worst blow the community experienced was when about 85000 young men, mostly from the estates, were taken under forced recruitment to serve in the various Japanese projects, especially in the notorious Siamese Death Railway.²¹⁶ Social life was thus disrupted and disorganisation set in.

Fourthly, when in the 1950's and 1960's, many estates were subdivided,²¹⁷ and estate lands were converted for industries and for housing, the estate workers were hard hit by retrenchment and were forced to seek other employment.

Fifthly, low incomes and lack of motivation led many workers to send their children to work as domestic or factory workers at a very young age.

Finally, the human factor also retarded the growth of a healthy family structure in most of the working class families. This human factor included lack of education, poor planning and attitudinal problems inherited from the past, environmental factors, certain social habits such as alcoholism, lack of guidance, inadequate medical care, poor amenities and, lastly neglect. These affected Indian welfare and a vicious circle was generated.

²¹⁵ Ibid, p.182.

²¹⁶ It was estimated that about half never returned; *ibid*, p.184.

²¹⁷ Aziz, Ungku Abdul, (ed) Subdivisions of Estates in Malaya, 1951-1960, Kuala Lumpur, University of Malaya, 1962, p.19.

It was against this background that the family structure had grown in Malaysia - while the working class community was most affected, the urban middle class and business class Indians had a smoother transfer of the institution of the family and their traditional social organisation.

But overall, the Indian family structure underwent certain changes. Among the upper classes, the traditional joint-family system, with few exceptions, was replaced by extended and nuclear families because about 85 percent were found to be in employment.²¹⁸ Occupational mobility and the desire of working sons to have separate and independent homes also supported the growth of such nuclear families.

The Indian family continued to be subjected to change under the influence of modernisation. There is now a greater tendency among the younger generation to set up their own families away from their parents as soon as they are spouses. They also demand more freedom in the choice of mates. Such changing attitudes have given rise to more nuclear families. However, these emerging patterns in the Indian family structure seem largely a phenomenon of the westernised groups. Among the lower and traditional sections the three-generation pattern continues to be dominant. Again, even though changes are taking place in family types, kinship ties based on the traditional values of socio-religious obligations continue to be observed.

Another significant change is seen in age at marriage. While the age at first marriage for males and females respectively was 18-24 and 16-20 a few decades ago, boys now marry between the ages of 24-32 and girls between 18-26. Here too, factors such as the emphasis on higher education, the burden of supporting the family, and the chances of getting a suitable spouse, tend to influence the marriagable age for both males and females. In this regard, a distinction may be made

²¹⁸ Aziz, 1981, p.162.

between the lower classes and the upper classes. The former tend to remain predominantly culture-bound and thus desire early marriages for boys and girls (since unmarried girls are still considered a burden on the part of the parents). The latter emphasise higher education and career for both the sexes, and hence, the delay in arranging marriages.

There is also a marked difference in the attitude towards educating girls among the modernised Indians. In traditional society, the upper classes usually frowned upon sending women to work and hence discouraged higher education for them. Now, however, both education and career are greatly stressed. In fact, among the educated youth there is greater preference to marry working girls.²¹⁹

1.6.2 Divorce Among the Indians

Indian attitude towards divorce is in many ways closely connected with the past cultural heritage and belief system of the Indian/Hindu society. Indian marriage practices and customs in India itself have been shaped over a thousand years by religion and caste, and may vary also according to language, region and, locality. Hindu law which is based on customs can be divided into three categories, namely local customs, class customs and family customs.²²⁰

There were attempts amongst Hindus to fix the ancient customs and tradition in a systematic form. Nibandhas or commentaries are accepted as authoritative expositions of Hindu law in the different provinces. The different commentaries have given rise to several schools of Hindu law but, in principle there are only two schools namely the Mitakshara and Dayabhaga schools. It is said that the Code of Manu was the earliest attempt at the compilation of the then

²¹⁹ Ibid.

²²⁰ Sarkar, R.N., Hindu Law, Calcutta, 1935, pp 5-6.

prevalent customs in India.²²¹ These customs were later imported into Peninsular Malaysia with the immigration of Indian labour in the first half of the century, and have in turn undergone changes with the influence of the present environment.

Marriage was considered necessary for the procreation and perpetuation of the family. According to Hinduism, it was also one of the fourfold stages in the ideal scheme of the life of an individual—except for those who renounced worldly life.²²² Many of these values continue to be stressed by the Malaysian Indians. In Indian society, marriage is not a matter of the individual but that of the family. Marriage is seen as a sacrament, a holy union, and is complete only on the performance of certain rites. In this sense, it is irrevocable. In the Hindu view of life, marriage is seen as a duty especially for a male. Hindu religion also demands that a girl should be married off as soon as she reaches the age of puberty. Although child marriages are common in India, there is little evidence of this phenomenon among the Indians in Peninsular Malaysia.²²³ This is partly because teenage girls can seek employment within the estates, and are thus a source of income to their parents. Nevertheless, marriage is desired before any possibility of suspicion regarding the virginity of a girl presents itself.²²⁴ As a result, there is social pressure to marry off girls in their late teens or early twenties.²²⁵

²²¹ Khetarpal S.P., Codification of Hindu Law in David Buxbaum (ed) Family Law and Customary Law in Asia, Netherlands, The Hague, 1968, p.212.

²²² See Kapadia, K.M., Marriage and Family in India, Bombay, Oxford University Press, 3rd edn, 1966, p.167.

²²³ Asaratnam, 1970, p.66.

²²⁴ In the Indian society, virginity was and still is a woman's honour. So, she had to guard it and must not conduct herself in any manner that may lead to suspicion. If she broke this rule, it would not only endanger her chances of marrying but also bring disgrace to the family, see Kapadia, 1966, p.140.

²²⁵ Asaratnam, 1970, p.67.

Polyandry is not practised among the Indian groups that migrated to Peninsular Malaysia. The ideal form of marriage in the Hindu scriptures is monogamy, and includes the ideal of the wife being devoted to the husband alone. On the other hand, polygamy is not uncommon. It appears in certain situations, as when a wife is unable to bear a son. It may also reflect a desire to get daughters married off before they are too old.

The aims of Hindu marriage according to the law of Manu are chiefly three, that is dharmā (practice of religion), proja (progeny) and rati (sexual pleasure). The foremost purpose of a Hindu marriage is to practice dharmā. Although ancient Hindu writers have specified the duties of husbands and wives very clearly, Pothan commented that in succeeding times, Hindu society seems to have conveniently forgotten the importance of the duties of the husbands toward the wife. On the other hand, the wife's duties toward her husband have been over-emphasised in each generation to the extent that husbands were lifted to the exalted position of gods and wives degraded to the status of mere slaves to their husbands.²²⁶

As to the second reason, that is proja, it is considered essential for continuing the lineage, and for propitiating the souls of ancestors.²²⁷ Hence, it is the duty of the responsible parents to see that their children are married and settled happily when they are of the right age. As such, marriages are still mainly arranged by parents. Even when love is involved, marriage must have the approval of the parents and the ceremony itself must be conducted according to tradition. Only such marriages are regarded as respectable by the community.

²²⁶ Pothan, S., Divorce: Its Causes and Sequences in Hindu Society, New Delhi, Shakti Book, 1986, pp.32-35.

²²⁷ In particular, the son is essential in performing funeral rites for his parents; see Kapadia, 1966, p.167.

For most Tamils in Peninsular Malaysia, the initiative for marriages comes from the prospective groom's, although there are a few communities where the reverse is true. Where marriages are arranged, many families still resort to the horoscope²²⁸ to determine the most auspicious time for marriage.²²⁹

The authority and control exercised by the joint family and caste regulations were so rigid that they hardly allowed any flexibility to suit individual tastes, interests and expectations. All inter-personal relationships including those between husband and wife were strictly regimented to well-established patterns. Moreover, when a woman joined the traditional family as a newly-wedded wife, she became such an integral part of the whole that the question of severing herself from it even in the eventuality of her husband's death became impossible. Although marriage was equally binding on both husband and wife theoretically, in practical life, the burden of maintaining the marital bond fell upon women. An ideal woman was expected to completely surrender her entire life to the service of her husband alone, while losing her identity.²³⁰

According to the Law of Manu, marriage is considered indissoluble, and is regarded as a sacrament. Manu advanced the extreme view that the wife's marital tie and duty did not come to an end even if the husband were to sell or abandon her.²³¹ However, some Hindu writers

²²⁸ Horoscope matching essentially matches the partners for compatibility on various characteristics, and is usually an important part of the marriage procedure.

²²⁹ Murugesu, R., Some Aspects of Marriage Practices Among Tamil-Speaking People: Case-Study of Midlands Estates, Klang, Graduation Exercise, Faculty of Economics and Administration, University of Malaya, Kuala Lumpur, 1980, p.36.

²³⁰ Pothan, 1086, pp. 38-9.

²³¹ Altekar, A.S., The Position of Woman in Hindu Civilisation: From Prehistoric Times to the Present Day, Varanasi, Motilal Banarsidas, 1962, 3 rd. ed. p. 83.

mentioned certain extra ordinary circumstances under which a separation was made possible:

- (a) concealment of the defects of the bride by her father or kinsmen
- (b) concealment of defects in the husband.

The code of Manu gave the husband the exclusive right of repudiation while the wife had no such right for any reason. However, divorce is permitted under certain well-defined circumstances, that is impotence, insanity or affliction with an incurable or contagious disease.²³² A wife's resentment of a husband cannot by itself dissolve her marriage against his will. But for mutual enmity, divorce may be obtained.²³³ On the other hand, the ideal of a wife devoted entirely to her husband requires her to accept her husband's failings (such as drinking, cruelty, adultery) as legitimate. Murugesu's study indicates that the males were more tolerant of such failings among husbands than among wives.²³⁴

The Dharma school and Artha school differ with regard to the indissolubility of marriage. Whereas the Dharma school considered marriage as a sacrament, the Artha school regarded is as a contract. This is pointed out in the Artha laws.²³⁵ If marriage is viewed as a contract, it can be terminated, but if it is considered a sacrament, it becomes indissoluble.²³⁶

²³² Choudhary, J.N., Divorce in Indian Society, Jaipur, Printwell Publishers, 1988, p.2.

²³³ Kapadia, 1966, p.184.

²³⁴ Murugesu, 1980.

²³⁵ Pothen, 1986, p.37.

²³⁶ See Kapadia, 1966, p.168.

In spite of the possibility of severing the marriage ties, a true Hindu, according to Pothen, rarely dissolved his marriage.²³⁷ Marriage remained an eternal bond. Ordinary Hindus believe that when they get married, the parties are bound to each other, not only until death, but even after death, in the other world.²³⁸ This idea enables the spouse to overcome incompatibility in spite of differences, difficulties and problems. Thus, marriage came to be looked upon as the highest ideal and value of human life,²³⁹ and Hindu men and particularly women were taught to make sacrifices in order to sustain the marital bond.²⁴⁰

There are divergent views on the question of divorce in ancient Indian texts. According to Narada,

*"There are five grounds on which a woman may take another husband, if her first husband has perished, or died naturally, or gone abroad; or if he is impotent, or has lost his estate."*²⁴¹

The third stage did not begin until the second quarter of the present century. In this stage, with the theories of individual liberty, sex equality and women's emancipation holding sway, divorce is considered as a remedy for inconvenient marriages. Since the 1960s, the Hindu attitude to divorce has changed considerably, as is substantiated by available data concerning the large number of such cases.²⁴²

²³⁷ Ibid, p. 35.

²³⁸ Such is the effect of the "mantras" recited at the time of marriage; see Venkatacharlu v Rangacharyule 14 Mad 316.

²³⁹ Decided cases have recognised its sacramental character; see Janki v Nand Ram, 11 All 194 F.B 208 "Hindu marriage is not a civil contract as in other systems, but is sacrament." 12 All 126; see also Binda v Kaulsalya, 11 Bombay 274.

²⁴⁰ Pothen, 1986, p.38.

²⁴¹ Narada, quoted by Khetarpal, 1968, p.212.

²⁴² Pothen, 1986, p.41.

Divorce was completely unknown among the high caste Hindus but it was prevalent among those belonging to the lower sections of society.²⁴³ The 9th century A.D. was a turning point in Indian history, and was marked by significant changes in social life. In the medieval period there was a marked dominance of religious influence, on marriage and divorce. Divorce was not allowed in the higher castes, however, women of lower castes were free to divorce and remarry. In India, divorce was impossible for Brahmans until 1955. On the other hand, lower castes and the outcaste, as well as tribal groups, have long permitted divorce. The situation in respect of divorce slightly changed in the 19th and 20th centuries owing to the pressures of various movements and organisations. Certain laws were also adopted during the period of British rule which provided freedom and privileges to women. Divorce was made possible, although in a limited respect.

Kautilya also stated that divorce may be obtained only in the case of mutual enmity and hatred between the husband and the wife. Neither the husband nor the wife could dissolve the marriage against the wishes of the other. Kautilya permitted the woman to abandon her husband if he was of bad character, or was abroad, or had become a traitor to the King or was likely to endanger her life or had fallen from his caste, or had lost his virility. He also stresses that marriages performed according to Brahma, Daiva, Arsha and Prajapatya forms could not be dissolved at all.²⁴⁴

Divorce is almost a new concept among the Hindus, for the characteristic quality of Hindu marriage was that it was a union for life. The Hindu woman has been asked to put up with all sorts of

²⁴³ Mukherjee, Illa, Social Status of North Indian Woman, Agra, Shiv Lal Agarwala and Co, 1972, p. 29; see also Jiva Magan v Bai Jetthi (1941) Bom. L.R. 538; see also Thangamonal v Gangay Ammal (1946) 1 M.L.J 279.

²⁴⁴ Prabhu, P.H, Hindu Social Organization, Bombay, Popular Prakashan, 4th.edn., 1963, pp. 193-5.

repressions and suppressions in the name of the honour of the family and for the good of the children. Pothen commented that the ancient Hindu writers seemed to be biased as they stressed strict fidelity and devotion by the woman, whereas a man could marry again in the life time of a wife. Through centuries, Hindu women were suppressed, fettered, and ill treated and any attempt to change the nature of Hindu marriage was violently opposed.²⁴⁵

Modern education has inculcated in the Indian woman a sense of her own identity, which, in turn, has undermined her capacity to perpetuate her marriage at the cost of her self-respect. The ideals and values relating to the Hindu marriage are changing rapidly and it is no more viewed as an eternal bond predestined by the gods.²⁴⁶

In Malaysia, where the local Indian community, far removed from original Indian traditional society and its forms of social control as well as experiencing the gradual erosion of certain traditional familial and moral values as a result of Malaysian conditions of living, is faced with a serious social problem. Divorce and remarriage in this group has taken the form of desertion and unapproved unions with other women and men. Jain believes that this practice might have started even before the Japanese Occupation period.²⁴⁷ This has resulted in the breaking up of families with the usual undesirable consequences on the general welfare of the families and the upbringing of the children.

When migration from India to Malaysia occurs, the presumption is that the family has adopted the law of the people among whom it has settled. This is generally considered to be the case if it is shown that

²⁴⁵ Pothen, 1986, pp.6-7.

²⁴⁶ Ibid.

²⁴⁷ Jain, R.K. South Indians on the Plantation Frontier in Malaya, Kuala Lumpur, University Malaya Press, 1970, p.275.

the migrants have definitely cut themselves off from their former environment. One could say, at least in the matter of the Hindu joint family, that the development of Hindu law in Malaysia was but a continuation and adaptation of Hindu law in India.²⁴⁸ The Malaysian Hindus are governed by the two principal schools of laws as stated above.²⁴⁹

An important problem for Hindus in Malaysia concerns the determining of the particular school of law to which they belong.²⁵⁰ It is stated in the case of *Nagammal v Suppiah*²⁵¹ that there is no uniform law applicable to Indian Hindus in Malaysia. Each has to be decided according to its own merits. This stems from the great diversity of Indian Hindu customary practices.²⁵²

Hindu religious rites and usages represent a diversity which is contrary to the apparent uniformity of Chinese customs. This is not surprising as the Indian immigrants who came to Malaya between 1931 and 1940 were from both North and South (75 percent of whom came from the South India). There were different ethno-linguistic groups among immigrants from the south who mostly comprised of estate labourers, likewise among immigrants from the north who comprised mainly the commercial and professional classes.²⁵³

²⁴⁸ Sarkar, 1935, pp.19-20.

²⁴⁹ Letchumanan Chettiar v Palaniappa Chettiar [1978] M.L.J. 120; see also Arunasalam Chettiar and Ors v Palaniappa Chettiar [1974] 2 M.L.J. 133.

²⁵⁰ Derrett J.D., "Private International law and Personal Laws", I.C.L.Q. Vol 14. (1965), p.1374.

²⁵¹ (1940) 9 M.L.J. 119.

²⁵² Wu Min Aun, Malaysian Legal System, Petaling Jaya, Longman Malaysian Bhd, 1990, p.101.

²⁵³ Sandhu, 1969, pp.236-242.

The caste system, with its various sub-castes, accounted for further sub-divisions and the bewildering variety of religious opinions, usages and rites among local Hindus. This hardly favoured judicial notice being taken of anything except perhaps their diversity. Thus, unlike the attitude taken by the courts regarding the “common law” characteristic of Chinese race, no such uniformity was judicially recognised as applying to Hindus and each case would appear to have been decided on its own merits. Furthermore, this contributed indirectly to uncertainty regarding the extent to which the Hindus have carried over their personal law and customs into Malaysia.

Hindu customary marriages are recognised in Malaysian courts even though Hindu marriage ceremonies vary according to local, family or caste usage. However, because the courts do not have judicial knowledge of what constitutes a valid Hindu marriage according to these varying religious rites and ceremonies, expert evidence must be adduced where circumstances require it to show those ceremonies which will constitute a valid Hindu marriage. In *Paramesuari v Ayadurai*²⁵⁴ the court accepted the evidence of the priest who performed the marriage ceremony between the petitioner and the respondent and also expert evidence on the traditional features of a marriage between Ceylon Tamil Hindus. The marriage in that case was solemnised according to the expert witness and the priest who performed the marriage. As there was proof of the respondent’s subsequent marriage to another woman it was held that the petitioner was entitled to a decree of dissolution of her marriage.

This initial uncertainty over the requirements of a valid Hindu customary marriage reflects the situation of Hindu customary divorce. There are very few decided cases in Malaysia dealing with Hindu divorce. This mirrors the fact that pristine Hindu law does not allow

²⁵⁴ [1959] M.L.J. 195.

divorce under any circumstances. This may be related to the fact that although it is a popular belief that a Hindu husband can marry any number of wives even during the lifetime of one or more wives, monogamy is recommended by the sacred texts.²⁵⁵

The dearth of decided cases which question the validity of Hindu divorces could bear testimony to this. On the other hand, we cannot unconditionally accept that Hindu marriage is wholly indissoluble as local Hindus are beset by numerous varieties of religious opinions and customs.

With the exception of the case of *Harbajan Singh v P.P* ²⁵⁶ which seems to confine the remedy of divorce to Sikhs, and even then only to Sikhs living in Selangor, the position of divorce under customary law amongst the Hindus in Peninsular Malaysia is vague. Divorce is recognised as a variant of Hindu law by usage and custom. A divorce by mutual consent, if evidenced by writing, sets the woman free to contract another formal and valid marriage. As Chinese and Hindu marriages were not normally monogamous, they could not be dissolved by order of the court as the court had jurisdiction only where the marriage was monogamous. There were no provisions for registration of Hindu marriages. Therefore Hindus could dissolve their marriage without recourse to the court. This applied only where the marriage had been contracted according to Hindu custom. If the parties chose voluntarily to contract a marriage under any law which provided that their marriage was a monogamous one, its solemnisation created a status which carried with it the obligations which the law imposed on parties having such status. If they entered into a marriage under the

²⁵⁵ See Raghavachariar, N.R, Hindu Law: Principles and Precedents, Vol.I 7th. edn., Madras, Madras Law Journal Office, 1980, p.33.

²⁵⁶ [1952] M.L.J. 83.

Civil Marriage Ordinance, such a marriage could only be dissolved under and in accordance with the Divorce Ordinance.²⁵⁷

For Indians, monogamy was accepted as the customary rule for some sub-groups while others were allowed polygamous unions. As a result, Hindu marriages cannot be dissolved by order of court as the court has jurisdiction only where the marriage is monogamous. Hindus can thus resort to their particular customs if they desire a dissolution of their marriage. However, in the case of Ceylonese Tamil Hindus married under the religious traditions of their caste, the parties are parties to a binding marriage contract which is monogamous in its nature. This was so held in *Parameswari v Ayadurai*²⁵⁸ where the petitioner was therefore entitled to a decree of dissolution of her marriage by the High Court.

There are no specific rules governing the grounds and form of Hindu customary divorce in Malaysia. This situation came about largely from various religious usages and rites among the local Hindus. Divorce consequently among the different ethno-linguistic groups will also be variations of Hindu law by usage or custom. The small number of cases decided on the point and the difficulty in locating Hindu custom experts from the various castes and sects has to some extent hindered the attempt to study the possible various modes of Hindu divorce. Notwithstanding this, it is interesting to note that the enforcement of the LRA has abolished polygamy among those Hindus who practise it since Hindus in India are no longer polygamous by virtue of the Hindu Marriage Act, 1955. The compulsory registration of marriage and divorce have brought about a more efficient and proper administration of these two areas of matrimonial extremities.

²⁵⁷ Soo Hai San v Wong Sue Fong [1961] MLJ 195.

²⁵⁸ [1959] M.L.J. 195.

It is interesting to note that Hindu law presents a marked contrast to Chinese law as it developed in Malaysia. This might seem rather strange because from the point of view of the dominant English law both Chinese and Hindu laws were “customary” and so prima facie susceptible to similar treatment by the courts. There are at least two reasons why this did not occur. First, and probably most important, Hindu law, unlike Chinese law in Malaysia, has been formulated by the courts upon the basis of authoritative texts. The courts had access to the great Indian treatises of the 19th century and referred to them constantly. Therefore, the development of Hindu law in Malaysia was simply a continuation and adaptation of Hindu law in India. The case with Chinese law was completely different. There were no texts to fall back on because it was realised that the laws of Imperial China were inappropriate for regulating the affairs of the Chinese immigrant in Malaysia. In the event, therefore, Chinese law is a much more original creation in Malaysia than Hindu law although this is not to deny the existence of some local characteristics in the development of Hindu law.

Secondly the activities of the Indian and Chinese immigrant communities differed. A significant proportion of the Indian Community was involved in business, particularly money-lending, which was regulated in accordance with their own laws rather than by English commercial law. Furthermore, these regulations were tied firmly to major institutions of Hindu law, most notably the joint family.²⁵⁹

On the other hand, we cannot say as yet why one society develops the pattern of divorce rather than separation or taking on a additional wife or concubine. Its primary difference is that it permits both partners to remarry. In societies without divorce, it is ordinarily only the man who is permitted to enter a new union. Thus in western nations such as

²⁵⁹ Hooker, 1976, pp. 147-8.

Brazil, Italy, Spain, and Portugal, the public attitudes opposing a wife's entering an unsanctioned public union are very strong while the husband is usually permitted to have a mistress outside the household. Viewing these alternatives, it seems false to speak of divorce as a "more extreme" solution than other patterns. We do not at present know whether the introduction of a concubine into a Chinese household creates more unhappiness than a divorce might have done. And whatever the answer might be, the judgement as to its desirability would still remain a matter of personal or social evaluation.

1.7 CONCLUSION

Since all three of the communal groups in Malaysia examined in this chapter have evolved from cultures predominantly of the rural peasant type, the traditional values to be found among Malaysians relating to the formation, building and functioning of families have important similarities. All three, until quite recently, were based on the extended family, working as a corporate group within a wider kinship system, marshalling strong family ties and sentiment and providing a high degree of social and economic security, solidarity and mutual assistance.

However, there are considerable variations among the three major ethnic groups in Peninsular Malaysia. The Malays married earliest both in 1947 and 1974, but their median age at marriage increased more than any other group, nearly five years for Malay females. At the other extreme, Chinese males had a median age at marriage of 27 years, a level which has increased by only two years since 1947. Indian females, with a long cultural tradition of very early marriages, have all but forsaken this custom in Malaysia, marrying at age 22 on the average, a postponement of nearly 5 years since 1947. This mean age (17.1 years), represents a departure from even earlier marriage characteristics of the first decade of Indian presence in Malaysia. By

contrast Indian males' age at first marriage has declined slightly. In this case, the trend is in response to a marked drop between 1957-1970, in the stock of potential bridegrooms relative to the number of eligible young women. This "marriage squeeze" also affected Malays in a similar but less extreme way.²⁶⁰ In this community, the increasing shortage of potential bridegrooms implied that the Malay traditions of a wide age difference between husbands and wives and virtually universal female marriage should have been maintained by the intensification of two other Malay traditions, relatively wide-spread polygamy and easy divorce. In fact, neither of these "escape valves" were increased but instead, declined dramatically, the necessary adjustment occurring in a narrowing of the distance in age between spouses and a marked rise in female age at marriage. The median age at marriage not only did not decline, as it did among males with the same problem, but actually increased by about two years over the period. This is evidence not merely of an adjustment to demographic realities but, particularly the parallel increase in the median age for male marriage, to fundamental changes in norms. Although the ethnic differences in median age at marriage persist, the changes have contributed toward a convergence over the last thirty years and a Malaysian perception of suitable conditions for marriage seem to be emerging.

The mechanisms and motivations behind these changes in the marrying behaviour of Peninsular Malaysia have been very thoroughly analysed and studies by Palmore and Ariffin²⁶¹ and Jones²⁶² point in similar directions. Changes in the availability of education to young Malaysians has been related to the changing attitudes. This has resulted in a

²⁶⁰ Jones, 1980, p.7.

²⁶¹ Palmore, 1970, p.32.

²⁶² Jones, 1980.

dramatic improvement opportunities for those Malays who had previously suffered considerable educational deprivation.²⁶³

The rapidly growing industrial base in Malaysia has created thousands of jobs; in some notable instances, as in the electronic component and textile industries, more for females than for males.²⁶⁴ But increases in most employment sectors have occurred, for both sexes, and more particularly for Malays due to vigorous implementation of the New Economic Policy since the early 1970's.

While many of these jobs provide only minimum incomes, they are frequently the cause of internal migration, living away from home and parents, and the adaptation to new, frequently urban environments. The social and economic changes involved are usually jolting, particularly to those brought up in rural, traditional systems. But they certainly provide an alternative to the previous patterns of teenage, arranged marriage and the raising of a large family.

Although these changes are essentially part of a wider process of modernisation associated with a development transition, from which all Malaysians are benefiting, Malays are particularly involved in the emergence of a "middle class" of salary and wage-earners working in government and in commerce. Since "middle-class" lifestyles discourage early marriage, a significant proportion of the decline in divorce among Malays will be related to this development trend.

²⁶³ Ibid., p.11.

²⁶⁴ Hing Ai Yun, and Talib, Rokiah bt, (eds) Women and Employment in Malaysia, Department of Anthropology and Sociology, University of Malaya, 1986, pp.7-16.

CHAPTER 2

STATUTORY DIVORCE AMONG NON-MUSLIMS

2.1 INTRODUCTION

The Law Reform (Marriage and Divorce) Act, 1976¹, which came into force on March 1, 1982 has introduced a quiet social revolution for the non-Muslims. It ushered in a new era of non-Muslim matrimonial relationships by replacing many outmoded concepts with new ones and extended existing provisions. In the words of Datuk Athi Nahappan, it is an Act that,

“...virtually affects matrimonial relationships of most non-Muslim marriages, who constitute about one half of the total population of the country.”²

This Act provides for monogamous marriage³ and consolidates the law relating to divorce. It is the first single Act of Parliament that embraces marriage, divorce and related matters. Its provisions are applicable generally to all non-Muslim persons domiciled in Malaysia with the exception of any native of the States of East Malaysia, and to any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom. As stated in the explanatory note to the Bill, the LRA has:

¹ Hereafter abbreviated as LRA.

² Parliamentary Debate (Dewan Negara) 6th January 1976, p.2298.

³ The law relating to divorce and matrimonial causes in relation to monogamous marriage before LRA is the Divorce Ordinance, 1952, No.74 of 1952.

“Replaced the hitherto heterogeneous personal laws applicable heretofore to persons of different ethnic origins comprising the majority of the non-Muslim population of Malaysia with a diversity of customs and usages observed by them.”⁴

In matters of divorce, the LRA has brought Malaysia in line with the law in England and most European countries that recognises irretrievable breakdown of marriage as the sole ground for dissolution of marriage.⁵ It goes on to provide that in its inquiry into whether there has been an irretrievable breakdown the court shall have regard to one or more specified factual situations (formerly known as grounds for divorce).⁶

At present, the LRA has been in operation for about ten years and it is timely to investigate the implications of its divorce provisions. In discussing the LRA, this chapter is divided into four sections. It begins with a historical review of how the LRA was mooted and continues with the second section that compares and contrasts the differences between the former statutory laws and the present law relating to divorce in Malaysia. A general study of the more controversial and main provisions incidental to divorce under the LRA will accordingly be made in the third section. The criticisms and the shortcomings of the LRA will be dealt with in the fourth section of this chapter.

2.2 HISTORICAL BACKGROUND OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976.

“... marriage and divorce first in Malaya and now in Malaysia have been dominated by male chauvinistic thinking and all the odds have been stacked against the women and the wives in this country. The present laws on marriage and divorce are so

⁴ Ibrahim, Ahmad bin Mohamed, Law Reform (Marriage and Divorce) Bill, [1975] J.M.C.L. 354.

⁵ See LRA, section 53.

⁶ See LRA, section 54(1).

blatantly unfair to the women that our judges have torn their hair with rage but they are unable to put right the injustice against women of this country in matters of marriage and divorce.”⁷

The above quotation reflects the inadequacies of the previous law in dealing with divorce. To understand the compelling reasons behind the need to reform the laws of marriage and divorce, one will need to look back at the conditions prevalent in Malaysian society before the LRA was first mooted.

As discussed in the previous chapter, Malaysia had a very complex legal framework as far as the laws of marriage and divorce were concerned. As Malaysian society consists of different ethnic groups, marriage and divorce were governed by a mixture of personal or customary and statutory laws. Non-Muslims customary marriages among the different ethnic and the religious groups differed sharply, with each couple marrying according to their religious or customary rites. More importantly, registration of the marriage was not compulsory, and it was up to the couple to register their marriage. Before 1982, there were three statutes which provided for the registration of marriages. They were:

- (a) The Civil Marriage Ordinance, 1952.
- (b) The Christian Marriage Ordinance, 1956 and
- (c) The Registration of Marriage Ordinance, 1952.

There was also no uniformity with regard to registration under the above Ordinances although the legal implications of doing so under each Ordinance differ. It was not uncommon for a couple to register their marriage under the Civil Marriage Ordinance, 1952 and then undergo a religious marriage later on, thus having both a legalised registered marriage and a customary and religious marriage.

⁷ Dr.Tan Chee Koon, Parliamentary Debate (Dewan Rakyat) 5th.November, 1975.

Customary or religious marriage was generally recognised by the courts except when one or both parties wished to have a divorce. This was because customary or religious marriages, being potentially polygamous, were not recognised for the purposes of matrimonial relief by virtue of the provisions of the Divorce Ordinance, 1952. To authorise the court to make any decree of dissolution of marriage, the marriage between the parties had to be contracted under a law providing for or in contemplation of which the marriage is monogamous.⁸

Therefore, couples who had entered into potentially polygamous customary or religious marriages could not resort to the courts to dissolve their marriage unless they had registered their marriages under the Civil Marriage Ordinance, 1952, or the Christian Marriage Ordinance, 1956. It did not help if they had registered their marriage under the Registration of Marriages Ordinance, 1952 which only provided for proof of such a marriage. A couple who had entered into a customary or religious marriage which was potentially polygamous might dissolve their marriage by way of customary divorce. This type of divorce, with the legal sanctions provided by the courts was however, difficult to enforce. The dilemma these couples faced is perhaps best summed up by Datuk Athi Nahappan, the then Deputy Minister of Law in his opening speech in the Dewan Negara (Upper House) on Law Reform (Marriage and Divorce) Bill;

⁸ Section 4(i)(a), Divorce Ordinance, 1952. Mehrun Siraj believes that the introduction of monogamy under LRA had brought with it certain disadvantages. One setback was the case of a wife who was ill, insane or unable to have children. Previously, her husband could take another wife without having to divorce her. Today, he may be forced to divorce her should he wish to have children; Siraj, Mehrun, Women and Family Law, Seminar on Women and Girls, Penang, September, 1988.

*"The Buddhists, Hindus and Sikhs have long been living under a legal vacuum without proper and adequate matrimonial reliefs. Once married, they are not able to have their marriage dissolved by the court, even if it has hopelessly broken down. They are not able to have a decree of nullity or judicial separation when they are justifiable grounds for such relief."*⁹

Apart from the uncertainty and unsatisfactory condition of the law concerning customary or religious marriages and divorces, most Malaysians, especially non-Muslim women, were also unhappy that polygamy was still recognised although it had long been abolished in the countries where it originated.¹⁰ All marriages were potentially polygamous unless they were registered under the Civil Marriage Ordinance, 1952, where it is expressly provided that a person who has married according to the said Ordinance was rendered incapable of contracting another marriage in the lifetime of his spouse without first dissolving the first marriage.¹¹ Even registering a marriage under the Christian Ordinance, 1956 did not prevent a Christian Chinese man from contracting a subsequent customary marriage. This is illustrated by the case of *Re Ding Do Ca, deceased*.¹² In this case, the deceased, a Chinese man had in 1923 married a woman under the Christian Marriage Enactment (which was then replaced by the Christian Marriage Ordinance, 1956). Subsequently, in 1937, he went through a Chinese customary marriage with another woman. The issue in this case was whether the deceased, a Chinese Christian, who had married under the Christian Marriage Enactment, could contract a polygamous marriage according to Chinese customs. The Federal Court held that he could do so. Thompson, L.P observed that there is nothing in the Christian Marriage Enactment (or the Christian Marriage Ordinance,

⁹ Parliamentary Debate, 1976, p.2301.

¹⁰ In both China and India, polygamous marriages were abolished for many years but they continued in Malaysia until the LRA came into force, Wu Min Aun, 1990, p.101.

¹¹ Section 4(1) and 4(2) of Civil Marriage Ordinance, 1952.

¹² [1966] 2 M.L.J 220.

1956) that renders a party who has married under it, incapable during its continuance of contracting a polygamous marriage. Therefore, mere registration of a marriage did not protect women with husbands of polygamous tendencies. Only registration under the Civil Marriage Ordinance 1952 did.

However, it had been held earlier by the then Court of Appeal in the case of *Re Loh Toh Met*¹³ that a Chinese Christian could elect as a Christian whether to contract a monogamous marriage or to form a valid polygamous marriage union or unions in accordance with his personal law.

Due to this unsatisfactory state of affairs and the need to review the laws of marriage and divorce, His Majesty The Yang DiPertuan Agong, in 1970, appointed a five member Royal Commission under the Chairmanship of Tan Sri H.T Ong, the then Chief Justice of Malaya on the non-Muslim marriages and divorce laws, with the following terms of reference:-

- a. To study and examine existing laws relating to marriage and divorce (other than Muslim marriages) and to determine the feasibility of a reform, if any is considered necessary, in particular, in the light of the resolution of the United Nations Convention on consent to marriage, minimum age for marriage and registration of marriages.
- b. To receive and consider representations that might be submitted from any racial or religious group affected or likely to be affected by the changes or reform of the existing marriage and divorce laws, and to prepare and submit a report to the

¹³ Re Loh Toh Met, decd [1961] M.L.J 234.

government and recommend changes or reform if any to be made to such laws.¹⁴

First, the Royal Commission sought to consolidate the laws relating to marriage and divorce and placed all matters pertaining to marriage, divorce and matters incidental thereto under one single Act of Parliament. The Commission also felt that the public was in favour of the abolition of polygamy. Therefore, it recommended that all marriages should be monogamous and proper provisions be made for the compulsory registration of marriages. Secondly, the Commission recommended that the minimum age for marriage should be eighteen years, except where a female was under the minimum but above the age of sixteen, special dispensation may be obtained from the proper authority.¹⁵

The Commission further incorporated new developments in English divorce law¹⁶ into the draft bill. It encouraged the introduction of divorce provisions existing in England then, which were based on the “no-fault” principle or irretrievable breakdown of a marriage as the sole ground for divorce. Certain innovations, like divorce by mutual consent among non-Christians were also introduced in the draft bill.¹⁷ The report of the Royal Commission and the draft bill underwent further transformation in 1973 when both the Dewan Negara (Upper House) and Dewan Rakyat (Lower House) appointed a Joint Select Committee to study the report of the Royal Commission and make recommendations thereto. The Committee invited members of the

¹⁴ See report of the Malaysian Royal Commission on Non-Muslim Marriage and Divorce Laws, Kuala Lumpur, Government Printer, 1971, p.1.

¹⁵ Ibid. pp.12-15.

¹⁶ Matrimonial Proceedings and Property Act, 1970, The Divorce Reform Act of 1969 and the recommendation of the English Law's Commission Report on Nullity of Marriage; Hooker, 1976, p.15.

¹⁷ A detailed discussion on this matter is made in pp.136-142.

public to send in their representations on the Bill in view of the major social and religious implications involved. The original draft Bill was then redrafted to contain the recommendations of the Committee. Among other things, the Committee introduced another ground for divorce, namely the case of conversion to Islam. It also recommended that divorce by mutual consent be extended to Christians.¹⁸

The Royal Commission completed its report in 1971 to which a Bill known as the Law Reform (Marriage and Divorce) Bill 1972 was annexed. The Bill was introduced to the Dewan Rakyat (Lower House) on 4th. December 1972. In May 1973 both the Dewan Negara (Upper House) and the Dewan Rakyat, Parliament was dissolved and the Bill lapsed. The original Bill was then re-drafted to contain the recommendations of the Joint Select Committee and was reintroduced in the Dewan Rakyat on 8th July 1975. It became law with the Royal Assent on the 6th December 1976 and was published in the Gazette on the 11th December 1976. It was not however brought into force until the 1st March 1982.¹⁹ Before that it had been amended by the Law Reform (Marriage and Divorce) Act, 1982.²⁰ A gestation period of twelve years had taken place from the date of the appointment of the Royal Commission in 1970 to the enforcement of the Act in 1982. When the LRA was first drafted in 1971 it incorporated the latest amendments in the family law in England. It was at that stage a very progressive Act.

¹⁸ Sim Ewe Eong, Granting of Decrees under the Law Reform (Marriage and Divorce) Act, 1976, Kuala Lumpur, Malaysian Law Publisher, 1983, p.50.

¹⁹ P.U.(B) 73/82.

²⁰ Act A498/80.

2.3 THE FORMER AND THE PRESENT LAW RELATING TO DIVORCE AND CHANGES IN THE LAW.

Since the coming into force of the LRA, a marriage in Malaysia may only be dissolved by a court. Section 4(1) of the Act preserves the validity of any marriage solemnised under any law, religion, custom or usage prior to 1st March 1982. Section 4(2) deems such a marriage as registered under the Act. This in actual fact, opens the door of the courts to persons who have undergone customary or religious marriage and could not dissolve their marriages under the provisions of the now repealed Divorce Ordinance, 1952.

The Commission in enacting this provision realised that if parties to customary marriages had been entitled to resort to the courts for matrimonial relief, the number of divorce cases applied for would have been considerably higher. However, divorce carries a degree of social stigma in Asian society and the prevalent economic inequality between the sexes may be another factor to be taken into account in considering the relatively small percentage of divorce actions.

Section 4(3) of the Act provides that every marriage unless void under the law, religion, custom or usage under which it was solemnised, shall continue until it is dissolved by:-

- (a) by the death of one of the parties or
- (b) by the order of a court of competent jurisdiction or
- (c) by a decree of nullity made by a court of competent jurisdiction.

Therefore, by virtue of section 4(3) of the Act, a decree of divorce can only be granted by a court of competent jurisdiction. The same section also implies that customary divorces are no longer recognised.

Before the enforcement of the LRA, the law regarding divorce and matrimonial causes in relation to monogamous marriage in Peninsular Malaysia was contained in the Divorce Ordinance, 1952,²¹ which dealt with nullity of marriage, dissolution of marriage, judicial separation and restitution of conjugal rights. Section 109 of the LRA has repealed the Divorce Ordinance, 1952. Besides that, it also repealed a number of written laws which were previously in force in Malaysia, including the Civil Marriage Ordinance, 1952, and the Christian Marriage Ordinance, 1956.²²

2.3.1 Jurisdiction of the Court

When a petition for divorce is made, the first question that needs to be dealt with is whether the court²³ has the jurisdiction to hear the petition. The Divorce Ordinance, 1952 confined the provision of relief only to monogamous marriages and to cases where the parties to the marriage at the time when the petition is presented are domiciled in the Federation. The provisions as to domicile in the original ordinance were found to create hardship,²⁴ and were removed by the Divorce (Amendment) Act 1959 enabling the courts to grant relief notwithstanding that the husband was not domiciled in the Federation, provided the wife had been resident for three years immediately preceding the commencement of proceedings.

The most noteworthy feature in the Divorce Ordinance is that it is confined to monogamous marriages only. As a result, parties who had contracted polygamous marriages cannot petition the courts for divorce

²¹ No. 74 of 1952 (Reprinted 1973).

²² See section 109, LRA.

²³ By virtue of section 2(1) "court" means the High Court or a Judge thereof, or the Sessions Court or a President thereof, as the case may be.

²⁴ See Kanmani v Sundarampillai [1957] M.L.J 172; see also Charnley v Betty [1960] M.L.J 29.

and they are left to such remedies as they can obtain under their personal law or custom and without any means of enforcement.

In the case of *Dorothy Yee Yeng Nam v Lee Fah Kooi*,²⁵ it was held that a Chinese domiciled in Perak could validly enter into a monogamous form of marriage. Although the Christian Marriage Ordinance, 1940, of Penang, did not expressly provide that a marriage under it was monogamous it was a law enabling the parties to enter into a marriage that they contemplated or intended should be monogamous. Therefore, a Chinese married under the Ordinance could apply for dissolution of the marriage under the Divorce Ordinance, 1952.

Section 47 of the LRA provides that the court in all suits and proceedings in Malaysia should 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.

An equivalent effect to section 3 of the Divorce Ordinance is given by Section 47 of the LRA. This is illustrated in the case of *Martin v Umi Kalthom*²⁶ where it was held that where a question of conflict of laws arose in relation to a matter regarding which the courts' jurisdiction came from the Divorce Ordinance, such question should be determined on the same principles as those on which such a question would be determined by the English courts. In its actual decision in the case however the court would appear to have gone further and to have decided the issue in the case as an English court would decide that particular issue. Thomson C.J said;

²⁵ [1956] M.L.J. 257.

²⁶ [1963] M.L.J. 1; see also *Ng Kah Ting v Ching Peng Tow* [1977] 2 M.L.J. 30.

"In my opinion if this marriage had been solemnised in a Registry office in London and not in Kuala Lumpur, the English Divorce Court would hold it to be valid."

The decision in this case was heavily criticised,²⁷ and it is doubtful whether this decision would be followed today.

Section 48(1) of the LRA provides that the court had jurisdiction to make a decree of dissolution of marriage where:

- (a) the marriage between the parties was contracted under a law providing that or in contemplation of which the marriage was monogamous and;
- (b) the parties to the marriage at the time when the petition was presented were domiciled in the Federation.²⁸

In general, both these conditions must be satisfied before the court may proceed to hear the case. The difficulty that may arise from section 48(1) is that when the petition is presented in court the husband may not be present in the country, resulting in a failure to meet the second condition. This means that the court will then have no jurisdiction to grant a decree of divorce, a situation that is unfair and harsh to the wife. Solution to this difficulty is found in section 49 which stipulated that the court had jurisdiction where the wife had been deserted by the husband or the husband had been banished or excluded from the Federation under any written law relating to banishment or exclusion and the husband was immediately before the desertion, banishment or exclusion domiciled in the Federation or if the wife were resident in the Federation and had been ordinarily

²⁷ See Ibrahim, 1984, see also judgement of Shankar J. in Re Divorce Petition No 18, 20 and 24, [1984] 2 M.L.J 158.

²⁸ Divorce Ordinance, 1952, section 4 (1).

resident for a period of three years immediately preceding the commencement of the proceedings.²⁹

Accordingly, the wife has only to satisfy either one of the two conditions stated above. Thus, section 49 enabled the wife to petition the court for divorce even though the husband was not domiciled or resident in Malaysia at the time of the petition. In the case of *Levene v Commissioner of Inland Revenue*³⁰ quoted with approval by Ong C.J. in *Mahon v Mahon*³¹ where Viscount Cave L.C. defined the word “reside” as:

“To dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place.”

This definition would then prevent those who only make brief and transient visits to Malaysia for the primary purpose of obtaining divorces.

The most important change made in England has been the abolition of the Common law rule that a woman acquires the domicile of her husband on marriage. The Domicile and Matrimonial Proceedings Act, 1973, section 1 abolished the wife’s dependent domicile and provides for a married woman’s domicile to be ascertained independently.

However, the situation in Malaysia is different. One of the most glaring flaws in the LRA flowed from the wife’s inability to acquire a separate domicile, and was that, even though she had always been resident in Malaysia, she could not obtain relief in Malaysia if her husband was domiciled abroad. However, two statutory basis of

²⁹ Ibid., section 49.

³⁰ [1928] All E.R.Rep. 746.

³¹ [1971] 2 M.L.J 266.

jurisdiction were introduced to meet these kinds of cases, and a wife was able to petition³²:

- (a) if her husband had deserted her and had been deported and before the desertion or deportation he had been domiciled in Malaysia, or
- (b) if she had been ordinarily resident in Malaysia for two years immediately preceding the presentation of the petition.

Under the section 49 of the LRA, a foreign wife of a man who has ceased to be of Malaysian domicile for reasons other than those set out in Section 49(1) (a) of the Act, cannot file for divorce. The court can pronounce a decree of divorce only if the husband was domiciled in Malaysia when the petition was presented.³³

Had domicile retained its original meaning of a person's home, this might have been a satisfactory principle, but a technical meaning that it acquired produced many anomalies.

In the recent case of *Melvin Lee Campbell v Amy Anak Edward Sumek*,³⁴ a joint petition for divorce was made. According to Section 48(1) of the LRA, a court could grant a decree of divorce only if both parties were domiciled in Malaysia. The issue before the court was whether the petitioner was domiciled in Malaysia at the time of presentation of the petition. It was held in this case that there were two elements involved in determining the domicile of choice and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it was alleged that the petitioner has adopted the domicile of choice. It was also held that the provision of Section 48(1)(c) required that the court

³² LRA, Section 49(a) and (b).

³³ LRA, Section 48(c).

³⁴ [1988] 2 M.L.J 338.

must be satisfied that at the time when the petition was presented the domicile of both the petitioner and the respondent was Malaysia. The burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia fell squarely on the petitioner. It was held that the petitioner had not succeeded in showing that at the time of the presentation of the joint petition, his domicile was in Malaysia. Therefore the court had no jurisdiction to entertain the joint petition.

A man habitually resident in Malaysia but domiciled abroad could not obtain a divorce in Malaysia unless he decided to change his domicile and therefore qualified himself to be considered under Section 48(c). A woman in this position could do so if she could bring herself to within one of the statutory exceptions.³⁵ It is recommended that jurisdiction should be extended to enable either spouse (not only the wife) to petition if he or she has been habitually resident in Malaysia for two years.³⁶

In Malaysia, the courts are still adopting the old concept of domicile, that is before the passing of the Domicile and Matrimonial Proceedings Act, 1973 as it was stated in the Civil Law Act 1956, that the court in Malaysia has to apply the common law of England on the 7th day of April, 1956.³⁷ As the amendment in England took place after 1956, the Malaysian law relating to domicile is therefore out of date. It is submitted that the present application of section 48 and Section 49 of the LRA is unfair to both parties of the marriage. Accordingly, section 49 should be amended by extending sub-paragraph (a) to cover a greater number of situations than just desertion and deportation and

³⁵ LRA, Section 49 (a) or (b).

³⁶ Kamarudin, Zaleha bt., The Concept of Domicile and Its Implications on the Court's Jurisdiction Relating to Matrimonial Matters in England and Malaysia, International Islamic University Law Journal, Vol.1, No.2, 1989, p.109.

³⁷ Civil Law Act 1956, Section 3 and Section 5.

the requirement of a residential qualification to be abolished.³⁸ Another alternative is to leave section 49 in its present form but introduce a new section in the act to enable wives to have a domicile of their own. A recommendation to this effect was also made by Ahmad Ibrahim.³⁹ This amendment is, in fact, long overdue since it has been introduced both in the United Kingdom and Singapore.

2.3.2 Time Restriction of Petition

The LRA has been seen by many as a law that readily paves the way for those who seek to divorce at the slightest excuse possible. The first indication that this view is a misconception is found in Section 50 which provides that as a general rule, no petition for divorce can be made to the court unless at least two years have elapsed from the date of the marriage.⁴⁰ The purpose of this general rule is to curb impetuous and hasty resort by spouses to divorce.⁴¹

The exceptions to this general rule are cases of exceptional circumstances or hardship suffered by the petitioner. It is important to note that even if the circumstances arise, the judge has the discretion to disallow the petition. In doing so, the judge must consider two things *viz.* the interest of any child of the marriage, and whether there is a reasonable probability of a reconciliation between the parties during the specified period.

Section 6 of the Divorce Ordinance 1952, has a counterpart in the LRA in Section 50. However, there are two differences. First, the former provision stipulates that no petition for divorce could be

³⁸ Anantham, K., Reforms of the Law Reform (Marriage and Divorce) Act, 1976, Seminar on Family Law, Rotary Club of Subang and Faculty of Law, University of Malaya, 1990.

³⁹ See Ibrahim, Ahmad bin Mohamed, Reform of the Law Reform (Marriage and Divorce) Act, 1976, 7th Malaysian Law Conference, Kuala Lumpur, October, 1983.

⁴⁰ Referred to as the "specified period" in LRA, section 50.

⁴¹ Report of the Malaysian Royal Commission, 1972, p.14.

presented in court unless at least three years had elapsed from the date of the marriage except by leave of the court upon application on the grounds that the case was one of exceptional hardship suffered by the petitioner. The court in granting leave was required to have regard to the interests of the children of the marriage and to the question whether there was a reasonable probability of a reconciliation between the parties before the expiration of the said three years.⁴² The waiting period has thus been reduced by a year from three years under Section 6(1) of the Divorce Ordinance, 1952 to only two years under the LRA. The implication of this is that a petitioner would be able to seek a divorce without a long delay. Indirectly, this may mean that more divorces may take place. It is undeniable that divorce is much easier to obtain than before.

Secondly, the exceptions to this general rule are cases where the petitioner has suffered exceptional depravity at the hands of the respondent. Whilst the first difference refers to the duration of the marriage, the second difference relates to the drafting of the provision. It is the latter difference that is of particular interest and which has raised two questions. First, must the hardship suffered by the petitioner be exceptional under section 50 of the LRA for it to qualify as an exception? Secondly, must the exceptional circumstances be suffered by the petitioner, or is the fact that the case is one of exceptional circumstances sufficient to qualify it as an exception to the general rule in section 50? These two questions have arisen because under the Divorce Ordinance 1952, it was clear that the hardship suffered by the petitioner must be an exceptional one. While the exceptional hardship must be suffered by the petitioner, the exceptional depravity, on the other hand, must be on the part of the respondent.⁴³

⁴² LRA, section 6.

⁴³ Divorce Ordinance, 1952, section 6.

Ronald Khoo and Ahmad Ibrahim believe that a better alternative to section 50 would be an absolute one year bar that would remove the ambiguity in the present law and at the same time still provide a one year cooling off period to discourage parties from rushing into a divorce in the early stages of their married lives.⁴⁴

2.3.3 Grounds of Divorce

Under the Divorce Ordinance, 1952, the grounds for dissolution of marriage which applied equally to men and women were adultery, desertion for a period of at least three years, cruelty and unsoundness of mind.⁴⁵ Generally, these have continued under the LRA with the same provisions as the Divorce Ordinance 1952. The LRA differs from the previous Ordinance in that it extends existing provisions and adds new clauses to the inquiry of the facts leading to the breakdown of the marriage. The LRA provides for three grounds of divorce, namely:

- (a) one party converts to Islam.⁴⁶
- (b) mutual consent.⁴⁷
- (c) irretrievable breakdown of marriage.⁴⁸

Grounds (a) and (b) are innovations under statutory divorce.

a. Divorce on the grounds of spouse's conversion to Islam.

Section 51 of the LRA provides that where one party to a marriage has converted to Islam, the other party who has not converted may petition for divorce. However, such petition may only be made after three months have expired from the date of conversion. In such a case, the court has the power to not only grant a decree of divorce but to make

⁴⁴ See Khoo, Ronald, and Foo Nyet Ngo, Divorce, Conference on the Reform of Law Reform (Marriage and Divorce) Act, 1976, Kulliyah of Laws, International Islamic University, Petaling Jaya, December, 1992, see also Ibrahim, 1983.

⁴⁵ Divorce Ordinance, 1952, ss 7,12,13.

⁴⁶ LRA, section 51.

⁴⁷ LRA, section 52.

⁴⁸ LRA, section 53.

provision for the wife or husband as well as for the support, care and custody of the children, if any. The court is further vested with the power to attach any conditions to the decree of divorce as it thinks fit.⁴⁹

It is to be noted that section 50, which generally disallows a petition for divorce to be presented to the court within two years of the marriage, does not apply to any petition under section 51. Section 51 must be read together with section 3(3). Section 3(3) of the LRA provides that it shall not apply to Muslims or to any person who is married under Muslim law. This provision clearly stipulates that although the LRA does not apply to Muslims, the court has the power to grant a decree of divorce under section 51, and such decree shall, notwithstanding any other written law to the contrary, be valid against the spouse who has so converted to Islam. Difficulties will however arise from section 51 which gives the non-converting party to a marriage the right to petition for divorce on the grounds of the other party's conversion to Islam. If the Act does not apply to Muslims, it is difficult to see how the court can make a decree of divorce against a party to whom the Act does not apply or make any other order against such party.

The cases of *Eeswari Visuvalingam v Government of Malaysia*⁵⁰ and *Pedley v Majlis Ugama Islam Pulau Pinang & Anor*⁵¹ show how unfairly the law can operate. It was observed that in the former case, although the appellant could have petitioned for divorce, she did not do so. This left the husband, who converted to Islam, without any remedies under the civil law. He had no right to do so under section 51(1) of the LRA as he was regarded as the party at fault, and he could not do so under

⁴⁹ LRA, section 50.

⁵⁰ [1990] 1 M.L.J. 86.

⁵¹ Penang Originating Summons No. 31-717-87.

section 54 of the Act, as, being a Muslim, the Act did not otherwise apply to him. He could have gone to the Shariah Court, but the Shariah Court had no jurisdiction as one of the parties was not a Muslim.

Wan Adnan J. in the case of *Pedley v Majlis Ugama Islam Pulau Pinang* stated that under the law, a non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not converted to petition for divorce.

According to Reddy, the ambiguity surrounding section 51 of the LRA has made it easier for people to convert to Islam to spite their partners in order to get out of the marriage and its attendant responsibilities. It has also made it easier for parties to abrogate their obligations under civil marriage and marry Muslims. More recently it appears some parties convert to Islam solely for the purpose of securing custody of young children, in the mistaken belief that conversion to Islam renders all the children of the marriage subject to Islamic law under which the custody of the children is granted to the Muslim spouse. Reddy suggested that such abuses of religion seem to be encouraged by the present legal provisions.⁵²

However, a man's debts or other civil liabilities towards others are not extinguished by his conversion into Islam or any other religion. By marriage, he incurs obligations, both legal and moral, towards his wife and children, whose fundamental rights are recognised in clauses (1) and (2) of Article 8 of the Constitution

No doubt there may be some cases where persons will abuse the law and perhaps in every case it is necessary to ensure that the conversion

⁵² Reddy, Rita, Reconciliation and Family Court, Conference on the Reform of Law Reform (Marriage and Divorce) Act, 1976, Kulliyah of Laws, International Islamic University, Petaling Jaya, 1992.

is a genuine one. However, in *Abdul Razak v Aga Mohamed*,⁵³ Lord Mac Naughten said “No court can test or gauge the sincerity of religious belief.” Therefore even the present position can be abused.

The position under Islamic law in Malaysia is that if a husband or wife embraces the Islamic faith and the other party does not follow him or her during the period of iddah, the marriage automatically comes to an end. However, section 46(2) of IFLA provides that conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

Section 51(2) states that:

“The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.”

It is also to be noted that the above section states that the orders for ancillary relief should be made by the court “upon dissolution” of the marriage. This raises the question whether the applications should be made simultaneously or the application be made subsequently. In the case of *Letchumy v Ramadason*,⁵⁴ it was held that a non-converting spouse must file a petition for dissolution under section 5 if he or she intends to seek ancillary relief. In that case, the petitioner obtained her divorce on the grounds of desertion under section 54. On an application for maintenance, the Court’s power to grant maintenance must stem from section 77. However, section 3(3) precluded the operation of section 77 to a Muslim. Hence, any spouse intending to apply for ancillary relief in a case where the other spouse had converted to Islam, must ensure the application for dissolution is made under section 51.

⁵³ (1893) 21 I.A 56, p.64.

⁵⁴ [1984] M.L.J 143.

The question is what would happen to a spouse to be precluded from making an application for ancillary relief and custody of the children if the other spouse converts to Islam subsequent to a decree of divorce, but before the application for ancillary relief has been made or is heard. A fairer result would be achieved if section 51(1) covers both spouses.⁵⁵

Ahmad Ibrahim contends that in a statute which purports to make the breakdown of marriage the sole grounds for divorce, it seems odd that section 51 has been included. The provision seems to revive the outmoded fault principle, in that one of the parties has been given the right to petition for divorce because of the fault committed by the other party, in this case, the conversion to Islam. He suggested that a better approach to the problem would have been to regard the conversion of one of the parties to Islam as evidence that the marriage had broken down.⁵⁶

The need for this amendment is even more desirable as at present, if the non-converting party does not apply for dissolution under section 51, the following appears to be the position. Section 3(3), which states that the Act shall not apply to a Muslim, precludes the converting spouse from benefitting from Orders for ancillary relief which the Court may make subsequent upon dissolution under section 51(2).

(b) Dissolution by Mutual Consent.

Section 52 of the LRA provides for divorce by mutual consent.⁵⁷ Although this form of divorce is alien to English divorce law on which

⁵⁵ Ronald, Khoo, 1992, Ibrahim, Ahmad bin Mohamed, Dissolution on Ground of Conversion to Islam, Conference on the Reform of Law Reform (Marriage and Divorce) Act, 1976, Kulliyah of Laws, International Islamic University, December, 1992.

⁵⁶ Ibrahim, Ahmad bin Mohamed, "The Need To Amend Section 51 Of The Law Reform (Marriage and Divorce) Act, 1976." [1990] M.L.J 1viii; see also Ibrahim, 1992.

⁵⁷ LRA, section 52.

the Act is based, it is not novel to Malaysia. In the State of Sarawak, a non-Christian married couple could mutually agree to present a joint petition for the dissolution of their marriage. It had been the law there since 1932.⁵⁸ Section 7 of the Matrimonial Causes Ordinance provided that two married persons whose marriage was a “registry marriage” and neither of whom professed Christianity, could mutually agree to present a joint petition that their marriage be dissolved. This Sarawak-Style divorce has been introduced to the whole of Malaysia by section 52 of the LRA.

Dissolution by mutual consent following previous Sarawak law is really not new in West Malaysia. In actual fact, it follows Chinese and Hindu custom as to marriages not of a monogamous nature where the Courts previously had no jurisdiction to grant any relief at all as wives acquired under customary law were generally victims of “one-sided deals”. It normally occurs among non-Christian Chinese for husbands could always declare to relatives, friends, or publish in newspapers a declaration of divorce. As regards mutual consent, both husband and wife may present a joint petition for a decree by the Court.⁵⁹

As discussed in the previous chapter, most, if not all, customary marriages could be dissolved by mutual consent. Section 52 provides for a joint petition for the dissolution of a marriage where the parties agree by mutual consent. The section goes further to state that;

“The court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children...”

⁵⁸ Section 7 of Matrimonial Causes Ordinance (Cap.94).

⁵⁹ Sim Ewe Eong, Law Reform (Marriage and Divorce) Act 1976, Act 164, edited by Nasser Hamid, Kuala Lumpur, Malaysian Law Publishers, 1986, p.10.

Section 52 of the Law Reform Act does not contain such a condition although it was recommended by the Royal Commission on Non-Muslim marriage and divorce laws and was in fact included in the Draft Bill.⁶⁰ However, before granting a decree of divorce, the court will have to be satisfied that four conditions been fulfilled, namely:

- (a) at least two years have elapsed from the date of the marriage.
- (b) both the spouses have freely consented.
- (c) proper provisions have been made for the wife.
- (d) proper safeguards have been made for the support, care and custody of the children.

In a petition for a dissolution of marriage by mutual consent, the party who has signed a consent agreement may withdraw the consent before the decree is issued by the court. In such a case, the court must be immediately informed and notice must be given to the petitioner.⁶¹ The rationale of section 52 of the LRA is that where a couple mutually agrees that it is in the best interests that their marriage should be dissolved, they should be allowed to do so quietly without recrimination and unnecessary publicity and quarrel.⁶² At first sight this provision may appear to make divorces extremely easy to obtain. In reality, however, it is a great deal more difficult than presumed because section 52 requires that proper provision be made for the wife and for the support, care and custody of the children of the marriage. This “proper provision” must be freely agreed to by both parties and must be accepted by the court as fair and reasonable before the decree of divorce can be granted.

⁶⁰ Clause 49, Law Reform (Marriage and Divorce) Bill, 1972.

⁶¹ Divorce and Matrimonial Proceedings Rules 1980, Form 5, clause 5.

⁶² Parliamentary Debate (Dewan Negara) 6th. January 1976 p.2311.

This has been confirmed by the Supreme Court in the case of *Sivanesan v Shymala*.⁶³ The parties in this case had filed a joint petition for dissolution of marriage, supported by a joint affidavit which provided for the settlement of the matrimonial property and a waiver by the wife of all future claims for maintenance. The learned trial judge granted a decree nisi and then adjourned the matter to deal with the property settlement. Before the decree became absolute, the husband died. The wife then appealed to set aside the decree nisi. In allowing the appeal, the Supreme Court held that the learned judge was wrong in dissolving the marriage before resolving the exact terms or conditions for the mutual divorce. The court went on to hold that as the husband had died before the decree could be made absolute, there would in effect be no divorce and the wife being a widow was entitled to claim for the properties.⁶⁴

The learned Chief Justice made one further observation of some significance. He disagreed with the interpretation of section 52 as stated in *In Re Divorce Petition No. 18,20 and 24 of 1983*⁶⁵ and declared that in a divorce by mutual consent, the parties do not have to establish irretrievable breakdown of marriage. He referred to the explanatory statement of the Deputy Minister of Law in the Dewan Negara on the effect of section 52, of which he stated that this new provision is not present under the Divorce Ordinance, 1952. Dissolution of marriage by mutual consent can be used provided that the consent is freely given; the dissolution is asked for after two years of marriage and if both parties agree then everything will be done quietly without unnecessary publicity. The court's power to grant this remedy is discretionary and it will have to be satisfied that the parties have freely agreed to this remedy and that consent of one party was

⁶³ [1986] 1 M.L.J 400.

⁶⁴ Ibid, p. 401.

⁶⁵ [1984] 2 M.L.J 158.

not obtained by fraud or force. The court has the discretion to accept and grant divorce on the basis that the parties are adults and they can decide for themselves that their marriage has failed.

Debates in Parliament on the LRA are of great historical interest, but according to Shanker J. in *In Re Divorce Petitions No. 18, 20 and 24 of 1983*, (supra) their value in the correct legal interpretation of a statute remains problematical.⁶⁶

The present practice is to present a joint petition for dissolution only when all the terms as to maintenance and arrangements for children are agreed upon. This would appear to be the intention of the Royal Commission on Non-Muslim Marriages and Divorce Laws as to clause 53. Clause 53 applies both to divorce by mutual consent and to a petition by either of the spouses, which enables any agreements or arrangements to be made upon the dissolution of a marriage to be subjected to scrutiny by the Court. This ensures the reasonableness of such agreements and arrangements and secures justice to the weaker party.

The idea is obviously to make sure that the Court scrutinises all arrangements and agreements. It therefore emerged that it was the intention of Parliament that proper arrangements for maintenance and custody be agreed by the parties and approved by the Court, before a decree was granted. This view was further fortified by the recommendations of the Commissions which stated that;

“Section 7 provides that a joint petition may be presented by both spouses if they mutually agree to a dissolution of their marriage and that the court may if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the wife and for the support,

⁶⁶ Ibid, p.162.

care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit."⁶⁷

The Commission accepted these principles and made the following recommendations:

- (a) that divorce may be granted either "where circumstances have arisen which make it just and reasonable that the marriage should be dissolved", or by mutual agreement, with proper safeguards for the wife and children;
- (b) that, before granting a decree the Court is required to inquire into the facts to satisfy itself that the marriage has irretrievably broken down;
- (c) that attempts or reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the Court thinks fit, to encourage reconciliation;
- (d) that, in order to curb impetuous and hasty resort to divorce no petition may be presented (except in special circumstances) unless three years have elapsed since solemnisation of the marriage;
- (e) that before making a decree the Court shall take into consideration the interests of the child or children of the marriage and of either party likely to be adversely affected thereby and that, upon granting a decree, the Court do so upon such terms and subject to such conditions as it deems fit and just to both parties.

The Commission especially stressed the vital importance of paragraph (e) to safeguard the interests of the respondent and the children of the marriage. Until the court is satisfied that the financial arrangements

⁶⁷ Report of Malaysian Royal Commission, 1972, p.7.

are fair and reasonable, or the best that can be made in the circumstances, the court should not make a decree.⁶⁸ The words “before making a decree” however do not appear in the section and it is arguable that practitioners have imposed an additional burden on themselves by assuming that all such arrangements must be agreed and approved by the Court before granting the decree. On the other hand the words “and that proper provision” is misleading and would seem to suggest this is necessary.

According to Noor Farida Ariffin, the position under this section is unclear.⁶⁹ The problem would arise in situations where the parties mutually agree to the divorce but are unable to agree on other terms. It would appear that in these situations the matter has to be referred to the conciliatory body (unless exemptions apply) and that the petition be proceeded with under Section 3. Unfortunately, the four facts indicative of breakdown may have no application at all in cases where parties mutually consent. She therefore recommended that the interpretation should be so as to allow parties who mutually consent, to obtain their divorce and then allow all other proceedings to be adjourned to Chambers.

Under dissolution by mutual consent, a court cannot grant a decree nisi under this section although the parties have mutually consented to the divorce but have yet to reach agreement on questions of maintenance and custody.⁷⁰ On the contrary, all factual issues would be more clearly presented to the Court which could at the end of the day adjudicate to arrive at the most satisfactory arrangements. It would also remove the element of force present in such arrangements where

⁶⁸ Ibid, pp.7-8.

⁶⁹ Ariffin, Noor Farida bt., *Reform of the Law Reform (Marriage and Divorce) Act, 1976*, 7th Malaysian Law Conference, Kuala Lumpur, 1983.

⁷⁰ Srvanesan v Shymala [1986] 1 M.L.J 400.

parties may well arrive at agreements which they are none too pleased with solely for the reason of obtaining a divorce by mutual consent. Variation of such orders is of course only possible if there is a material change in circumstances and it is therefore imperative that the parties be allowed to arrive at arrangements that are satisfactory to themselves.⁷¹

(c) Divorce on the grounds of irretrievable breakdown of marriage.

Under the principles of the English Matrimonial Causes Act, 1973, the sole ground for divorce is irretrievable breakdown of the marriage. Either the husband or the wife may petition for a divorce on this ground.⁷² This concept was also incorporated in section 53 of the LRA, which provides that the court shall enquire into the facts alleged as causing or leading to the breakdown of the marriage and if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.⁷³

Previously, divorce under the traditional grounds was based on fault or guilt of one of the parties. Divorce was only granted to the petitioner if he or she could prove that the respondent had committed a matrimonial offence.⁷⁴

Under section 53, to establish irretrievable breakdown the court shall have regard to one or more of the following facts:

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

⁷¹ Ariffin, 1983.

⁷² Matrimonial Causes Act, 1973, Section 1 (2).

⁷³ LRA, section 53.

⁷⁴ See Divorce Ordinance, ss. 7-14.

- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.⁷⁵

Upon presentation of such a petition, the court shall inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if it is satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution. Hence, it is mandatory for the court to inquire into such facts as proof of the irretrievable breakdown of the marriage. These are stipulated in section 54 and are similar to the former matrimonial offences such as adultery, cruelty and desertion as found in the Divorce Ordinance 1952.

Apart from paragraph (d) all the above mentioned “facts” that can be accepted by the court as establishing irretrievable breakdown of marriage, prove a fault on the part of the respondent. Thus despite the attempt to move away from fault, the majority of divorce cases would still have to resort to the old grounds of adultery, desertion or conduct which in the past would have come under the grounds of cruelty or constructive desertion.

- (a) The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

In section 54 (1)(a), the petitioner must not only satisfy the court that the respondent has committed adultery, as under the previous grounds

⁷⁵ LRA, Section 54(1).

of adultery, but also that he or she finds it intolerable to live with the respondent. At one time, the courts were undecided as to whether it was necessary that when the petitioner finds it intolerable to live with the respondent it must be of the consequence of the adultery.

In the absence of any local cases on this point, English cases will invariably be relied upon when the Malaysian court are called upon to construe section 47 of the LRA. As section 54 of the LRA is in pari materia with section 1(2) of the Matrimonial Causes Act 1973 in England, English cases on this point are relevant.

In the Malaysian case of *Shanmugam v Pitchamany and Anor*⁷⁶ it was held that the allegation of adultery had to be proved to the satisfaction of the court beyond reasonable doubt. In this case the evidence produced by the petitioner had sufficiently established by necessary inference that adultery must have been committed and therefore a decree nisi should be granted. The petitioner has not only to prove that the respondent has committed adultery but also to prove that he or she finds it intolerable to live with the respondent. The question that arises is whether the two facts required by section 54 (1)(a) are severable or independent, or, whether they are interconnected. Is it sufficient for the petitioner to prove that the respondent has committed adultery and that she or he finds it intolerable to live with the respondent? There are two opposing views on this. On the one hand, in the case of *Roper v Roper*⁷⁷, Faulks J. said;

"I think that common sense tells you that where the finding that has got to be made is that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent, it means, in consequence of the adultery, the petitioner finds it intolerable to live with the respondent."

⁷⁶ [1976] 2 M.L.J. 222.

⁷⁷ [1972] 3 All E.R. 668.

In addition to this view, a Judicial Commissioner, Mr. Sim Ewe Eong, has expressed the view that under section 54(1)(a), the petitioner has to satisfy the court that adultery was so offensive and wounding to him or her that any further married life was unthinkable.⁷⁸

On the other hand, in *Goodrich v Goodrich*,⁷⁹ Lloyd-Jones J. accepted the view that the two facts in section 2(1) (a) of the Matrimonial Causes Act, 1973 are, in the context, independent of one another. This view was later affirmed by the Court of Appeal in *Cleary v Cleary*,⁸⁰ where it was held that the two facts were separate and unrelated, and the petitioner was not obliged to show that it was in consequence of the adultery that he found it intolerable to live with the respondent.⁸¹ Except for the House of Lords, the courts in England are bound on this point by the decision of the Court of Appeal in *Cleary v Cleary*. However, that decision is only of persuasive authority to the courts in Malaysia. Only a decision of the Privy Council with regard to a provision in a statute in which is in pari materia with a local statutory provision is binding in the Malaysian courts.⁸²

In *Wee Hock Guan v Chia Chit Neo & Anor*,⁸³ Winslow J. referred to the case of *Farnham v Farnham*⁸⁴ and stated that an allegation of adultery must be proved beyond reasonable doubt. The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely

⁷⁸ Sim Ewe Ong, 1986, p 75.

⁷⁹ [1971] 2 All E.R 1340

⁸⁰ [1974] All ER 498.

⁸¹ The Court of Appeal in *Carr v Carr* [1974] 1 All ER 1193 was unhappy on this point, but reluctantly accepted the interpretation of Section 1(2) (a) in *Cleary v Cleary* [1974] 1 All ER 498.

⁸² *Khalid Panjang and Ors v P.P.* (No.2)[1964] M.L.J. 108.

⁸³ [1964] 1 M.L.J. 217.

⁸⁴ (1925) 133 L.T. 320.

circumstantial the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation.

There is no reported decision on finding of adultery under the LRA. Ronald Khoo believes that although the burden is not as strict as that required in a criminal case because it is still considered a matrimonial offence, a high standard of proof is required. Adultery is still regarded as a matrimonial offence, as reflected in the fact that under section 58 of the Act, the alleged adulterer or adulteress must be made a co-respondent to the suit unless the court dispenses with such a requirement on “special grounds”. Furthermore, the Act provides that a co-respondent may be condemned in damages in respect of the alleged adultery. On the damages that may be awarded, there is specific provision that it shall not include any exemplary or punitive element. Hence, any damages must necessarily be compensation for actual loss suffered arising from and caused by the adultery in question.

Ronald Khoo has argued that the right to claim damages for adultery from the co-respondent should be abolished; first because it is not in keeping with the intention of the Royal Commission and secondly, on occasions it is found that parties to a marriage may be constrained to proceed with their divorce application although they have reached agreement on divorce, maintenance, custody and distribution of matrimonial assets purely because the co-respondent insists on costs and damages for having been included in the Divorce Petition.

(b) The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

Section 54(1)(b) states that a divorce can only be granted if it is proved beyond reasonable doubt that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The English courts have refused to give a broad

interpretation to this guideline but have favoured a narrower, more legalistic approach. First, the respondent must have behaved in such a way that the petitioner cannot reasonably be expected to live with him. In this regard it is pertinent to define the meaning and the scope of the word “behaviour”. In *Katz v Katz*⁸⁵, Sir George Baker P. said that:

*“Behaviour is something more than a mere state of affairs or a state of mind...(it) is action or conduct by the one which affects the other.”*⁸⁶

However, in the case of *Thurlow v Thurlow*⁸⁷, Rees J. held that in order to establish that the respondent has behaved in such a way that the petitioner could not reasonably be expected to live with the respondent, it is not sufficient merely to establish that the marriage was dead and that it was impossible for the petitioner to cohabit with the respondent. It has to be shown that it was the respondent’s behaviour which justified a conclusion by the court that the petitioner could not reasonably be expected to endure cohabitation. For that purpose, however, “behaviour” included negative conduct.

In *Livingstone Stallard v Livingstone Stallard*,⁸⁸ it was held that the proper approach was to determine on the question of fact whether the respondent had behaved in such a way that the particular petitioner can not reasonably be expected to leave with the respondent, taking into account the whole of the circumstances and the characters and personalities of the parties.⁸⁹

⁸⁵ [1972] 3 All E.R 219.

⁸⁶ [1975] 2 All E.R p.979.

⁸⁷ [1975] 2 All E.R 979.

⁸⁸ [1974] 2 All E.R 766.

⁸⁹ This decision was approved in *O’Neill v O’Neill* [1975] 1 W.L.R. 1118, and again endorsed by the Court of Appeal in *Buffery v Buffery* [1988] 2 F.L.R. 365.

Section 54 (1)(b) of the LRA necessarily poses an objective and subjective test. This is in contrast to the phrase “the petitioner finds it intolerable to live with the respondent” in section 54(1)(a). In determining whether the petitioner can or cannot reasonably be expected to live with the respondent, the court must take into account the character, personality, disposition and behaviour of the petitioner, and the respondent as alleged and established in evidence. If the petitioner and respondent are equally bad in a similar respect, each can reasonably be expected to live with each other.

This proposition is also borne out by words of Bagnall J. in *Ash v Ash*,⁹⁰

“In order therefore to answer the question whether the petitioner can or cannot reasonably be expected to live with the respondent, in my judgement, I have to consider not only the behaviour of the respondent as alleged and established in evidence, but the character, personality, disposition and behaviour of the petitioner. The general question may be expanded thus: can this petitioner, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?”

The primary emphasis is on the behaviour of the respondent. It is insufficient for the petitioner to show that he or she cannot reasonably be expected to live with the respondent. The petitioner must show that this situation arose from the respondent’s behaviour. Hence, the court is required to make a value judgement on the behaviour of the respondent and its effect on the petitioner, and then decide whether the petitioner has complied with section 54(1)(b). The case in point is *Pheasant v Pheasant*.⁹¹ In that case, the husband left the wife and petitioned for divorce under section 2 (1)(b) of the Divorce Reform Act 1969 in England (which is in pari materia with section 54(1)(b) of

⁹⁰ [1972] 1 All E.R. 582.

⁹¹ [1972] 1 All E.R. 587.

LRA). He alleged that his wife had not been able to give him “the spontaneous, demonstrative affection which his nature demanded, and for which he craved”, and that in consequence, it was impossible for him to live with her any longer. Accordingly, he stated that the marriage had irretrievably broken down. The husband did not attempt to establish anything which could be regarded as a serious criticism of the wife’s conduct or behaviour. In evidence, the wife stated that she welcomed her husband’s return and that she did not believe that the marriage had broken down irretrievably. It was held that the husband was not entitled to a divorce as there was nothing in the wife’s behaviour which could be regarded as a breach, on her part, of any of the obligations of the married state or as effectively contributing to the breakup of the marriage.

The latest case on this point in England is *Birch v Birch*.⁹² It was held that the test of behaviour was to be subjective and the trial judge in this case had been incorrect in using an objective test.

For a petition of divorce under section 54 (1)(b), it would be consistent with the spirit of the LRA for the court to approach each case more from the point of view of matrimonial obligation than in terms of the now obsolete idea of matrimonial offence. Unreasonable behaviour has been interpreted by the courts to mean behaviour which is severe and gross. Within the Malaysian context, a large number of cases that fall within this category are those where there have been continuous and gross acts of abuse and domestic violence.⁹³

In this case, Ormrod, J. preferred the approach used by Pearce, J. in *Lissack v Lissack* ⁹⁴, that is whether it was reasonable to expect this

⁹² [1992] 1 F.L.R. 564.

⁹³ Reddy, 1992.

⁹⁴ [1950] 2 All E.R. 233.

petitioner to put up with the behaviour of this respondent. This approach is basically quite similar to the propositions above. In addition, it was held that it was not appropriate for the court to analyse the degree of gravity of conduct which would be sufficient to justify dissolution of the marriage. The proper approach was to determine as a question of fact whether the respondent has behaved in such a way that the particular petitioner before the court cannot reasonably be expected to live with him or her, taking into account the whole of the circumstances including the history of the marriage, and the character and personality of the parties.

In practice, however, this behavioural fact is very much similar to the former grounds of cruelty. Under the former law, cruelty in the legal sense consisted of conduct by one spouse of such character as to have caused danger to life, limb or health, whether bodily or mentally or so as to put the other spouse in fear of danger. Physical violence was not necessary to establish cruelty. In the case of *Wong Siew Fong v Wong Siew Fong*⁹⁵, Gill J. referred to English cases and came to the conclusion that constant and persistent nagging by a wife without any justification against a husband resulting in a deterioration of his health amounts to cruelty.

This is in contrast to the case of *Vethaguru v Sivagnanachelvi*⁹⁶, where the petitioner sought divorce on the grounds of cruelty. He said being a Hindu he felt hurt by the refusal of the respondent to wear sarees and cholis suitable to that of a Hindu married woman. He had tried to restrain her from bobbing her hair to ear length but to no avail. The respondent had indulged in playing hockey too often and had taken part in hockey matches out of town. He alleged that the respondent and the respondent's parents had abused and humiliated him. As a

⁹⁵ [1964] M.L.J. 37.

⁹⁶ [1981] 2 M.L.J. 204.

result of all these he had suffered ill-health and a mental breakdown. The petitioner claimed that the marriage had irretrievably broken down. The respondent on the other hand had denied all these allegations. She stated that the root cause of their matrimonial troubles was her refusal to hand over her pay cheques to the petitioner after the birth of their child. The petition was dismissed because according to the judge in order to establish the matrimonial offence of cruelty it must be shown that the acts and conduct complained were of grave and weighty nature as to cause danger to the petitioner's health or a reasonable apprehension of such a danger. The standard of proof required to establish cruelty is based on the preponderance of evidence or balance of probabilities. Intention is not a necessary ingredient of cruelty. The question to be decided is whether the respondent's conduct is cruel rather than whether the respondent is a cruel person. Spouses take each other for better or worse and having entered into matrimony they must accept the ordinary wear and tear of married life. The facts adduced in this case did not establish that the conduct of the respondent was of such a grave and weighty nature as to make cohabitation virtually impossible, the quarrels were of a trivial nature and largely because of the pay cheques.

In *Theresa Tek v Luke Lim*,⁹⁷ the petitioner sought divorce on the grounds of cruelty. In support of her case she produced several police reports and medical certificates. The respondent had not seriously challenged her allegations of assault but said that he had tried to stop her from going out late at night. The respondent in turn alleged that the petitioner had committed adultery with two persons. The petitioner denied all the allegations. It was held that the petitioner having proved cruelty against the respondent would be entitled to a decree nisi, but she had wilfully and deliberately suppressed the fact of her own

⁹⁷ [1981] 2 M.L.J. 205.

adultery. This meant that there was a discretionary bar to the matrimonial relief which she sought.

In a recent case of *Hariram Jayaram v Saraswathy Rajahram*⁹⁸, Lim Beng Choon J. held that following the test stated in *Katz v Katz* and *Pheasant v Pheasant*, it must be decided that on the facts of the case, the respondent has not shown herself to be of such a character and personality and her behaviour has not been such that the judge can conclude that the petitioner can reasonably be expected to live with her.

- (c) The respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

By section 54(1)(c), the petitioner must prove that there had indeed been a desertion lasting for a continuous period of at least two years. Moreover, this period must immediately precede the presentation of the petition. Desertion is based on the rejection by one spouse of all the obligations of the marriage. To prove desertion, the petitioner has to establish four elements, that is;

- (a) There was a de facto separation.
- (b) The respondent possessed the animus deserendi
- (c) The deserted spouse did not consent to the separation.
- (d) There was no reasonable cause or excuse for the respondent to leave the petitioner.

In addition to proving that there was a de facto separation, the petitioner has also to prove that the respondent possessed animus deserendi or the intention to desert. This intention to desert must be established by the petitioner. It is also possible in law for a separation

⁹⁸ [1990] 1 M.L.J 114.

which began by being based on consensus to acquire the character of desertion later.⁹⁹

Desertion under section 54(1)(c) is similar to grounds of desertion under the Divorce Ordinance, 1952. However, under the previous law, three years must elapse before the petition can be presented. This period has been shortened to two years under the LRA. Under the former law, in order that desertion could constitute a ground for divorce, the respondent had to have deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. This three years' period had to be continuous, and two separate periods of less than three years could not be added so as to give a period of three years in the aggregate. Moreover the period had to immediately precede the presentation of the petition. To this second proposition there was one exception, for if the petitioner had already obtained a judicial separation and the respondent had been in desertion for a continuous period of three years, preceding the institution of the earlier proceedings, the petitioner could rely upon that period of desertion as grounds for divorce, provided that the decree or order had been in force continuously and the parties had not resumed cohabitation since it was granted.¹⁰⁰

There could be no desertion unless there was a de facto separation between the spouses. It was not sufficient for this purpose that one of the spouses had abandoned some of the obligations of matrimony or refused to perform duties. There must be a rejection of all obligations of marriage. In a case where both parties continued to live under the same roof but where one shut himself off from the other, so that they were living as two units rather than one, there was no de facto

⁹⁹ Miller v Miller [1948] M.L.J. 183.

¹⁰⁰ Divorce Ordinance, 1952, ss. 7, 12.

separation sufficient to constitute desertion. This was however, rebuttable, for as had been stated by Lord Merrivale P. that;

*“Desertion is not withdrawal from a place, but from a state of things.”*¹⁰¹

Hence, if there had been a total cessation of cohabitation there could be desertion just as effectively as if the husband and wife were living in two separate houses. The correct test to be applied in such a case was: are the spouses living in two households or in one? Cohabitation must have entirely ceased. Therefore there could not be desertion if any matrimonial services were performed even though those were isolated and intermittent.¹⁰²

Desertion had to be a continuing offence and the respondent had to still be in desertion when the petition was presented. If the spouses resumed cohabitation, there would then be no de facto separation and therefore no desertion. Lord Merriman P. in *Mummery v Mummery*¹⁰³ stated that;

“A resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bilateral intention on the part of both spouses so to do.”

In *Saigal v Saigal*¹⁰⁴, the learned judge applied the principles of *Perry v Perry*¹⁰⁵ where sexual intercourse did not amount to condonation of desertion. By reason of the resumption of normal marital relations

¹⁰¹ *Pulford v Pulford* [1923] p.18.

¹⁰² *Naylor v Naylor* [1961] 2 All E.R. 129; *Hopes v Hopes* [1948] 2 All E.R. 920.

¹⁰³ [1942] 1 All E.R. 553.

¹⁰⁴ [1964] M.L.J. 429.

¹⁰⁵ [1952] M.L.J. 203.

between the parties, each act of cruelty alleged by the husband was condoned but it was revived by each subsequent act of cruelty. Cruelty which has been condoned may be revived by subsequent desertion and therefore in this case the wife's cruelty was revived by her continued desertion. It had been held in the case of *Miller v Miller*¹⁰⁶ that an original involuntary separation could be converted into one of desertion by the formation of an animus deserendi by the respondent when it was physically impossible for her to join the petitioner. Since all that must be proved is the fact of separation, it was irrelevant for this purpose that the spouses were forced to live apart and therefore could not live together even if they wished to do so. Even though there was de facto separation, there would be no desertion unless the guilty spouse had the intention of remaining permanently separated from the other.

It was held in *Goh Soon Toon v Yuen Yoke Chee*¹⁰⁷ that where a separation deed was in force it was an absolute answer to a charge of desertion. In the same way, if the deserted spouse obtained a judicial separation he could not then allege that the other was in desertion, for the order itself relieved the petitioner from the duty of cohabiting with the respondent and therefore effectively put it out of the latter's power to return. It clearly showed a desire on the petitioner's part not to have the spouse back. But if the consent to the separation was withdrawn, desertion would automatically commence provided that the other conditions were all satisfied. Even though the agreement was originally intended to last for ever, it could be brought to an end by its termination.

¹⁰⁶ [1948] M.L.J 183.

¹⁰⁷ [1950] M.L.J 96.

In *Adelina Loo Soo Chai v Maurice Eng Chuan Gan*,¹⁰⁸ the parties had entered into a deed of separation, under which the husband undertook to pay a monthly allowance of one thousand and five hundred Malaysian Ringgit (RM \$1,500) and to provide the wife with a car, and the wife undertook to look after the children at the matrimonial home. Subsequently the wife moved out of the house and lived apart from the children. The husband then stopped paying the monthly allowance. He alleged that the wife was in breach of the deed of separation as she had left the children to live in the house with him. He also alleged that there had been cohabitation between the parties and also that the wife had contrary to the deed of separation pledged his credit. The wife applied for leave to sign a final agreement. It was held that the application must be dismissed as there were issues which were liable for trial.

If one spouse had a reasonable cause or excuse for leaving the other there would be no unjustifiable separation and consequently he would not be in desertion. Generally the commission of a matrimonial offence by one spouse, which would entitle the innocent spouse to petition for divorce or judicial separation, would be a good excuse for his breaking off cohabitation, for if he or she did not do so he or she would also run the risk of condoning the offence and thus putting all relief out of the question.

This was subject to two qualifications. First, if the innocent party had put it out of his power to complain of the offence by having induced, connived in or condoned it, then he was no longer entitled to break off cohabitation because of it. Secondly, the committing of the offence must have been the cause for his leaving the guilty spouse, so that if he was ignorant of the matrimonial offence or was indifferent to it and

¹⁰⁸ [1980] 1 M.L.J 191.

intended to leave in any event he could not plead the committing of the offence as a reason for his so doing.¹⁰⁹

Conduct which did not in itself amount to a matrimonial offence could nevertheless be a good excuse for one spouse leaving the other so as to preclude his or her being in desertion. The conduct must be so grave as to make married life impossible. It was held that the ordinary wear and tear of conjugal life did not in itself suffice.¹¹⁰ It was held in *Lee Kah Wah v Cheah Paik Yean*¹¹¹ following *Buchler v Buchler*,¹¹² that the criterion for assessing whether a spouse was justified in leaving the matrimonial home was that the conduct of the spouse remaining must exceed such behaviour, vexatious and trying though it might be, as every spouse bargained to endure when accepting the other for better or worse.

In *Chua Seok Choo v Ooi Chuan Lok*,¹¹³ Ong Hock Sim J. decided that a solitary instance of assault when the petitioner was with a child was not conduct of such a grave and weighty character as to make the respondent guilty of constructive desertion. In another case, *Thambyah v Thambyah*,¹¹⁴ the judge decided that the onus of proof was on the petitioner and the court had to be satisfied that the grounds had been proved beyond reasonable doubt. As the petitioner had failed to satisfy the court, the petition was dismissed.

¹⁰⁹ *Day v Day* [1957] 1 All E.R. 848.

¹¹⁰ *Dyson v Dyson* [1953] 2 All E.R. 1511.

¹¹¹ [1964] M.L.J 125.

¹¹² [1947] 1 All E.R 319.

¹¹³ [1968] 1 M.L.J 282.

¹¹⁴ [1966] 1 M.L.J 13.

- (d) The parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition

Section 54(1)(d) is the separation clause or “living apart” clause. This provision is similar to section 1(2)(e) of the Matrimonial Causes Act, 1973. As was said by Ormrod, J. in *Pheasant v Pheasant*,¹¹⁵

“Separation is undoubtedly, the best evidence of breakdown, and the passing of time, the most reliable indication that it is irretrievable.”

The petitioner will have to show that the parties of the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. This clause is quite different from section 54(1)(c) because the deserting party may petition for divorce. Whereas under section 54(1)(c), the petitioner can only be the deserted party, and not otherwise.

The courts in England imposed a comparatively high standard. The view taken was that each spouse took the other for better or for worse, and the duty to cohabit was not lightly to be abandoned. English law did not relieve the spouses of their marital obligations merely because of incompatibility of temperament or unhappiness.¹¹⁶ In *Santos v Santos*,¹¹⁷ it was held that to establish that a husband and wife have lived apart, mere physical separation is insufficient if both the parties still recognise the marriage as subsisting. Proof of the facts in Section 54(1) is no guarantee that the court will dissolve the marriage. This is because, as provided by section 54(2),

¹¹⁵ [1972] 1 All E.R. 587.

¹¹⁶ *Buchler v Buchler* [1947] 1 All E.R. 319.

¹¹⁷ [1972] 2 All E.R.246.

"In considering whether it would be just and reasonable to make a decree the court will 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 thinks fit to attach, but if it should appear to the court that it would be wrong to dissolve the marriage, it should dismiss the petition."

In *Hoe Gan Tai v Fong Chee Yan*,¹¹⁸ it was held that the petitioner's evidence in such cases should normally be accepted in the absence of contradiction and in the absence of any element of inherent improbability. There was no uncontradicted evidence in this case not only of physical violence but of a long continued series of acts carried out by the husband causing not just a reasonable apprehension of danger to the appellant's limb and health but actually causing such danger. The petitioner in this case had therefore proved beyond reasonable doubt cruelty on the part of her husband and therefore there should be a decree of dissolution of marriage.

2.4 GENERAL MATTERS TO BE CONSIDERED BY THE COURT

On a petition for dissolution of marriage it was the duty of the court to inquire, so far as it reasonably could, into the facts alleged and whether there had been any connivance or condonation on the part of the petitioner and whether any collusion existed between the parties.

If the court was satisfied on the evidence:

- (a) that the case for the prosecution had been proved;
- (b) that where the grounds of petition was adultery, the petitioner had not in any way been accessory to, or connived at or condoned the adultery, or where the grounds of the petition was cruelty;

¹¹⁸ [1970] 1 M.L.J 75.

- (c) the petition was not presented or prosecuted in collusion with the respondents; the court could pronounce a decree nisi.

The court was not bound to pronounce a decree and could dismiss the petition if it found that the petitioner had during the marriage been guilty of adultery or if in the opinion of the court the petitioner had been guilty:

- (a) of unreasonable delay in presenting or prosecuting the petition,
- (b) of cruelty towards the other party to the marriage;
- (c) where the grounds of the petition was adultery or cruelty, of having without reasonable excuse deserted or having without reasonable excuse wilfully separated himself or herself from the other party before the adultery or cruelty complained of; or
- (d) where the grounds of the petition were adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as had conducted to the adultery or unsoundness of mind or desertion.

Collusion, connivance and condonation, which were bars to petition for divorce under the previous law are no longer recognised under the LRA. The court's discretion in granting a decree where there were discretionary bars is completely unfettered though it must be exercised according to established principles. In *Blunt v Blunt*,¹¹⁹ Lord Simon L.C laid down that the following five points:

- (a) The position and interest of the children of the marriage who in the long run will probably suffer most from the collapse of the marriage;

¹¹⁹ [1943] A.C 517.

- (b) The interest of the party with whom the petitioner has committed adultery, with special regard to the prospect of their future marriage;
- (c) The question whether if the marriage is not dissolved, there is a prospect of reconciliation between the parties;
- (d) The interest of the petitioner and in particular the interest that the petitioner should be able to remarry and live respectably;
- (e) The interest of the community at large to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social consideration which makes it contrary to the public policy to insist on the maintenance of a union which has utterly broken down.

The principles laid down by Lord Simon were followed by the Malaysian court in *Kathi Rasen v Kathi Rasen*¹²⁰. Even though one party was more to blame than the other the court in the exercise of its discretion could pronounce a decree on the petition and the cross petition. The judge in *Wong Siew Fong v Wong Siew Fong*¹²¹ also referred to the words of Lord Simon in *Blunt v Blunt*, where the primary consideration is to maintain a true balance between respect for the binding sanctity of marriage and the social consideration which makes it contrary to public policy to insist on the maintenance of the union which had utterly broken down. Hepworth J. in *Lee Kah Wah v Cheah Paik Yean & Anor* stated that the facts of this case are very similar to those in *O'Brien v O'Brien*. In that case the Court of Appeal held that the case fell within the words of Lord Simon in *Blunt v Blunt*, and that the right order was for the court to exercise its discretion and pronounce a decree nisi on the ground of adultery and on the cross petition on the ground of desertion.

¹²⁰ [1960] M.L.J 57.

¹²¹ [1964] M.L.J 37.

As to the interest of “either party” to the marriage, in *Mathias v Mathias*,¹²² the petitioner wished to remarry and the wife, would, in all likelihood, be able to find a happy future as another man’s wife, so it was not in the circumstances wrong to dissolve the marriage. It is interesting to note that the general policy or philosophy of the present divorce legislation is to dissolve marriages which have irretrievably broken down as quickly and painlessly as possible.

If at any stage of the proceedings for divorce it appears to the Court that there is a reasonable possibility of a reconciliation between the parties to the marriage, it may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.¹²³ This provision is in pari materia with section 6(2) of the English Matrimonial Causes Act, 1973. The main comment that can be made on this provision is that after the conciliatory body has certified that it has failed to reconcile the parties,¹²⁴ cases of genuine reconciliation after a last minute adjournment reconciliation by the Court will in practice be very rare.

Experience gained in the courts in England and Australia has shown that reconciliation in the sense of reuniting persons who are estranged has little chance of success once divorce proceedings have started.¹²⁵ But adjourning proceedings may be effective in the sense that although expert help may not save the marriage at a late stage of divorce proceedings, it may help parties to resolve issues relating to finance and custody of children with the minimum possible anxiety to themselves and their children.

¹²² [1972] 3 All E.R 1.

¹²³ LRA, section 55(2).

¹²⁴ LRA, section 106.

¹²⁵ Finlay, H.A. and Johnson A.Bissett, Family Law in Australia, Melbourne, Butterworths, 1972, pp. 593-6.

However, it is provided under section 78 of the Act that when determining the amount of maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, one of the matters the Court has to have regard to is the degree of responsibility which the Court apportions to each party for the breakdown of the marriage. The quantum of maintenance ordered to be paid is entirely at the discretion of the Court and the apportionment to each spouse for the said breakdown is merely one of the factors for the Court to consider to enable it to do justice to both sides. The declared object of this provision is stated in the explanatory statement accompanying the Law Reform Bill.

2.5 PROCEDURE¹²⁶

The Divorce and Matrimonial Proceedings Rules, 1980 gazetted on February 7, 1980,¹²⁷ laid down the procedure for obtaining matrimonial relief under the LRA 1976. To a large extent they are similar to the Divorce and Matrimonial Causes Rules, 1953.¹²⁸ In some respects, more detailed provisions have been included in the new rules. The 1953 Rules will be repealed when these new rules come into force but they may continue to apply to such extent as may be necessary to give effect to the transitional provisions and savings in the LRA, 1976.

A rule worth noting is rule 104 which provides:

“Where no other provision is made by any written law or by these rules, the present practice in Malaysia shall remain in force.”

¹²⁶ Personal conversation with Puan Siti Naaishah Hambali, Senior Assistant Registrar, Family and Property Division, High Court, Kuala Lumpur, in March 1991.

¹²⁷ P.U.(A)32/80.

¹²⁸ L.N. 136 of 1953.

The use of the term “present practice” creates some uncertainty as to what other sources may be referred to. Under the 1953 Rules, the procedure followed in England would be applied where there is no provision dealing with the situation. Rule 70 states;

“In any case in which no provision is made by these rules, the procedure applicable to the Supreme Court in England in such cases shall be applied as nearly as the case permits.”

This reference to the English position will presumably form part of the “present practice”. It can be concluded therefore, that under rule 104, English rules of procedure may be relied on where there is no provision here. It is a matter of some concern that rules so necessary for the enforcement of the LRA should have taken four years to be passed.

According to the LRA, every decree of divorce by the Court is in the first instance a decree nisi and it will generally not be made absolute before the expiration of three months.¹²⁹ The waiting period between decree nisi and decree absolute is to give the Attorney General time to show cause against the decree being made absolute.¹³⁰ The abolition of the old bars of divorce (“connivance or condonation on the part of the petitioner and whether any collusion exists between the parties”)¹³¹ make intervention by the Attorney General unusual. In practice, the period after decree nisi is used for the resolution of problems relating to determination by the Court of ancillary reliefs which will involve hearing in chambers normally after decree absolute. If the decree is not made absolute after three months, the party against whom the decree nisi was granted may make an application to

¹²⁹ LRA, section 61.

¹³⁰ Divorce and Matrimonial Proceedings Rules 1980, Rule 50.

¹³¹ Repealed Divorce Ordinance, 1952, Section 9(1).

the Court for an order making the decree absolute or rescinding the decree nisi.¹³²

For divorce, a petition following Form 2 should be filed,¹³³ together with Form P.22 (Certificate from Conciliatory body); Form 5 (Notice of Proceedings); Form 6 (Acknowledgment of Service); Form 7 (Affidavit by Petitioner in support of Petition); and Form 4 (where there are minor children.) For proposed presentation of petition for divorce within two years of marriage under section 50, Originating Application¹³⁴ should be filed accompanied by Form 1 (Notice of Application), and Form 6 (Acknowledgment of Service). For divorce by Mutual Consent, Form 3 (joint petition) should be filed.¹³⁵ Being a joint petition it is therefore not intended to be served on any person. Form 4 (Statement as to arrangements for children) should also be filed if there are children of the marriage. For decree absolute, Notice of application in Form 8 should be filed together with Certificate of making Decree Nisi Absolute (Divorce) under Form 9.

Once a petition has been filed in court with all the necessary documents, the court will return the sealed copies of the petition to be served on the respondent, notifying him of the divorce action. Only after there is evidence of service in the court file, by way of an affidavit of service, will the court proceed with the matter.

In circumstances where the spouse's whereabouts is not known and it is not possible to find the spouse to serve the petition, one may apply to court for the dispensation of service. The court will then fix a date for the hearing.

¹³² LRA, section 6(2).

¹³³ See also Divorce and Matrimonial Proceedings Rules 1980, Rule 3.

¹³⁴ Ibid, Rule 4 and 5.

¹³⁵ Petition must be signed by both parties and their solicitors (if any).

Under exceptional circumstances, the court may, upon application by the parties, reduce the period after which the decree would be made absolute to one month or any period requested. If the divorce is contested, the court may proceed to hear the contested divorce with the parties and the witnesses.

Where both spouses agree to the divorce but are not agreeable on the terms of custody and maintenance or division of matrimonial property, the court may grant the decree nisi nevertheless and adjourn the case to be heard on the disputed matters after the divorce.

If the petition is uncontested, the court will, in the presence of the parties, grant the decree nisi to be made absolute in three months. The LRA empowers the Registrar of the Court with new and additional powers in undefended petitions (and where there are no children of the family) to consign these petitions to the special procedure list after considering the evidence filed by the petitioner and certifying that the petitioner has proved the contents of the petition and is entitled to a decree. After issuing this certificate the Registrar shall fix a day for the pronouncement of the decree by a judge in open court. This special procedure will lead to a quicker granting of decrees. Parties to the petition need not even appear before the judge on the day fixed for pronouncement. This procedure is under Rule 39 of the Divorce and Matrimonial Proceedings Rules, 1980, which is similar to the English Matrimonial Causes Rules, 1977, Rule 48. A way to obtain a simpler divorce where there are no children of the marriage to complicate or delay matters, has yet to be devised. It has to be said that the effect of this special procedure has been to make the judge's function formal and ritualistic.

2.6 RECONCILIATION.

Section 55 of the LRA provides for the establishment of conciliatory bodies as a means of encouraging reconciliation. Subsection (1) stipulates that the provision may be made by rules of court for requiring that before a petition may be presented, the petitioner shall have recourse to the assistance and advice of persons or bodies for the purpose of reconciling the estranged parties to the marriage. This has to be read with section 106, which provides that (except for divorce on the grounds that one's spouse has converted to Islam and divorce by mutual consent) one must first refer the matrimonial difficulty to a conciliatory body which must first certify that it has failed to reconcile the spouses before one can petition for divorce.

In England, solicitors advising clients in matrimonial matters are put under a strict duty to advise them as to reconciliation first before advising them as to divorce.¹³⁶ However, in Malaysia, the LRA goes further. Section 106 provides for a mandatory reference of a matrimonial difficulty to a conciliatory body before the presentation of a petition, unless the exceptions mentioned apply. On the face of it, this would seem to achieve exactly what is designed to do. However, the cumbersome procedure involved in referring a matter to a conciliatory body, its composition and several other factors, prove to be stumbling blocks to attaining the desired objective. Further, section 106 has inadvertently rendered certain other sections of the Act virtually inoperable.

The extent to which the LRA encourages reconciliation can be seen in sub-section 2, where it is provided that although the proceedings for divorce have already commenced, the court has the discretionary power

¹³⁶ Matrimonial Causes Act 1973, section 6 (1), for further details see Report of the Committee on One-Parent Families, Cmnd. 5629, 1974, London, H.M.S.O., see also Law Commission, Reform of the Grounds of Divorce: The Field of Choice, 1966, Cmnd 3123, London, H.M.S.O.

to adjourn the proceedings for such a period as it thinks fit to enable attempts to be made to reconcile the spouses if it appears to the court that there is a reasonable possibility of a reconciliation.

A conciliatory body may be either:

- (a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or
- (b) a marriage tribunal set up for a specified area or district consisting of a Chairman and not less than two and not more than four other members nominated by the Minister; or
- (c) any other body approved as such by the Minister.

A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties, but in the absence of agreement reference may be made to the appropriate marriage tribunal. A conciliatory body to which the matrimonial difficulty has been referred to is given six months to resolve it. It requires the attendance of the disputing parties and shall give each of them an opportunity of being heard and may also hear such other persons and make such inquiries as it may think fit.

If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade the spouses to resume married life, it shall issue a certificate to that effect and may append to its certificate such recommendation as it thinks fit regarding maintenance, division of matrimonial property and the custody of minor children, if any, of the marriage.

As to rules of practice and procedure to be observed during the conduct of the hearings and enquiries, members of these bodies are left entirely on their own as there are no specific rules. However, under Section 55(1) of the Act rules of court may be made. The words

“entirely on their own” are used advisedly as Section 106(5)(c) of the Act stated that:

“No advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.”

As no procedural rules have been formulated under Section 55(1) of the Act for the guidance of these conciliatory bodies, their implementation has been haphazard. In particular, at the marriage tribunals, members are at best guided by common sense rules as to fairness and justice in the conduct of their investigations and inquires. Noor Faridah Ariffin in her paper¹³⁷ presented at the 7th. Malaysian Law Conference, 1983 stated that from the practitioner’s point of view, the implementation of the LRA has given rise to a number of problems, the most pressing of which is the mandatory reference of matrimonial difficulties to a conciliatory body before the presentation of a petition.

The Bar Council recommended that conciliatory procedure should be available after filing of petition. It should be done behind closed doors and the findings must not be revealed to the judge. A simple certificate of outcome should be given to the judge. Section 106 (5)(b) should be amended to state this. The conciliatory body’s power of recommendation regarding maintenance, division of matrimonial property and the custody of children should be deleted. It is agreed, in particular, that the conciliatory body’s power to make recommendations with respect to ancillary matters be deleted.

Ancillary matters are vital issues in any divorce proceedings - issues which should be resolved only after all relevant facts have been

¹³⁷ For further details see Ariffin, 1983.

disclosed to the court under oath. Any recommendations made as to ancillary issues by the conciliatory body will only be after three or four meetings with both parties. If it is agreed that it is purely in the discretion of the members whether to make such recommendation, they must be seriously questioned. Nesarajam's study¹³⁸ revealed that there is a tacit understanding that the Conciliatory Body is not to make recommendations with respect to ancillary issues, as it is felt that the members of the body are not competent on the law relating to such matters.

The Bar Council also recommended that there should be an obligation of secrecy on the part of members of the conciliatory body and a penalty for breach of this. The reason for the first limb of this provision is clear and requires no further elaboration. There are in fact directives from the relevant authorities as to the necessity for secrecy. However, beyond a reprimand, there is no further sanction for this provision. It is felt that the imposition of a penalty on members for breach is inappropriate because of the difficulty of enforcement. It is also felt that a better solution would be for these bodies to draw up their own code of ethics. It is of interest to note that Singapore and Australia have legislated on the issue of the duty of secrecy in relation to the admissibility of evidence of anything said in the course of reconciliation. Section 85(4) of the Singapore Women's Charter 1961 states that evidence of anything said, or of any admission made in the course of an endeavour to effect a reconciliation under this section, shall not be admissible in any Court.

Further recommendations were also advocated by the Federation of Women Lawyers. They laid emphasis on the composition of the conciliatory body. Presently, the bodies are composed of laymen. They

¹³⁸ Sitaravelu, Mary Nesarajam, *Conciliatory Bodies in Klang and Petaling Jaya*, Academic Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, 1983.

are not trained in their burdensome roles of reconciling estranged couples,¹³⁹ neither are there any guidelines as to how to approach their task. It would appear that general directives have been issued by the relevant authorities. However, these deal mainly with procedure. Some districts organise explanatory and briefing sessions prior to the session, but Sitaravelu's study¹⁴⁰ suggested that not very many members of the conciliatory bodies knew about these sessions and some had not even seen the directives. The necessity for secrecy is stressed several times in the directives. It also states that the Body may call and hear any number of people apart from the couple to help in their investigations. Nowhere in the directive are there guidelines on how to counsel. It is felt that the task of reconciliation, should be undertaken by trained personnel. It is timely for the relevant authorities to recognise that the prescribed role of the conciliatory body is one that requires training and experience.

The Federation of Women Lawyers also recommended that the administration of the conciliatory bodies should be removed from the National Registration Department, whose ordinary functions do not include such activities. The ideal solution, and this again underlines its importance, is for the setting up of a family court. The whole system of counselling should become part and parcel of the family court infrastructure. A study of countries which have a family court, notably Japan and the United States in particular, the Los Angeles Family Court and the Toledo Family Court, which provide for conciliatory services, should be carried out in depth and proposals for its urgent implementation in Malaysia be made.¹⁴¹

¹³⁹ As pointed out by a woman politician, Kee Phaik Cheen, the present marriage tribunals are run by volunteers with questionable qualifications. Madam Kee suggest the National Unity and Community Development Ministry to send personnel overseas to be trained as marriage counselors.

¹⁴⁰ Sitaravelu, 1983.

¹⁴¹ For further details see Chapter 6, pp.460-491.

Another frequent complaint is that the composition of the Conciliatory Bodies is constantly changing so that the parties have to keep repeating their problems each time they attend. The time lag between the first meeting and the next cannot possibly help as any kind of counselling sessions should really be intensive, frequent and continuous within the six month period. The members of the conciliatory bodies are in fact volunteers or nominees. They receive no remuneration, compensation, nor even travelling allowance. The obvious advantage of having trained personnel to take on the counselling as a paid job, is that counselling can be undertaken on a frequent and more regular basis and not merely when all the members of the panel are available.

E.E. Sim, the Judicial Commissioner of the Family and Property Division, suggested that the onerous task of these voluntary bodies be made available only if it appears to the Court that there is a reasonable possibility of reconciliation between parties to the marriage during the course of the hearing. During the adjournment by Court although expert help from conciliatory bodies may not save the marriage, with the help of trained officers in the Social Welfare Department this period may give time to parties to the marriage to resolve issues relating to custody of "children of the family" as defined under Section 2 of the Act.

He also agreed with the other recommendation of the Bar Council that conciliatory bodies should have no power to make recommendations regarding maintenance, division of matrimonial property and the custody of minor children of the marriage. To continue to allow them to do so would, among other things, be treating the Matrimonial Court like a rubber stamp.¹⁴²

¹⁴² Sim, Ewe Ong, "Conciliatory Body under Law Reform (Marriage and Divorce) Act, 1976", Malaysian Current Law Journal, 1982, p.339.

Anantham in his paper entitled Reforms of the Law Reform (Marriage and Divorce) Act, 1976 suggested the abolition of Section 106(1). The section as presently worded suggests that no party to a marriage can file a petition unless he/she has first referred the matrimonial difficulty to a conciliatory body. Accordingly, a petitioner cannot file a divorce petition even if the respondent is in possession of a certificate from the conciliatory body. This could not have been the intention of Parliament as the conciliatory body is only required to issue one certificate in respect of any one marriage. He also contended that Section 106(1) of the Act does not serve the intended purpose. Very often, it is the party who wants the divorce (but has been advised by his/her solicitor that a petition cannot be filed without a certificate) who applies to the conciliatory body. Accordingly, the intention behind the application is not to seek the assistance of the conciliatory body to resolve his/her matrimonial differences but merely to get a certificate.

Furthermore, as the intention of the applicant is to secure a certificate at the end of the six month period, the applicant is normally advised either not to attend the joint conciliatory meetings convened by the body or to inform the body at such meetings of his/her desire to end the marriage. Hence, it is apparent that section 106(1) of the Act does not serve the intended purpose. On the contrary, it effectively serves to delay the filing of a divorce petition.

Anantham also suggested that if Section 106(1) is to be retained, then, section 106(1)(vi) should be amended. More often than not, the dispensation is sought under sub-section (vi). Unfortunately, there are no provisions in the Act as to what constitutes “exceptional circumstances”. Accordingly, legal practitioners have difficulty in advising parties eager to obtain a divorce as to which is faster, seeking dispensation from the court or applying to the conciliatory body.

In so far as both the lawyer and the client are satisfied that the marriage is over, it seems best that an application for dispensation be made to the court. However, should the application be dismissed some three to six months after the intending petitioner first visited his/her lawyer, the dismissal of an application for dispensation would place the plans of the intending petitioner for an early divorce behind schedule by this period of time. Anantham added that, to make matters worse, the intending petitioner will have to start afresh by applying to the conciliatory body for a certificate before being in a position to file a petition. As a solution, he recommended that section 106(1) be amended by the inclusion of provisions as to what constitutes exceptional circumstances. Essentially, parties above a certain age or who have been married for ten years or more should be exempted from having their disputes sent to a conciliatory body. Alternatively, this section should be amended to allow for the filing of a petition subject to no decree nisi being granted unless the petitioner or respondent obtains dispensation or produces a certificate from the conciliatory body prior to the granting of the decree nisi by the court.¹⁴³

2.7 CONCLUSION

The LRA of 1976 came into force in 1982.¹⁴⁴ This much-delayed event effected the long-awaited changes to the family law applicable to non-Muslims in Malaysia. Regarded as a milestone in law reform, the Act abolishes polygamy,¹⁴⁵ prescribes a minimum age of eighteen

¹⁴³ Anantham, K. "Reforms of the Law Reform (Marriage and Divorce) Act 1976," Seminar on Family Law, Faculty of Law, University of Malaya, 1990.

¹⁴⁴ Act 164 as amended by the Law Reform (Marriage and Divorce) (Amendment) Act, 1980 (Act A498).

¹⁴⁵ LRA, section 5.

years for marriage¹⁴⁶ and provides for compulsory registration of all marriages.¹⁴⁷

It is clear from the summary of the main provisions of the Act relating to divorce that the Act has effected a reform of the law of marriage and divorce in conformity with modern thinking on these subjects. A general postmortem of the divorce clauses in the LRA immediately reveals that it makes for potentially easier divorces. The LRA grants a divorce decree based on mutual consent with proper safeguards for the wife and children of the family.¹⁴⁸ This factor makes collusion irrelevant.¹⁴⁹

There is a reduction of the period of restriction on filing petitions for dissolution from three years under the previous law to only two under the LRA.¹⁵⁰ The Court may even allow presentation of a petition within two years on the ground of exceptional circumstances or hardship suffered by the petitioner,¹⁵¹ whereas under the previous law, the grounds were “exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent.”¹⁵² This may be justified in a way that if a marriage cannot work from the very beginning, it will be much better to end the mistake rather than to continue a false tolerance of each other.

There is also seemingly unrestrained access to a joint petition by mutual consent under section 52. The idea behind easier divorce is also

¹⁴⁶ LRA, section 10.

¹⁴⁷ LRA, sections 25-27, 31, 35.

¹⁴⁸ LRA, section 52.

¹⁴⁹ Section 91 of the repealed Divorce Ordinance, 1952.

¹⁵⁰ LRA, section 50(1).

¹⁵¹ LRA, section 50(2).

¹⁵² Divorce Ordinance, 1952, section 13.

to reduce the bitterness and strife that normally follow divorce proceedings. If the couple mutually agree to split up, or even if one spouse merely petitions on the ground of irretrievable breakdown of marriage by proof of certain facts, there will be less need to wash dirty linen in public and less embarrassment for the children.

The LRA also gives a spouse the right to petition for divorce on the ground of conversion by the other spouse to Islam. The 1980 amendment added a provision empowering the court to make orders with regard to the maintenance and custody of children as well as the maintenance of either spouse in the event of such a divorce being granted.¹⁵³ This in fact means that although the Act as a whole does not apply to Muslims, persons who have converted to Islam after contracting a marriage which is subject to the Act, can be ordered to maintain their spouse of that marriage even though by their new personal law, that is Islamic law, the said marriage may have ceased to subsist on the conversion by one of the parties to Islam and the subsequent failure of the other party to do so. This provision has thus solved a long-standing problem faced by non-Muslim wives who were unable to get relief in the Shariah Courts or bring actions under the law applicable to non-Muslims against husbands who had converted to Islam.

The LRA has also put Malaysia close to the law in England,¹⁵⁴ which recognises irretrievable breakdown of marriage as the sole grounds of divorce.¹⁵⁵ There can be no finding of irretrievable breakdown without proof of one or more specific facts, which may be summed up as adultery, intolerable behaviour desertion and separation.¹⁵⁶ These

¹⁵³ LRA, section 51.

¹⁵⁴ English Matrimonial Causes Act, 1973.

¹⁵⁵ LRA, section 53.

¹⁵⁶ LRA, section 54.

are reforms from the previous position which provided for the traditional grounds for divorce under the Divorce Ordinance, 1952.

The LRA has also gone a long way to achieve its object of enabling “the empty legal shell to be destroyed with the minimum bitterness, distress and humiliation,”¹⁵⁷ but it is still probable that defended proceedings will generally be attended by the bitterness, distress and even humiliation which the Act in the first place was to overcome.¹⁵⁸ With the abrogation of collusion as a bar to divorce, the parties are now free to reach agreement or arrangement on questions relating to maintenance or provisions for any children of the marriage no matter which of the four guidelines the petitioner proceeds upon.

We have seen that in spite of the distinct retreat of fault as a cause of divorce, the notion of fault has not been totally eliminated. In England, the irretrievable breakdown of the marriage is the only grounds for divorce since the Divorce Reform Act of 1969.¹⁵⁹ The Malaysian law of divorce extends the grounds of divorce not only to the irretrievable breakdown of marriage but also to mutual consent¹⁶⁰ and conversion to Islam.¹⁶¹

The testimony of a cross-section of views advanced by various critics towards the Divorce Reform Act, 1969 showed that its chief criticism is that it is a compromise between the old law based on matrimonial fault and the new concept of irretrievable breakdown of marriage which perpetuates many of the defects of the former without

¹⁵⁷ Law Commission Report, Reform of the Grounds of Divorce: The Field of Choice, para 15 (cmd. 3123), London, HMSO, 1966.

¹⁵⁸ See Bromley, P.M, and Lowe Family Law, 8th ed., London, Butterworths, 1992, p.227-8.

¹⁵⁹ Incorporated in the Matrimonial Causes Act, 1973.

¹⁶⁰ LRA, section 52.

¹⁶¹ LRA, section 51.

necessarily producing the advantages of the latter. The first three guidelines to the proof of breakdown in marriage as stated in Section 54 of the LRA will still raise questions of matrimonial misconduct. In addition, the court will still have the duty to consider the conduct of the parties whenever it must determine matters of financial provisions, property distribution, or welfare of the children. To this extent, distress, bitterness and humiliation are likely to remain part of divorce proceedings for some time to come. This can be reflected by making a brief appraisal of the practical working of similar divorce laws in England a few years after the Divorce Reform Act, 1969. A considerable amount of literature has been written on this. For instance, Finlay criticized the dichotomy of interpretation which began to emerge four years after the Divorce Reform Act, 1969, came into operation. He submitted that even where irretrievable breakdown has been found to exist, dissolution was refused in certain cases not because of the law but because its provisions have been interpreted and applied in accordance with traditional methods of adjudication derived from a fault-based philosophy that has not yet been unequivocally discarded. He succinctly compared the "somewhat uneasy compromise" characterised by the Act as "much old wine in the new bottles."¹⁶² In adopting the English divorce provisions based on irretrievable breakdown, the LRA might just as well have adopted its defects too.

The court cannot grant a decree nisi under the existing LRA when the parties to the marriage are agreeable to the dissolution of the marriage but have not reached agreement on questions of maintenance and custody, the rationale presumably being that the wife and the children may suffer if the husband is granted a decree nisi when no proper

¹⁶² Finlay, H.A., and Baily-Harris, R.J., Family Law in Australia, 4th ed. New South Wales, Butterworths, 1989, pp. 117-121, see also Law Commission Report, 1988.

order has been made to protect the interests of the wife and the children.

There is no justification for keeping alive a marriage for the duration of time it takes a court to decide on the rights of the parties on maintenance and the distribution of matrimonial assets on a permanent basis. It has three distinct disadvantages. First, either for financial reasons or to avoid blame for the failure of the marriage, the parties very often may stay together pending a decision of the court. The “forced” living together of two unhappy adults can lead to violence within the marriage. Secondly, in so far as the resolution of the issue of permanent maintenance and distribution of matrimonial assets may take as long as two years, it is highly undesirable that the children should be forced to live with two unhappy parents for such a long period of time. Thirdly, the parties may be compelled to indulge in protracted and expensive divorce proceedings when the dispute is only over ancillary relief.

It is therefore submitted that this section be amended to allow the courts to grant a decree nisi even if the parties only agree to the dissolution of the marriage but not on the ancillary issues. This will not work unfairly as sufficient legislation exists in the form of the Guardianship of Infants Act, 1961 and the Married Women and Children (Maintenance) Act, 1950 which enable the wife to obtain custody of the children and adequate maintenance pending resolution by the court of the issue of permanent maintenance and distribution of matrimonial assets.

The Act has also introduced a new feature to divorce proceedings in Malaysia, which is the requirement of mandatory reference to a conciliatory body before petitioning for divorce.¹⁶³ The Act provides

¹⁶³ LRA, section 106.

for attempts to be made to reconcile the estranged spouses before a petition for divorce can be presented; and also for the adjournment of court proceedings when there remains a reasonable probability of success in bringing the spouses together.¹⁶⁴ Since the LRA came into effect on 1st. March, 1982, there has been a public outcry over the requirement that parties must go through conciliatory proceedings before they can file a petition for divorce.

Although designed to encourage reconciliation, it is doubtful if section 106 will achieve its aim because the section itself provides for a variety of circumstances in which the requirement can be dispensed with. Some of the permitted exceptions will defeat the very purpose of the provision, for example, the exception in paragraph (iii) "where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend," and in paragraph (vi) "where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable."

If the ten years of experience of the English provision are anything to go by, the Malaysian provision is likely to be a failure, although the more active role of the court may improve its chances. However, since the Malaysian divorce court is required by law to "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 England acts and gives relief",¹⁶⁵ there may be some useful lessons to be learned from English practice. The English provision is based on the practice in Australia,¹⁶⁶ where there is little evidence to suggest that it has succeeded in achieving reconciliation.

¹⁶⁴ LRA, section 55 and 106. This provision is in pari materia with section 6(2) of the English Matrimonial Causes Act, 1973.

¹⁶⁵ LRA, section 47.

¹⁶⁶ O'Donovan, Katherine, Conciliation and Reconciliation on Divorce in Malaysian Legal Essays, edited by M B Hooker, Malaysian Law Journal, Kuala Lumpur, 1986 p.40.

Only time will tell how successful this innovative set-up of conciliatory bodies will be in reconciling parties. It has been stated that their setting-up was a futile effort, that it will not work in Asian societies and is, therefore, undesirable. In Malaysian society, conciliatory efforts would have been exhausted by the couple's parents and relatives before the parties petition for divorce. In some cases religious institutions in Malaysia also assume an important role in reconciling estranged parties. However there are no formal structures since Malaysian society is such that few are prepared to talk to strangers and to express their intimate feelings. It might be better if this hurdle of a conciliatory body were removed from its present pre-petition position to a position after a petition is filed? This suggestion deserves serious thinking.

CHAPTER 3

THE MUSLIM DIVORCE AND ITS LAW IN THE FEDERAL TERRITORY OF KUALA LUMPUR

3.1 INTRODUCTION

In 1984, the Islamic Family Law Act (Federal Territory) 1984 (IFLA) was enacted to regulate divorce in Kuala Lumpur only.¹ It repeals various provisions² of the Administration of Muslim Law Enactment, 1952,³ Act A 206, of Selangor that had been made applicable to Kuala Lumpur, when it became a Federal Territory in 1974.⁴ Before that, amendments were made to the provisions of the Administration of Muslim law Enactment, 1952, to extend its applicability to Kuala Lumpur. Unfortunately the only amendments made involved the word “The Yang DiPertuan Agung” being substituted for “Sultan” and the “Federal Territory” being substituted for “Selangor”. Other than these slight amendments, the provisions of the Administration of Muslim Law Enactment, 1952, had been adopted and enforced in Kuala Lumpur in full before the IFLA came into force.⁵

¹ IFLA, section 1.

² IFLA, Parts VI, VII, sections 155, 156, 158, 159, 160, and para (n) of section 178; section 135.

³ P.U.(A) 44/74.

⁴ The administration of Muslim Law Enactment, 1952 (Selangor Enactment No.3 52) is extended to Federal Territory (P.U(A) 44/74, Act A 576 84, P.U (A) 390 81.

⁵ The Administration of Muslim Law Enactment 1952 of Selangor was modified by the Federal Territory (Modification of Administration of Muslim Law Enactment Order 1974 made pursuant to Section 6(4) of the Constitution (Amendment)(No.2) Act 1973 and in force in Kuala Lumpur by virtue of Section 6(1); IFLA, section 2.

The Islamic Family Law Act (Federal Territory) 1984, Act 303⁶ is, as its long title states, an Act to enact certain provisions of the Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected with family life. This attempt at codification is a welcome move since the Islamic law is complex and at times has to be traced from several different sources. However, this codification is not complete and there are several sections of the Act that still refer to the Hukum Shara'.⁷ This means that the primary sources of Islamic law will still have to be referred to for a full interpretation of some provisions. Nevertheless, the effect of IFLA is to simplify and to a certain extent improve the administration of family law in Kuala Lumpur.

IFLA was the result of an attempt made by the Federal Government to have a model law for the administration of Islamic Family law in Malaysia. In drafting the law, the example of the Law Reform Bill appears to have been used but certain modifications were made to bring the law into line with the teachings of Islam. There was also some borrowing from legislation in Singapore, Egypt, India and Pakistan. The draft was then submitted to the Conference of Rulers and when it was approved in principle, sent to the individual states for their comments and adoption. In Kuala Lumpur a committee was set up to consider the legislation, which had among its members the Mufti, The Chief Qadhi, Officials of the Religious Department, two academics from the University of Malaya and a representative of Wanita UMNO⁸. The legislation produced by this committee was enacted as

⁶ Hereafter abbreviated as IFLA.

⁷ Hukum Shara' means the laws of Islam in any recognised sects; IFLA, section 2.

⁸ The ladies wing of the United Malays National Organisation (UMNO), the ruling party in Malaysia.

the Islamic Family Law (Federal Territory) Act, 1984 (Act 303).⁹ It is pertinent to note that IFLA represents the fruit of an attempt to unify and reform the existing law through a draft model presented to the Conference of Rulers.¹⁰ The main thrust of IFLA is the “tidying-up” of the administrative machinery,¹¹ a move that was long over-due. These needs have been met in the new legislation.¹² However, these legislative amendments are of little use if the will to enforce them does not exist.

Part V of IFLA deals specifically with the dissolution of marriage. Before that, the Selangor Muslim Law Enactment, 1952, which had been adopted in full, was used. However, the 1952 Enactment is only a law of general application. In Selangor, besides this main enactment, the Rules on Marriage, Divorce and Reconciliation, 1967, which is subsidiary legislation laying down the various rules and procedures of marriage and divorce were also applied. The Rules of Marriage, Divorce and Revocation, 1967 do not apply in Kuala Lumpur because this legislation has not been made under the main enactment. Thus, there were no specific rules and procedures to guide the qadhis in conducting marriage and divorce in Kuala Lumpur. The qadhis usually exercised their discretion in this and the procedure they followed was still that prescribed by the Selangor rules despite the fact that there was no legal enforcement.¹³

⁹ Ibrahim, Ahmad bin Mohamed, "Recent Legislation on Islamic Law in Malaysia", Law Seminar, International Islamic University, Petaling Jaya, July, 1986, pp. 26-27.

¹⁰ Islamic law falls within the legislative authority of the States, hence the need for the Ruler of each state's approval.

¹¹ See Parliamentary Debate (Dewan Rakyat) December, 1986.

¹² Siraj, Mehrun, Family Law, Survey of Malaysian Law, 1984, p.162.

¹³ Haji Haron, Maznah bt., Muslim Marriage and Divorce in the Federal Territory of Kuala Lumpur, Academic Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, p.96.

Before examining the provisions relating to divorce under these two laws, a brief discussion on divorce in Islam will be made as a preface to the main discussion in this chapter.

3.2 DIVORCE UNDER MUSLIM LAW

In Islam, the family is the primary and essential unit of social organisation.¹⁴ Its proper constitution and functioning is therefore necessary for the health and happiness of society and this is attained through the institution of marriage. Muslim jurists unanimously declare it both a sacred and a social contract. It is considered sacred because marriage is declared and regulated by the injunctions of God. And it is also social because on it depends the constitution and well-being of society.¹⁵ Marriage combines the nature of both ibadat (worship) and muamalat (social relations).¹⁶ Because marriage in Islam is the basis of society, the means by which the race is perpetuated, it has always been viewed by Sunni Muslims as a permanent institution. The Qur'an has enjoined a formal permanent contract between man and woman as the basis of matrimonial life; and all kinds of temporary sexual contact between man and woman have therefore been forbidden.¹⁷

According to Sunni when the parties enter a marital contract, the intention must be clear to make the bond permanent. However, to insist on the permanent character of marriage does not mean that the marital contract is absolutely indissoluble. In spite of the sacred

¹⁴ Hassan Ibrahim Hassan, Islam: Religious, Political, Social and Economic Study, Beirut, 1967, p.255.

¹⁵ See Siddiqi, Mohammad Mazheruddin, Women in Islam, Lahore, Institute of Islamic Culture, 1966, pp. 50-51; Abd-Al Ati, Hammudah, Islam in Focus, Indiana, American Trust Publications, 1977, p. 179.

¹⁶ Esposito, John, Women in Muslim Family Law, New York, Syracuse University Press, 1982, p. 16.

¹⁷ Marghinani, Hedaya translated by Charles Hamilton, Lahore, Sh. Muhammad Ashraf, 1957, p.73.

character of the marriage-tie, Islam recognises the necessity of keeping the way open for its dissolution by divorce. Islam does not recommend the sacramental nature of marriage that renders the marriage indissoluble and would cause great hardship to both the parties if marriage proved to be incompatible.¹⁸

A marriage unites two different individuals by love and affection and two different families by a bond of kinship. When these objects, among others, fail, the continuation of a marriage may not be in the interest of the spouses. Under such circumstances, it is permissible to break the marriage bond. As stated by Wilson, in the Muslim system of law, divorce or dissolution of the marriage is a “makeshift” solution for the purpose of avoiding the evil consequences of an unhappy marriage.¹⁹

As pointed out by Abdur Rahim, marriage under Muslim law partakes of the nature of both a sacrament and a civil contract.²⁰ Consistent with this view, provisions were made for legal action to protect the rights of each partner if the terms of the contract were not met. Under such circumstances, an attempt is first to be made for reconciliation by referring the matter to arbitration. Thus it is laid down in the Quran,

“And if you fear a breach between the two (husband and wife), then appoint an arbiter from his (husband’s) people and an arbiter from her (wife’s) people. If they desire agreement, Allah will effect harmony between them.”²¹

¹⁸ Al Faruqi, Ismail R, Islam, Niles, Illinois, Argus Communications 1979, p.48-9; see also Hanifi, Manzoor, A Survey of Muslim Institutions and Culture, Lahore, Sh. Muhammad Ashraf, 1962 p.236.

¹⁹ Wilson, R.K, Anglo-Muhammedan Law: A Digest, London, 1930, p.53.

²⁰ Rahim, Abdur, The Principles of Muhammadan Jurisprudence, Lahore, PLD Publishers, 1958, p.327.

²¹ Al Qur’an, Surah An Nisa: 35.

According to the spirit of Islamic law, the marriage may only be dissolved if disagreement continues and effort to bring about a reconciliation meet with failure.²² Judicial separation in which the aggrieved spouse is allowed to live separately from the other without the marriage being dissolved is an institution not recognised by Muslim law. The reason for this is that the objects of marriage are not restored by a judicial separation, while it may result in immorality which in Islam is an evil far greater than divorce.

Muslim jurists have held different views regarding divorce in Islam. According to some, divorce is generally prohibited but is permissible in cases of necessity. It is stated in *Al-Radd Al-Mukhtar*, dealing with Hanafi law, that although divorce is forbidden, it becomes mubah (permissible) for certain reasons. When there is no cause for separation, there is no necessity for release. Thus, if there is no legal ground for talaq, then it must be considered unlawful. This is based on the principles in the Quran that says,

*“So if they (your women) obey you, seek not a way against them.”*²³

It is stated that Abu Hanifah believe that if there is no urgent need for release from the marriage-tie, the divorce is haram (forbidden).²⁴ Divorce without good cause is a specific injury that is not allowed under Islamic law. This is based on the sayings of the Prophet:

*“There must be no injury and no ill-treatment in Islamic.”*²⁵

²² Ahmad, K.N, The Muslim Law of Divorce, Islamabad, Pakistan, Islamic Research Institute, 1972, p.4.

²³ Al Qur'an, Surah An Nisa': 34.

²⁴ Hj. Ibrahim, Hj Said bin, Persekutaran Talak dan Rujuk, Simposium Rumah Tangga Bahagia, Institute Technology Mara, 1987.

²⁵ Anderson, 1950, p.179.

The Qur'an enjoins some forbearance, as Ibrahim showed when he analysed these verses chronologically and wrote that the first Muslim regulation about talaq seems to be the prohibition to use it for extortions from the woman.²⁶ He quoted Surah An Nisa' verse 24:

"O Believer, it is unlawful for you to inherit women against their will, neither debar them, that you may go off with part of what you have given them, except when they commit a manifest indecency. Consort with them honourably; or if you are averse to them, it is possible you may be averse to a thing, and God set in it much good."

Traditional jurists regarded marriage as a civil contract, so it follows that divorce is a simpler matter in Islam than it is in other religions and legal systems. However, some modernist Islamic scholars lay great emphasis on those Quranic verses and traditions in which divorce is looked upon with great disfavour. Furthermore, they tend to recommend some means of settlement for family disputes other than of divorce.

The Prophet (s.a.w) is reported to have said that if any woman asks her husband for divorce without any strong reason the odour of paradise will be forbidden to her.²⁷ These negative attitudes toward divorce in Islam are also clearly reflected in the opinions of Hanafi jurists. As the Hedaya says, divorce is:

*"...a dangerous and disapproved procedure as it dissolves marriage, an institution which involves many circumstances as well of a temporal as of a spiritual nature, nor is its property at all admitted, but on the grounds of urgency of release from an unsuitable wife."*²⁸

²⁶ Hj. Ibrahim, 1987.

²⁷ Ali, Maulana Muhammad, A Manual of Hadith, Lahore, The Ajmadiyya Anjuman Ishaat Islam, 1944, p.284.

²⁸ Marghinani, 1957, p.73.

From the above, it can be seen that in Islam, divorce, when not absolutely necessary, is strongly disapproved of and discouraged. This has been done in two ways, namely, by condemning divorce except in certain circumstances and commending forbearance and the continuation of marital relationship even in cases of disagreement and some suffering. Divorce is permitted as a matter of necessity for the avoidance of greater evil which may result from the continuance of a marriage. Every attempt should be made to maintain a marriage but once the marriage becomes a failure, Muslim law allows the parties to separate from one another. Therefore, divorce in Islam serves as a safety valve in cases where the spouses can no longer live in harmony and where the very purpose of marriage would be defeated if they remained together.

3.3 DIVORCE LAW IN KUALA LUMPUR

There are various forms of divorce practised under Muslim law but the more common ones in Kuala Lumpur are: talaq, khulu', fasakh, and ta'liq. These are the forms of dissolution of marriage that are recognised under IFLA. There are three more forms that are described by classical jurists, but have little practical relevance now:

- (a) Zihar - that is when the husband compares his wife to a relative within a prohibited degree, for example to his mother.²⁹
- (b) Vow of Continence (Ila), that is when the husband makes an oath of abstention from the wife for four months or more.³⁰
- (c) Imprecation (lian) where the husband affirms under oath that the wife has committed adultery and that the child born of her is not his, and she affirms under oath the contrary.³¹

²⁹ This is based on Al Qur'an, Surah Al Mujadilla, verse 1-4.

³⁰ This is based on Al-Qur'an, Surah Al-Baqarah: 226.

³¹ This is based on Al Qur'an, Surah An-Nur: 6-9.

3.3.1 Talaq

The most common manner of divorcing a wife by a Muslim husband is by a pronouncement of a talaq or repudiation against her. The word talaq is an Arabic word derived from a root word “tallaqa” meaning “to release from a tether”. Talaq, in its primitive sense, therefore means dismissal. In law, it signifies the dissolution of a marriage.³² The institution of talaq finds its sanction in the Qur’an.

“Thus when they fulfilled their term appointed, either take them back on equitable terms or part with them on equitable terms.”³³

The instructions of the Prophet (s.a.w) also serve as an authority for the recognition of divorce by talaq. The Prophet (s.a.w) is reported to have said that:

“The most detestable of all things permitted by God is al talaq”³⁴

As discussed above, it is obvious that talaq, though permissible is strongly condemned in Islam. However once it is pronounced by a husband who is aqil, that is of sound mind and mature age, it is valid irrespective of whatever the cause may have been. No particular formula or words have been prescribed by the Sunni law for pronouncing a divorce. The pronouncement of talaq according to Shafi’i school, if it is in explicit terms (sarih) and therefore indicates a clear intention to dissolve a marriage, is valid and effective. Explicit terms include repudiation, separation and dismissal. If on the other hand, the pronouncement of talaq is in implicit terms (kinayat), then

³² Marghinani, 1957, p.72.

³³ Al Qur’an, Surah At-Talaq:2.

³⁴ Muslim Ibn Al-Hajjaj, Sahih Muslim, Vol IV, translated by Abdul Hameed Siddiqi, Lahore, Sh. Muhammad Ashraf, 1976 p.756.

the husband must really intend to repudiate his wife. Any words can serve the purpose so long as they clearly denote the husband's intention to divorce his wife.

A husband may pronounce one, two or three talaqs (severally or jointly) to his wife. Any other declarations that are implied, and with the intention that the husband divorces his wife, are considered as divorce by one talaq. For example, when the husband says "I have released you" or "go back to your family", this may or may not constitute divorce. The verdict depends on the husband's intention. If his intention is to divorce his wife it is considered as a divorce by one talaq. Talaq may be given verbally or in writing. In the Kedah case of *Haji Hanafiah v Rokiah*,³⁵ the Appeal Board held that a written talaq read by the husband was ineffective since he had no intention to divorce his wife.

Under the Hanafi school of law, the talaq is effective even when uttered under compulsion or in jest. The talaq is also effective if uttered when the husband is drunk.³⁶ Where as under the Shafi'i school, a talaq extorted under violence has no legal effect, unless it duly appears that the husband already had the intention of repudiating his wife. When a person has temporarily lost his reason through liquor or medicine, according to the majority of Shafi'i's opinion, he is nonetheless capable of pronouncing talaq.³⁷ Divorce may be pronounced before or after the consummation of marriage. Regarding repudiation prior to consummation, the Quran says:

³⁵ [1970] 2 J.H p.103.

³⁶ Marghinani, 1957, p.76.

³⁷ Nawawi, Yahya ibn Sharif, Minhaj-et-Talibin, A Manual of Muhammadan Law According to the School of Shafi'i, translation by E.C Howard, London, W.Thacker, 1914, p. 330.

“O You who believe! When you marry believing women, and then repudiate them before you have touched them, no period of iddah have you to count in respect of them, so give them a present and set them free according to decent custom.”

The Hanafi classify the talaq according to the number of times it is pronounced and the circumstances applying, viz:

- a) talaq al Sunnah, that is the repudiation which conforms with the dictate of the Prophet (s.a.w) and therefore approved and;
- b) talaq al Bid'ah, that is, the repudiation which does not conform with the dictate of the Prophet (s.a.w) and is regarded as “bid'ah” or innovated and therefore not approved.

The talaq al-sunnah is the only mode that is plainly recognised by the Quran, so it is regarded as being the most regular and proper mode of repudiation. It is of two kinds; ahsan (most laudable) and hasan (laudable).

- (i) Ahsan repudiation is where the husband repudiates his wife with a single sentence during the period of her tuhr (purity) where he has not had sexual relations with her and then leaves her untill the expiry of her iddah (waiting period). This mode of divorce is termed the most laudable for two reasons. First, because the companion of the Prophet (s.a.w) esteemed most those who gave no more than one divorce until the expiry of the iddah, as holding this to be a more excellent method than that of giving three divorces, by repeating the sentence on each of the two succeeding tuhr or periods of purity. Secondly, because in pursuing this method the husband leaves it still in his power, to restore his wife, if he should be so inclined, by a reversal of the divorce during her iddah. This method is moreover, the least harmful to the woman, as she remains a lawful wife.³⁸

³⁸ Marghinani, 1957, p.72.

- (ii) Hasan; the hasan form is where a husband repudiates a wife by three sentences of divorces, in three tuhrs. Each of these repudiations should have been made at a time when no carnal connection has taken place during that particular period of purity. On the third repudiation the talaq becomes irrevocable and final.

a Talaq al-Bid'ah.

This is the opposite form to the talaq al-sunnah. The very name “bid’ah” signifies its irregularity and it is therefore a disapproved form of talaq, as it does not comply with the direction of the Sunnah and finds no sanction in the Quran. It is considered as bid’ah to repudiate one’s wife during her menstruation periods or during her purity but after having had intercourse. It is also regarded as bid’ah (a) to repudiate one’s wife with three talaqs in a single period of purity whether in one sentence or in three sentences; (b) to divorce with one single but irrevocable talaq either during the period of purity or even at other times.

The Maliki and Hanbali schools do not regard the form of repudiation, which the Hanafi school term the “hasan” form, as al-sunnah. On the ground that divorce being in itself a dangerous and disapproved procedure, it is only because of the urgency of release from an unsuitable partner that the law gives sanction to a divorce, and this urgency is fully answered by a single tuhr, after which the woman should be left till the expiry of the iddah.

It must be noted that the Shafi’i school of law as followed in Malaysia divides talaq into two kinds, that is talaq raj’i or revocable divorce and talaq bain or irrevocable divorce. Talaq has three stages before it becomes final and irrevocable, with each stage consisting of a single divorce. The first two divorces or repudiations are revocable in the sense that a husband is allowed to revoke the divorce by the process

known as ruju' (revocation of divorce). In such a case, there is no need for a fresh contract of marriage if the wife is still in her iddah.³⁹ This is because, during the iddah period, the marital rights do not cease, otherwise, a fresh contract of marriage is essential. This provision is based on the Quranic ruling:

*“and their husbands have the better right to take them back in that period if they wish for reconciliation” and “Repudiated women shall wait concerning themselves for three monthly periods.”*⁴⁰

By the third talaq however, the wife becomes decisively divorced and the talaq is irrevocable. This is based on the Quranic ruling that “A divorce is only permissible twice: after that the parties should either hold together on equitable terms or separate with kindness.”⁴¹

Thus, it can be seen that in this form of divorce, it is necessary to repeat the declaration of divorce three times in three different tuhurs and to abstain from sexual intercourse with the wife during the whole of this period. The divorce becomes absolute and irrevocable on the pronouncement of third divorce unless revoked in the meantime. In fiqh terminology it is called irrevocable divorce of major degree, that is talaq bain kubra, and as a result of it, the husband cannot re-enter into a marriage contract with the same wife, unless she has married and has been divorced from him or the second husband has died.⁴²

³⁹ Iddah literally means counting or numeration. In Islam, it means the period of time after a marriage is dissolved before the wife can marry again. The period refers to three periods of menstruation and is calculated to be three months and ten days in Malaysia.

⁴⁰ Al Qur'an, Surah Al Baqarah :228.

⁴¹ Al Qur'an, Surah Al Baqarah: 229.

⁴² Hj. Ibrahim, 1987.

According to Naser, this kind of talaq has resulted in many abuses of Quranic regulations. First, it bypassed the waiting period (iddah) that the Quran had intended for reconciliation. Furthermore, since this form of divorce is irrevocable, remarriage was impossible without an intervening marriage of the wife to another man. Among the practices that resulted was that of tahlil (making lawful). Its aim was the circumvention of the impediment to remarriage resulting from a triple repudiation. The former (divorced) husband would arrange the marriage of his former wife to another man (muhallil) with the understanding that upon consummation (real or pretended) the second man would then divorce her. Only then would the former husband and wife be free to remarry.⁴³ Such a process is also practised in Malaysia and is well known as "Cina Buta".⁴⁴ Some legal scholars, such as Ibn Taimiyya condemned tahlil as an abuse of the spirit of the law and thus invalid.⁴⁵

Therefore, it can be seen that Muslim law, while it permits divorce, insists that there shall be some guarantee that the husband or the wife is not acting from caprice or frivolity or on the impulse of a momentary provocation. For this purpose, certain restrictions as discussed above are imposed by the law upon the spouses' right to dissolve their marriage. This cautious attitude towards divorce forms the basis of the al-talaq al-sunnah under which marriage is terminated only after a minimum period of three terms of the wife's menstrual courses from the time of the pronouncement of divorce. During this period the husband has the option to take the wife back.

⁴³ Nasir, Jamal J., The Status of Women under Islamic Law and Under Modern Islamic Legislation, London, Graham and Trotman Ltd., 1990.

⁴⁴ "China Buta", the derisive term used for the Arabic "muhallil" or person who agrees to marry a woman with the promise to divorce her after consummation of the marriage, so as to enable her to remarry her former husband, who has divorced her for the third time. Although allowed the device is regarded as sinful.

⁴⁵ For further details, see El Alami, Dawoud, The Marriage Contract in Islamic Law in the Shariah and Personal status Laws of Egypt and Morocco, London, Graham and Trotman, 1992.

Some jurists are of the opinion, that three talaqs pronounced with one sentence or in three sentences will count as only one talaq on the basis of the instruction of the Prophet that talaq should be given only once during the period of purity and on the understanding of the Quranic verse⁴⁶ that gives the impression that the decisive talaq that is talaq kubra has three stages on three separate occasions. The report by Ibn Abbas saying that the procedure of talaq in the time of Prophet (s.a.w), the Caliph of Abu Bakar and for two years in the Caliph of Umar, was that talaq pronounced three times on one occasion was a single talaq. Also Umar has said that since people in his time had made haste in a matter that offered them an opportunity for deliberation, they were bound by their decisions.⁴⁷

From the above statement, it can be seen that the validity of this triple divorce resulted from the consultation between Umar and his counsellors. The aim was to discourage the growing frequency of its use. It was also intended as a punishment to those who disregarded the rule of talaq as directed by God. In other words, the jurists who held the opinion that double or triple talaq should be counted as only a single revocable divorce were in fact following the practice as established in the Prophet's time.

Mutararrif bin Abd Allah reported that Imran bin Hussain was asked about a person who divorces his wife and then has intercourse with her but does not call any witness to her divorce nor her restoration. He said:

⁴⁶ Al Qur'an, Surah Al Baqarah :229.

⁴⁷ Muslim, 1976, p.1099.

*"You divorced against the Sunnah and took her back against the Sunnah. Call someone to bear witness to her divorce and to her return to marriage and do not repeat it."*⁴⁸

In another hadith it is said that Ibn Umar said he divorced his wife while she was menstruating and Umar mentioned the matter to the Prophet. The Prophet (s.a.w) said:

*"Order him he must take her back until she is purified, then has another menstrual period and is purified. Thereafter if he desires he may divorce her before having intercourse with her, for that is the period of waiting which Allah the Glorified has commanded for the divorce of women."*⁴⁹

It is clear from the Qur'an and Sunnah that divorce should not be pronounced at the whim and fancy of the husband but should only be effected for good reason and where it is obvious that the parties can no longer live within the limits ordained by Allah and that the marriage has irretrievably broken down. It is stated in the Qur'an that;

*"And among His signs is this, that he created for you spouses from among yourselves, that you may dwell in tranquillity with them and He has put love and mercy between your hearts. Verily is that are signs for those who reflect."*⁵⁰

⁴⁸ Al Bukhari, Muhammad ibn Ismail, Sahih Al Bukhari, Vol VI, Translation by Muhammad Muhsin Khan, Hlal Yayinlain, Ankara, Turkey, 1976, p.129.

⁴⁹ Ibid.

⁵⁰ Al Qur'an, Surah Al Rum:21.

3.3.2 Procedure for Talaq⁵¹

IFLA has provided an elaborate procedure for divorce by way of pronouncement of talaq by the husband.⁵² It is provided in Kuala Lumpur that the court can make an order of divorce or permit a husband to pronounce a talaq if the marriage has been registered or deemed to be registered under the Act, and the marriage was contracted in accordance with Hukum Shara'. It is also required that the residence of either of the parties to the marriage at the time when the application is presented is in Kuala Lumpur.⁵³ A husband or wife who desires divorce shall present an application for divorce to the court in the prescribed form, accompanied by a statutory declaration. Upon receiving an application for divorce, the court shall cause a summons to be served on the other party. If the other party consents to the divorce and the court is satisfied after inquiry and investigation that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one talaq before the court.

Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall as soon as possible appoint a conciliatory committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the committee. In appointing the two persons, the court shall give preference to close relatives of the parties having knowledge of the circumstances of the case. The court may give directions to the conciliatory committee as to the conduct of the conciliation and if the court is not satisfied with the conciliation, the

⁵¹ Personal conversation with Ustaz Mohammad Ibrahim, Registrar of Sharia Court, Kuala Lumpur, in December, 1992.

⁵² IFLA, section 47.

⁵³ IFLA, section 45.

court may remove the committee and appoint another committee in its place.

The Committee shall endeavour to effect reconciliation within a period of six months. If it fails to reconcile the parties, a certificate will be issued to that effect. If within this period the couple are reconciled, the application will be dismissed. If there is no reconciliation, the husband will be asked to pronounce a talaq. If he refuses, the matter will be referred to a hakam.⁵⁴ A hakam is very similar to the earlier committee stated in section 47. The two arbitrators too are relatives of the parties or persons aware of the circumstances of the case. The difference with the earlier committee lies;-

- i. if the parties give the arbitrators full authority, the arbitrators may pronounce the talaq on behalf of the husband.
- ii. if they have not, the court will then appoint another hakam to pronounce the talaq or order the divorce.⁵⁵

This procedure is based on the recommendation found in the Qur'an that in the case of marital disputes, this method of settlement must be adopted. The judges are required to try to reconcile the couple, failing which a divorce would be the last resort. In fact in this procedure certain limitations are placed upon the exercise of this right and the husband is not permitted to use it arbitrarily.⁵⁶

⁵⁴ IFLA, section 48.

⁵⁵ Ibid.

⁵⁶ Personal conversation with Sheikh Ghazali Abdul Rahman, Chief Qadhi, Shari'ah Court, Federal Territory of Kuala Lumpur in March 1992.

The verse on hakam⁵⁷ justifies the idea that no formula of divorce should be pronounced outside a court of law, before making any attempt at reconciliation.⁵⁸

The requirement for reference to a conciliatory committee is not applicable in the following cases:

- a. desertion;
- b. where the other party residing outside West Malaysia and it is unlikely that she/he will be within the jurisdiction of the court within six months after the date of application;
- c. where the other party is imprisoned for a term of three years or more;
- d. where the applicant alleges that the other party is suffering from incurable mental illness; or
- e. where the court is satisfied that there are exceptional circumstances that make reference to a conciliatory committee impracticable.⁵⁹

Before the IFLA came into force in Kuala Lumpur, the 1952 Enactment failed to set out the particular conditions and procedures in its administration of divorce. As stated above, the Rules on Marriage, Divorce and Revocation 1967 of Selangor were not adopted. The only law that applied and acted as guidance is the 1952 Muslim Law Enactment that only gave the general principles as to the administration of Muslim law.

However, it has been seen that the qadhis used their own discretion and made several attempts to curb the power of the husband. First,

⁵⁷ Al Qur'an, Surah An Nisa':35.

⁵⁸ Khan, Qamaruddin, The Right of Divorce, Karachi, Dawn, 1982.

⁵⁹ IFLA, section 47 (15).

they required the petitioner to fill in a specific form for the application of divorce. This form (MUIWP 3/75) which is to be filled by the petitioner discloses the causes of the break in marital ties. In this form, the party seeking divorce will also have to state all particulars especially those relating to maintenance during iddah, and specify the amount to be given to the children who are often in his former wife's custody. There must be two witnesses to the divorce and they are required to attest and sign the document of application. The contents of the form will be subjected to scrutiny by the qadhi and if he is satisfied that all the facts are true and attempts at reconciliation have failed, and assures himself that whatever is stated in the form has been complied with, he may grant the divorce.

Although this requirement is a commendable step towards an attempt to curb the increase in the number of divorces each year, it appears from a study made by Haron that a large number of divorces still take place at home instead at the qadhi's office. Only when the talaq has been pronounced does the husband register the divorce and only at that particular time do they fill in the application form for divorce. This has killed the motive behind the requirement of the application for a divorce form.⁶⁰

IFLA has improved the situation by having a provision requiring both parties to apply for divorce.⁶¹ Any man who divorces his wife by pronouncement of talaq in any form outside the Court and without the permission of the Court commits an offence punishable by a fine not exceeding one thousand Malaysian ringgit or by imprisonment not exceeding six months or both.⁶²

⁶⁰ Haji Haron, 1976, p.46.

⁶¹ IFLA, section 47.

⁶² IFLA, section 124.

In the other states in Peninsular Malaysia, the same procedure applies except that the express provision that a husband must apply on the prescribed form to the Qadhi or the Registrar of the locality in which the divorce takes place for permission to divorce his wife is not stipulated. The only requirement is that the husband must report the divorce.

However, in Pahang, a report of a divorce or revocation must be made within fifteen days and not seven days as in other states. Upon receipt of such form from a husband who intends to divorce or has divorced his wife, the Registrar shall for the purpose of effecting a reconciliation investigate the applicant and his wife. Every husband and wife intending to have a divorce may together appear in person before the Registrar in the area in which they reside. If the husband and the wife cannot be reconciled, the divorce shall be effected but all rights between husband and wife shall first be determined by consent of both parties in the presence of the Registrar. In such a case the husband shall pay by way of advance to the Registrar a sum not less than one month's personal expenses unless the divorce does not require the husband to provide maintenance.

Every divorce must be registered. When the divorce has been registered the Registrar shall issue a certificate of divorce to the husband and the wife but if the divorce is revocable the certificate of divorce shall be given to the wife on her completing the iddah. It is provided that it shall be an offence if a husband fails to surrender to the wife or destroys or damages the property after the apportionment has been made to the husband. A husband who wishes to effect a ruju' with his former wife must fill the prescribed form and submit it to the Registrar. The Registrar shall make an entry in the Divorce Register,

and the certificate of divorce shall be revoked and a certificate of ruju' issued.⁶³

Just as marriage should be effected in love and understanding, so too divorce should be effected with kindness and on equitable terms. The man should not be allowed to divorce his wife in anger or to injure her or to take undue advantage of her. A Muslim husband cannot justly divorce his wife in the absence of reasonable grounds and without having recourse to an attempt at reconciliation. It is unfortunate that this basic principle regarding divorce has been abused. This conception of law ignores the strong condemnation and disapproval of divorce in Islam and has led many husband to abuse their power of talaq. This often results in great misery and unhappiness for the wife and children and has made marriage insecure and the wife's position very precarious.

It is unfortunate that in the past the law has been very lax in allowing husbands to divorce their wives without any control with the result that hardships and injustices have been done to many wives. This is the reason why the law has been tightened. Under the IFLA, it is clear that what is contemplated is that all divorces should be effected through the court. A husband or wife who desires divorce shall present an application for divorce to the Sharia Court. The Sharia Court will then ensure that every effort is made to effect reconciliation between the parties and only if the court is satisfied that the marriage has irretrievably broken down, would the court advise the husband to

⁶³ Administration of the Religion of Islam and the Malay Custom of Pahang Enactment, 1982, sections 67, 68 and 76. Kelantan Shariah Courts and Muslim Matrimonial Causes Enactment 1966, sections 68 and 75; Trengganu Administration of Islamic Law Enactment, 1955, sections 103 and 109; Penang Administration of Muslim Law Enactment, 1959, sections 121 and 122, Malacca Administration of Muslim Law Enactment, 1959, sections 120 and 121; Kedah Administration of Muslim Law Enactment, 1962, sections 121 and 122; Perak Administration of Muslim Law Enactment, 1965, section 124; Johore Administration of Muslim Law Enactment, 1978, section 118, Perlis Administration of Muslim Law Enactment, 1963, sections 90, 90A and 93.

pronounce one talaq before the court.⁶⁴ A divorce can only be registered if there is an order of court dissolving the marriage or permitting the talaq to be pronounced before the court.⁶⁵ There seems to be no procedure for the registration of divorces effected outside the court⁶⁶ although a divorce effected without the court's permission is made an offence.⁶⁷

In the Qur'an and Hadith, there are rules laying down the procedure to be followed when a person wishes to divorce his wife. These rules are meant for the good and benefit of all parties and to avoid cruelty and injustice. A divorce should be pronounced in accordance with those rules and with the enactment of the Act. These rules have been enacted in the form of law. It is the duty of judges, Sharia lawyers and other officials to enforce the law and to advise everyone to abide by them. If someone has not obeyed and followed the law, the court should not rush to help him to obtain what he wants, even though he has clearly not complied with the rules laid down and his act may bring about cruelty and injustice.

If the procedure and rules which have been laid down by Allah and which have been provided in the IFLA are followed, a person who wishes to divorce his wife should pronounce one talaq at a time. In this way he is given the opportunity to exercise his right to revoke the divorce. On the other hand if he does not want to exercise his right of revocation, his wife will be effectively divorced at the end of the period of iddah. If however, the wife is pregnant at the time that the talaq is pronounced or the order is made, the talaq or the order shall

⁶⁴ IFLA, section 47.

⁶⁵ IFLA, section 54.

⁶⁶ See proposal in Appendix II.

⁶⁷ IFLA, section 124.

not be effective until the pregnancy ends.⁶⁸ Even in that case, he has the opportunity to remarry her, if they both agree. If a person does not follow this procedure and he pronounces all three talaqs at once, he has no opportunity to revoke the divorce and his wife will be revoked by talaq bain, which cannot be revoked. Ahmad Ibrahim stated that it is generally thought that the best and correct method of pronouncing the talaq is to pronounce all three divorces at once. He recommended that this wrong belief should be rejected and corrected by all who are involved including judges and Sharia lawyers.⁶⁹

However, in a study of Malay divorce in Trengganu, Abdul Jalil found that an average Malay in Trengganu normally gives only one talaq should he want to divorce his wife either by pronouncement or by letter, and then lets the period of her iddah elapse. Only if a person is completely shattered on account of his wife's gross failing does he pronounce a triple talaq at once. This triple talaq is not unusual, but it is rarely practised because it is understood that when it is uttered, the talaq becomes complete (bain kubra). Reunion cannot take place by simply revoking the talaq or entering a new marriage contract and giving a fresh mahr if the waiting period is passed, but the divorced woman must first marry another husband and later see that this marriage also come to an end.⁷⁰

There is a view held in some Muslim countries where the Hanafi school of thought is followed that in order to avoid possible wrongdoing and injustice in this matter, a divorce coupled with a number should be counted as one. This view has been applied in the

⁶⁸ IFLA, section 47.

⁶⁹ Ibrahim, Ahmad bin Mohamad, Perkahwinan dan Perceraian dalam Undang-Undang Islam, Seminar Wanita dan Undang-Undang, Kuala Lumpur, 1981.

⁷⁰ Haji Hassan, Abdul Jalil bin, The Influence of the Shafi'i School of Muslim Law on Marriage and Divorce in the Malay Peninsular with Special Reference to the State of Trengganu, Ph.D Thesis, University of St.Andrews, 1969.

case of *Re Mohd Hussin bin Abdul Ghani and Anor*,⁷¹ which was decided by the Appeal Board in Kuala Lumpur. However, there is no fatwa or law in Malaysia to provide that the pronouncement of three talaqs at once should take effect as one talaq only. In the case of *Ibrahim v Fatimah*⁷² the Appeal Board held that in the absence of clear evidence to the contrary, the talaq pronounced was considered as one talaq only.

In Kuala Lumpur, which generally adheres to the Shafi'i school of thought, a pronouncement of three talaqs by the husband is normally taken as three talaqs. Consequently, this form of divorce cannot be revoked even after the wife's period of iddah. These rules have caused a lot of hardship to the wife especially if the talaq has been pronounced in haste. In Egypt, Sudan, Jordan, Syria, Morocco, Tunisia, Indonesia and Pakistan, reforms have been made and a divorce by three talaqs is taken to be one and thus can be revoked.⁷³ This reform is supported not only by cogent arguments from the Qur'an but by a statement attributed by Muslim to Ibn Abbas (and also reported as from Ali and Abu Musa al-Ashari). This is also the view of Muhammad bin Ishaq, Daud al-Zahiri, various doctors of Cordova, and later jurists such as Ibn Taimiyyah and Ibn Qaiyyim al-Jauziyyah.⁷⁴

The practice adopted by the Sharia Court of Singapore is that when a divorce by three talaqs has been pronounced by a man all at once and in the same place, the court will declare that there has been one talaq. It is only where the three talaqs have been pronounced three times on three different occasions that the court will declare that there has been

⁷¹ [1990] 2 M.L.J 1xxv.

⁷² (1979) 1 J.H Part I p.74.

⁷³ Ahmad, 1972, p.88.

⁷⁴ Anderson, J.N.D, The Problem of Divorce in the Sharia Law of Islam, Journal of the Royal Central Asian Society, 37, 1950, p.172.

a divorce by three talaqs. In Malaysia, the opinion of Shafi'i is still dominant. However, the court should exercise caution in confirming such a divorce and should always examine the matter carefully and in detail.

In *Rojmah bte Abdul Kadir v Mohsin bin Ahmad*,⁷⁵ the matter of divorce was not treated with care and circumspection. The husband respondent claimed that he had on 10th January 1990 divorced his wife by pronouncing three talaqs in her presence. He subsequently applied to the Sharia Court under Section 47 of IFLA to divorce his wife officially. At the hearing before the Sharia Court, the wife denied that the husband had pronounced the divorce in her presence on the date stated. From the record of the learned judge, it appears that the husband was not certain when he pronounced the divorce. This clearly goes against the regulation fixed by Allah that requires the divorce to be pronounced "at their prescribed periods and count accurately their prescribed periods." The burden of calling witnesses to prove his case lies on the husband. From the record of the trial, the Sharia Appeal Board came to a conclusion that the judge hearing the case in the first instance gave more weight to the evidence of the lawyers rather than the evidence of the parties themselves. No witness was produced by the husband regarding the pronouncement of the divorce. According to the Sharia Appeal Board in a case where the pronouncement of the divorce is disputed, it would have been better if the learned judge had called for and considered all the evidence available. As there were many defects and omissions in the trial before the trial judge, the Appeal Board, ordered that the case be retried before another judge. The learned judge who is asked to rehear the case should hear the witnesses produced, record all the evidence and the arguments offered and decide whether the husband has pronounced the divorce as stated by him.

⁷⁵ [1991] 3 M.L.J.

In Pakistan, to discourage hasty exercise of the husband's right of repudiation (talaq), the law requires written notice to the Chairman of the Arbitration Council as well as to the wife.⁷⁶ A ninety day waiting period is required during which the Council will seek to reconcile the couple.⁷⁷ Divorce will not take effect until the ninety day period has elapsed or, if the wife is pregnant, the completion of pregnancy.⁷⁸ Although failure to observe the above procedures is punishable by a fine and/or imprisonment, these penalties are relatively light, that is imprisonment of up to one year or a fine of up to 5,000 rupees.⁷⁹

The Tunisian law of Personal Status, 1956, is quite similar to IFLA in that a unilateral pronouncement of divorce is no longer possible. Talaq is dependent upon the consent of the court and in all circumstances a decree of divorce shall only be granted if all possible efforts to effect a reconciliation between the couple have failed. Arbitrators will only be appointed if one party to the marriage alleges ill-treatment but has no proof to substantiate the allegation. The arbitrators however have no power to decree any divorce and all their decisions must be referred to the court.⁸⁰ Should a husband divorce his wife, he is enjoined by the Qur'an to give her a consolatory gift or mut'ah as understood from the following verse;

*"There is no blame on you if you divorce women before consummation or the fixation of their dower, but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means."*⁸¹

⁷⁶ Family Law Ordinance, section 7.1.

⁷⁷ Ibid, section 7.4.

⁷⁸ Ibid, Sec. 7.3 and 7.5.

⁷⁹ Ibid, section 7.2.

⁸⁰ The Tunisian Law of Personal Status, Article 25,31 and 32.

⁸¹ Al Qur'an, Surah Al Baqarah: 236.

Section 56 of IFLA gives a woman who has been divorced without just cause by her husband, a right besides maintenance during iddah to apply to the Court for mut'ah or a consolatory gift. The Court may order the husband to pay such sum as may be fair and just according to Hukum Shara'.⁸²

IFLA also provides that pronouncement of talaq or order of divorce shall not be registered unless the Chief Registrar is satisfied that the Court has made a final order or orders for the custody and maintenance of the dependent children. This also includes maintenance and accommodation of the divorced wife, and for the payment of mut'ah to her.⁸³ This provision is an improvement from the previous law. It is unfortunate that previously, Malaysian jurists overlooked this basic concept regarding divorce, and did not take into consideration the hardship caused to a wife as a result of it. It cannot be gainsaid that the previous practice which allows a husband to divorce his wife unscrupulously, not only contravenes the basic principle of Muslim law of marriage and divorce but also ruins the life of the wife and children. In some cases, it even leaves the wife absolutely destitute.

The present Baitul Mal (Public Treasury) does not support divorced women and their dependent children. It is assumed that their former husband will be responsible for their welfare. Therefore it is necessary that this provision be fully enforced so that the welfare of these women and their children are taken care of in keeping with the basic principle of Muslim law.

3.3.3 Khulu'

It is a misconception that Islam neglects the right of wife by awarding the right of talaq to the husband. In fact, Islam also gives the wife the

⁸² IFLA, section 56

⁸³ IFLA, section 55.

right to claim the dissolution of her marriage if there is apprehension that she “will transgress the limits of God.” For example in the case when she deeply detests her husband and can no longer perform the marital duties prescribed by the divine laws, she can take steps to terminate the marriage. In such a case, she is permitted to compensate her husband out of her property in lieu of a form of dissolution in her favour known as khulu⁸⁴ or divorce by redemption. Although her right requires application to the court, the chances of succeeding are not as slim as one would initially infer, because there are two other forms of divorce available, that is fasakh and ta’liq.

Khulu’, relates to a metaphoric description of the spouses in the Quranic verse; “They are an apparel for you and you are apparel for them.”⁸⁵ The Qur’an describes the closeness of the relationship of married couples as both being garments for each other. Therefore, their separation in this sense would mean the taking off of each other’s garments. In its technical term, khulu’ is the divorce of husband and wife for a compensation paid by the wife to the husband.

The following Qur’anic revelation serves as an authority for the recognition of dissolution of marriage by khulu’ in Islam:

“If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah, so do not transgress them.”⁸⁶

⁸⁴ The Arabic form is Khulu’ which literally means “to take off clothes” and hence “to lay down one’s authority over a wife”. It is variously spelt “kholo” or “khula” in the States of Malaysia. The Malay equivalent is “cerai tebus talak” or literally, divorce by redemption of the talag.

⁸⁵ Al Qur’an, Surah Al Baqarah: 187.

⁸⁶ Al Qur’an, Surah Al Baqarah: 229.

This verse permits a wife to redeem herself by giving some consideration to her husband and permits the latter to accept it in exchange for his repudiation when they cannot live according to God's will. Morally and religiously, it is reprehensible for a husband to take anything from the wife if actual aversion is from his part. Otherwise, if the aversion is from the wife, it is also morally reprehensible for him to take more than he has given to her. The basis of this approval can be derived from the Quranic verse;

*"and if you wish to exchange one wife for another and you have given unto them a sum of money, take nothing from it. Would you take it by the way of calumny and open. How can you take it (back) after one of you hath gone into the other, and they have taken a strong pledge from you."*⁸⁷

These two verses show that when the husband desires to replace one wife with another as the result of his aversion for example, he must not take back anything from her. Khulu' according to Ibn Qudamma is valid without any payment on the wife's part. Anderson claimed that Khulu' is a dissolution of marriage granted by the husband in exchange for a payment by the wife-usually, but not necessarily, the return of her dower.⁸⁸ The Egyptian Code, Article 175 based upon the classical authorities also lays down that a khulu' repudiation can validly takes place before or after consummation of the marriage, and without payment of compensation by the wife.

Khulu' also finds sanction in the traditions of the Prophet (s.a.w). Ibn Abbas reported that Jamilah, the wife of Tsabit bin Qais came to the Prophet (s.a.w) and said,

⁸⁷ Al Qur'an, Surah An Nisa': 20-21.

⁸⁸ Anderson, J.N.D., Islamic law in the Modern World, New York, New York University Press, 1959, p.52.

*"Oh Messenger of Allah, I do not blame Tsabit for defects in his character or his religion, but I dislike ingratitude in Islam. The Messenger of Allah asked if she is prepared to return the garden given to her by Tsabit. She said, "Yes". Then the Prophet (s.a.w) said to Tsabit, "Accept the garden and divorce her once."*⁸⁹

This tradition shows that there was an order from the Prophet to Tsabit to take back the garden given by him to his wife as mahr and give her a single talaq, as the Prophet (s.a.w) was satisfied that the couple could not amicably live together and he never asked for the consent of her husband. As a result of the above evidence, therefore, one could deduce that khulu' is the right of the wife to claim her release from a marriage bond with a husband she detests, just as talaq is the right of the husband to dissolve his marriage with a woman whom he cannot live with.

The Report of the Commission on Marriage and Family laws in Pakistan endorses this view in the following statement;

*"...khula, that is divorce sought by the wife, there is a consensus of opinion that Islam has granted this right to the woman if she foregoes the mehr or a part of it, if it is so demanded by the husband. There is a universally accepted Hadith about a khula divorce which arose between a woman of the name of Jamila and her husband Sabit (Tsabit) ibn Qais. The Holy Prophet granted the divorce on the basis of extreme incompatibility of temperament only; no other accusation was made by the wife as a ground for the demand of divorce. We are recommending that incompatibility of temperament should not give the wife a right to demand a divorce except in the khula form."*⁹⁰

In Islam, therefore, both sexes have been given the right of dissolving their marriage vow, so that neither party must be forced to continue

⁸⁹ Al-Bukhari, 1976, p.150.

⁹⁰ Khurshid Ahmad, Studies in the Family Law of Islam, 2nd. ed., Karachi, 1961, pp.61-2.

in marriage where the objects of marriage have been frustrated. Although a woman has the right to claim khulu', there is an important limitation on this right. It is considered sinful for any woman to demand khulu' without necessity and this can be deduced from the tradition of the Prophet (s.a.w) which bears the meaning that any woman who asks her husband for a divorce without necessity will lose heaven.⁹¹

Khulu' operates as a single irrevocable repudiation or talaq after the wife offers and the husband accepts compensation out of her property for the release of his marital rights. It is classified as a talaq bain sughra. The obvious consequence is that marital life cannot be resumed by reconciliation but a fresh contract of marriage with a new mahr is necessary. It must be noted that according to the Shafi'i school of law, it is not compulsory for the husband to accept the compensation offered by the wife and to grant her divorce. His consent is necessary and he cannot be forced to give a khulu' divorce.

This has been shown in the Penang case of *Rokiah v Abu Bakar*,⁹² where the court decided that a divorce by khulu' must be by the consent of the husband.

However, the situation in Pakistan is very different. Initially, the full bench Pakistan Supreme Court decided in the case of *Sayeeda Khanam v. Muhd. Sami*,⁹³ that if wives were allowed to dissolve their marriage without consent of their husbands by merely giving up their dowers, the institution of marriage would be meaningless as there would be no stability attached to it. However, in *Balqis Fatima v Najm -ul-Ikram*

⁹¹ Hj. Ibrahim, 1987.

⁹² Taylor, E.N., "Mohammedan Divorce by Khula", in Journal of the Royal Asiatic Society, (1948) Vol. 21 Part 2, p.10.

⁹³ (1952) P.L.D Lahore 113.

*Qureshi*⁹⁴ the High Court of Lahore asserted its right to grant a khulu' divorce where serious incompatibility made a harmonious marriage impossible. According to Hanafi law, a khulu' divorce is extra judicial, based on mutual agreement and, most importantly, dependent upon the husband's consent for its validity. However, basing themselves on the Qur'an Surah Al Baqarah verse 229:

"If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom."

The court interpretation was that the hakam has the power to separate the spouses and so dissolve their marriage. Thus the court, through its interpretation of Islamic sources, departed from the traditional Hanafi law and allowed judicial dissolution of a marriage by a judge upon the evidence that:

*"... the limits of God will not be observed, that is, in their relations to one another, the spouses will not obey God, that a harmonious married state as envisaged by Islam, will not be possible."*⁹⁵

According to the court, the requirement set for a wife seeking such a divorce was to show that incompatibility prevented a harmonious marriage and to return her dower. The court's attempt to remedy the social injustice suffered by women can be seen in the Justices' observation that the marriage had to be terminated because it is not a reasonably possible view that a marriage must continue even though the husband misbehaves, or is unable to perform his obligation or for no fault of the wife it would be cruel to continue it.⁹⁶

⁹⁴ (1959) P.L.D Lahore 566.

⁹⁵ Ibid.

⁹⁶ Id.

This position of the High Court was given the highest approbation in 1967 when in the case of *Khurshid Bibi v Mohd Amin*,⁹⁷ the Supreme Court, declared that Khurshid Bibi was entitled to a divorce upon returning her dower to her husband. Thus, while the right of the man to repudiate his wife has remained unfettered, the granting of a unilateral khulu' divorce to a woman in case of incompatibility represents significant headway in achieving a balance of human rights.

In Peninsular Malaysia, divorce by khulu' is known by the Malays as "tebus talaq". The word "tebus" is Malay meaning redeem, thus the wife recovers her freedom by making some payment to the husband. A Malay wife who is so eager to dissolve her marriage normally induces her husband to release her by offering him some monetary or other material compensation. Usually the payment given by a Malay wife when seeking a khulu' divorce is to surrender her claim to the "maskahwin" (mahr), if still unpaid by her husband or to pay him back the amount of it if she had already accepted. In the case where a couple have only recently married, it is not unusual for the husband to demand some more substantial compensation before he will assent to grant the divorce.

In addition, according to the Malay custom, if a husband guiltless of offence towards his wife under religious and customary law refuses her divorce, she can leave him "sehelai sepinggang" (in the clothes she wears) and return the dower. If she wants a divorce because she cannot endure her husband's behaviour but not because of any offence towards her under religious law, then she can get a divorce in accordance with custom, returning half her dower. All property acquired during

⁹⁷ (1967) P.L.D S.C 97.

marriage goes to the man, but each party takes his or her personal property.⁹⁸

3.3.4 Procedure for Khulu'

In Kuala Lumpur, there were no statutory provisions for khulu' under the previous enactment. The present law however, provides that where the husband does not agree to pronounce a talaq voluntarily, but the parties agree to a divorce by redemption or "cerai tebus talaq" the court shall, after the amount of the payment of "tebus talaq" is agreed upon by the parties, cause the husband to pronounce a divorce by redemption. Such divorce is bain sughra or irrevocable.⁹⁹ If the parties cannot agree to the amount of compensation payable, the court may assess the amount in accordance with Hukum Shara', taking into consideration the status and means of the parties.¹⁰⁰ Where the husband does not agree to a divorce by redemption or does not appear before the court as directed, or where it appears to the court that there is a reasonable possibility of a reconciliation, the court shall appoint a conciliatory committee as provided under section 47.¹⁰¹

Previously, there were no express statutory provisions for khulu' in other states in Peninsular Malaysia. In Selangor, Kuala Lumpur, Negeri Sembilan and Malacca, it would appear that the qadhis can make decrees of khulu' in accordance with Hukum Shara'. The procedure in the other states is quite dissimilar. For example in Kelantan, Trengganu and Perak, it is provided that a married women may apply to a qadhi for a divorce in accordance with Muslim law. In any such case, the qadhi summons the husband and inquires whether he consents

⁹⁸ Kempe, J.E and Winsteadt, R.O., A Malay Legal Miscellany, J.M.B.R.A.S., Vol 25, Pt.1, (1952), p.6.

⁹⁹ IFLA, section 49.

¹⁰⁰ IFLA, section 49(3).

¹⁰¹ IFLA, section 49(4).

to the divorce. If the husband consents, the qadhi will cause him to pronounce a divorce by redemption and registers the divorce. If the husband does not agree to divorce by redemption, the qadhi may appoint arbitrators to deal with the matter.¹⁰²

On the other hand, in Pahang, if such an application for divorce has been brought by a female spouse because of a serious disagreement between the husband and her, the qadhi will first appoint two arbitrators, representing both parties, with sufficient powers given by the latter to enable the arbitrators to effect a peaceful reconciliation of the parties, to the extent of the arbitrator of the husband divorcing the wife and the arbitrator of the wife applying for a divorce by redemption. If both arbitrators decide on a divorce, whether by redemption or not, the arbitrator of the husband may divorce the wife and the divorce shall be registered. If the husband does not agree to a divorce, but the parties agree to a divorce by redemption, the qadhi may assess the amount of the payment to be made by the wife and shall then cause the husband to pronounce the divorce by redemption and register the divorce.¹⁰³

In Penang and Kedah it is provided that a married woman may make application to a qadhi for the divorce known as khulu'. Notice of the application must be served on the husband. The qadhi is required to record the evidence of the wife and at least two witnesses and may then, if satisfied that the provisions of Muslim law have been complied with, make such an order or decree as is lawful.¹⁰⁴ Whereas in

¹⁰² Kelantan Shariah Courts and Muslim Matrimonial Causes Enactment, 1966, section 69; Perak Administration of Muslim Law Enactment, 1965 section 125; Trengganu Administration of Islamic Law Enactment, 1955, section 104.

¹⁰³ Pahang Administration of the Religion of Islam and The Malay Custom of Pahang Enactment, 1982, section 73.

¹⁰⁴ Penang Administration of Muslim Law Enactment, 1959, section 123; Kedah Administration of Muslim Law Enactment, 1962, section 123.

Johore, it is provided that a wife may request divorce in accordance with Hukum Shara' by application to the Registrar of Muslim Marriages and Divorces who shall then summon the husband before him and enquire if the husband consents to divorce the wife. If so the Registrar shall request the husband to pronounce the divorce in his presence.¹⁰⁵

In the Perlis case of *Che Pa v Siti Rahmah*,¹⁰⁶ the plaintiff had applied for an order that his wife, the defendant, should return and cohabit with him. The defendant refused to do so since she claimed the husband was a gambler and a drunkard and did not pray. She asked for a divorce from him and offered to pay compensation for a "tebus talaq." The court after hearing the parties ordered the wife to return to the husband and ordered the husband to pay her maintenance and provide a house for her. The wife refused to go back to her husband and the husband did not give the maintenance as ordered. The qadhi thereupon ordered that hakam be appointed under section 90 A(1) of the Administration of Muslim Law Enactment, 1963. The hakam were able to get the agreement of the parties for a khulu' divorce on the payment of one hundred Malaysian ringgit to the husband. On payment of this sum, the husband divorced the wife and this was recorded by the court.

3.3.5 Fasakh

X All the Sunni schools unanimously agree that every couple has the right to the option of rescinding the marriage contract¹⁰⁷ if either party is found to be afflicted with elephantiasis, leprosy, insanity, or

¹⁰⁵ Johore Administration of Islamic Law Enactment, 1978, section 119.

¹⁰⁶ (1976) 2 J.H. 244.

¹⁰⁷ For further details, see Abu Zahra, Muhammad, Family Law in Majid Khadduri and H.J. Liebesny (eds) Law in the Middle-East, Origin and Development of Islamic Law, Washington D.C., Middle East Institute, 1955, pp.146-9.

a defect of the procreative organs. This defect would cause not only a sense of physical repulsion in the other party leading to the defeat of the very object of marriage as a field for both mutual love and procreation, but also to the possibility of transmitting such diseases and defects to the issue of the marriage. The reason they confined the right of dissolution to these specified defects was both the absence of any textual authority for any extension of the principle and also their belief that to only these diseases were the above arguments wholly applicable.

Moreover, all of the Sunni schools held that no such right existed where one person entered a marriage with another in the knowledge that he or she was so afflicted. All the above is concerned with defects existing at the time of the marriage. In cases where such defects occur subsequently there is less unanimity, but the Shafi'i generally allow dissolution on the same terms as above, provided that the other party has not expressly or tacitly consented to continue the relationship. The exception is that once the marriage has been consummated they regard no disease of the procreative organs as a ground for its dissolution. In all these cases, dissolution of the marriage tie is termed judicial rescission, that is fasakh by the Shafi'i and Hanbali, but judicial divorce by the Malikis.¹⁰⁸

According to the Shafi'i school, fasakh.¹⁰⁹ operates under the heading of khiyar (option). Divorce by fasakh is primarily a right given to the wife on application to a qadhi. The option to repudiate may be exercised by the wife if the husband is suffering from vital defects such as impotence, insanity, leprosy or elephantiasis, if he is unable to

¹⁰⁸ Anderson, 1950, pp. 177-178.

¹⁰⁹ Fasakh literally means annulment or abrogation. The Malay equivalent is "fasah" or "pasah".

maintain her or if he is not equal in kufu', (marriage equality).¹¹⁰ to her.¹¹¹

In theory, a similar option is given to the husband when he becomes aware that his wife is insane, suffering from leprosy or elephantiasis or is incapable of sexual intercourse because of some physical infirmity. In practise however, this option is rarely exercised as the husband already has the right of talaq.

In cases where a man had decided to use his option of rescinding the marriage through the discovery of a defect in his wife, the wife would not be entitled to receive her mahr nor the mut'ah if the marriage had not been consummated. But should the marriage have been consummated, then she would be entitled to her mahr.¹¹²

A wife's right to judicial divorce by reason of her husband's defects covers defects existing at the time of the marriage contract as well as those acquired subsequently. However, a husband who becomes impotent after cohabitation with the wife cannot be repudiated by her. If it can be proved that the husband is totally impotent, then the qadhi, may, upon application by the wife to rescind the marriage, pass a judgement of rescission, provided that a year's grace has first been given to the husband so that he may undergo sufficient medical treatment. The option will also be lost if a party to the marriage fails to repudiate the marriage within a reasonable time after coming to know of the defect in the other party.¹¹³

¹¹⁰ For further details on kufu' see Nasir, 1990, pp.18-19.

¹¹¹ Re Husseinah Banoo (1963) 5 M.L.R 392 at p.395.

¹¹² Hj. Ibrahim, 1987.

¹¹³ Ibid.

When a husband during his marriage, becomes insolvent and can no longer give the minimum maintenance prescribed, and the wife can no longer bear such an insolvent husband, she can demand the rescission of the marriage since her husband no longer fulfils his obligation. However, the Hanafi jurists refuse any right of dissolution in such cases. This opinion is based on the Quranic verse¹¹⁴ to the effect that no one is expected to spend more than God has granted to him. Therefore, if the husband is indigent, he cannot properly be required to provide his wife with maintenance. But this outstanding sum may be regarded as a debt payable at a later date when the husband becomes more prosperous.

On the other hand, under the Shafi'i school, if the husband's insolvency is proved, the qadhi may pronounce the rescission of the marriage. However, three days respite must be allowed to the husband before it can be effected.

Another report of Shafi'i says that the wife is not entitled to make rescission on the grounds of the husband's insolvency as she is allowed to earn her own income. The maintenance outstanding from the husband then becomes a debt which he may pay during a later period of solvency.¹¹⁵

In cases where the husband has the means to maintain his wife but refuses or fails to do so, although the wife is blameless, the wife still has no claim to rescission, since the husband may, if still resident within the country, be ordered or compelled by the court to support his wife. Should he be absent, then maintenance can be paid to his wife out of his property. But when such property cannot be traced in time, and the husband is not actually indigent, the marriage contract

¹¹⁴ Al Qur'an, Surah Al Talaq: 7.

¹¹⁵ Hj. Ibrahim, 1987.

may not be rescinded either, because destitution is not regarded as a defect and thus cannot be the primary reason for dissolution in such an issue.¹¹⁶

Though according to the Shafi'i school, a fasakh decree cannot normally be granted on the grounds of lack of maintenance in cases where a husband is solvent, some jurists, are of the opinion that a qadhi may grant a fasakh decree. It is based upon this view that fasakh decree have been granted by qadhi to wives deserted and left without maintenance by husbands who, although not paupers, cannot be traced. In the Kedah case of *Abdul Aziz v Che Pa*,¹¹⁷ the Appeal Court confirmed an order of fasakh on the grounds that the husband was incapable of maintaining the wife.

Under the Malay custom, a woman deserted for three years without maintenance can get a divorce but must arrest the man if she meets him.¹¹⁸ Judicial rescission of a contract of marriage is known to the Malays as “pasah”, which is obviously derived from the Arabic fasakh, meaning rescission. “Pasah” has been recognised as the legal authority of a qadhi to rescind a marriage contract upon the application of a married woman. In the Malay Peninsula, it was the practice, before the ta'liq (cerai taklik as the Malay call it) became so popular, for a qadhi to grant a decree of “pasah” to a complainant wife on the grounds of non-maintenance if her husband had abandoned her for a long period and not supported her in any way.

The general conception behind the legality of “pasah”, as subsequently understood by the Malays is that the qadhi exercises his legal authority

¹¹⁶ For further details see Anderson, 1950, pp. 175-6.

¹¹⁷ (1972) 2 J.H. p.113.

¹¹⁸ Kempe, 1952, p.7.

in dissolving a marriage contract so as to give relief to an injured wife, since the wife has not been given the power of talaq like the husband. It is perhaps due to this conception that most Malay guardians prefer to attach the right of talaq ta'liq to a marriage contract, so that the future wife will have the right to demand the dissolution of the marriage from a qadhi if she is deserted and not maintained.

Section 128 of the Administration of the Muslim Enactment, 1952 covers fasakh and ta'liq but no details are given as to grounds under fasakh. Section 52, IFLA improves the situation by providing and specifying the grounds that could be used under fasakh. A woman who married in accordance with Hukum Shara', shall be entitled to obtain an order for the dissolution of marriage or fasakh on any one or more of the following grounds:-

- (a) that the whereabouts of the husband have not been known for a period of more than one year;
- (b) that the husband has neglected or failed to provide for her maintenance for a period of three months;
- (c) that the husband has been sentenced to imprisonment for a period of three years or more;
- (d) that the husband has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year;
- (e) that the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent;
- (f) that the husband has been insane for a period of two years or is suffering from leprosy or vitiligo or is suffering from a venereal disease in a communicable form;
- (g) that she, having been given in marriage by her father or grandfather before she attained the age of 16 years, repudiated the marriage before attaining the age of 18 years, the marriage not having been consummated;

- (h) that the husband treats her with cruelty, that is inter alia:
 - i. habitually assaults her or makes her life miserable by cruelty of conduct; or
 - ii. associates with women of evil repute or leads what, according to Hukum Shara' is an infamous life, or
 - iii. attempts to force her to lead an immoral life
 - iv. disposes of her property or prevents her from exercising her legal rights over it, or
 - v. obstructs her in the observance of her religious obligations or practice or
 - vi. if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Shara';
- (i) that even after the lapse of four months, the marriage has still not been consummated owing to the wilful refusal of the husband;
- (j) that she did not consent to the marriage or consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstances recognized by Hukum Shara';
- (k) that at the time of the marriage she, although capable of giving a valid consent, was, whether or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 and her mental disorder was of such a kind or to such extent as to render her unfit for marriage;
- (l) any other grounds that are recognised as valid for dissolution of marriages of fasakh under Hukum Shara'¹¹⁹

The grounds covered in IFLA are so many and varied since they encompass virtually every situation which a wife would wish to free herself from.

¹¹⁹ IFLA, section 52.

However, unlike Kuala Lumpur, in Kelantan under its Islamic Family Law Enactment in 1983,¹²⁰ the grounds for fasakh are more limited than those under the IFLA and seem to be confined to the grounds recognised in the Shafi'i school of thought.

Twentieth century reforms in other Muslim countries have sought to establish grounds that would enable women to sue for judicial divorce and to limit the husband's exercise of talaq. In Egypt, broader grounds for divorce were established by Law No. 25 of 1929. This reform legislation recognised four situations in which a woman could sue for divorce:

- a. her husband's failure to provide nafaqah (maintenance)
- b. dangerous or contagious disease of the husband.
- c. desertion
- d. maltreatment.

Article 1 of the Egyptian law of 1929 decreed that maintenance was a cumulative debt owed by the husband to his wife, commencing with the first time the husband failed to support his wife.¹²¹

Article 4 decreed that non-support due to a husband's incapacity or unwillingness to support constitutes grounds for a wife's divorce suit. The only exception permitted involved cases of destitution in which the husband was granted a grace period of not more than one month. If the husband is absent or imprisoned and if there is a lack of property from which his wife's maintenance can be extracted, the wife is entitled to a divorce on grounds of non-support. If, on the other hand, the

¹²⁰ No.1 of 1983 as amended by E No.6 of 1984 and E No.3 of 1987.

¹²¹ This provision requiring payment of past maintenance was the cause of many false claims as to the arrears date. Thus the code of 1931 decreed that claims should not be in excess of three years prior to the date of the suit.

husband is at a great distance or if his location is unknown, the wife is granted a divorce at once.¹²²

The third and fourth grounds giving a woman the right to sue for divorce, maltreatment and desertion, were established through law No. 25 of 1929. Maltreatment or darar (cruelty) finds its only support as grounds for divorce in the Maliki school. Following this source, Article 6 decreed that where a wife's allegation of maltreatment detrimental to the continued marital relationship is substantiated and reconciliation seems impossible, the qadhi shall grant the wife an irrevocable divorce. The law grants the wife the right to repetition if her first petition is denied on grounds of unsubstantiated evidence. In the event of a second rejection of her petition, the qadhi is required to appoint two arbitrators. However, if this is not possible, men acquainted with the circumstance of the case should be appointed.¹²³ Their task is a thorough investigation of the causes for the marital conflict and the submission of recommendations to the court for a reconciliation. However, if reconciliation proves impossible, and if responsibility for the conflict lies with the husband, with both spouses, or if the source of the conflict is unknown, the qadhi is instructed to grant a single but irrevocable divorce.¹²⁴

Article 10 stipulates that should the report of the arbitrators indicate a deadlock, the qadhi is to order them to make a fresh attempt. Should their renewed efforts prove fruitless, then other arbitrators are to be appointed. And finally, the court is to render its judgement in accordance with the recommendation of the arbitrators' report.¹²⁵ The

¹²² Article 5, Law No. 25, 1920.

¹²³ Article 7, Law No. 25, 1929.

¹²⁴ Article 8 and 9, Law No.25, 1929.

¹²⁵ Article 11, Law No. 25, 1929.

fourth and final grounds for divorce is desertion. The legislation of 1929 decreed that if a husband was absent for one year or more without sufficient reason, a wife had the right to sue for an irrevocable divorce on the grounds of injury due to his unwarranted absence. If the husband can be reached, the qadhi must inform him of the pending suit. The husband's failure to return or make arrangements for his wife to join him will result in a decree of divorce. If, on the other hand, contact with the husband proves impossible, the court must then grant the wife a divorce immediately. Moreover, a petition based on desertion may be initiated even if the husband has property from which the wife's maintenance can be obtained.¹²⁶

Article 14 addressed itself to a specific kind of desertion which had been the source of much hardship, that is the husband's imprisonment. The law decreed that a woman whose husband had been sentenced to not less than three years may, after a separation of at least one year, petition the court for divorce.

3.3.6 Procedure for Fasakh

Section 50 of IFLA provides that upon the application of the wife for a fasakh divorce, the qadhi will send a notice to the husband informing him of the wife's intention. He will then proceed to record the sworn statement of the wife and of at least two witnesses. If the qadhi is satisfied that the provisions of Muslim law have been complied with, he will make an order or decree as is lawful for fasakh divorce and he will register and issue the certificate for divorce.

The procedure for a fasakh in other states¹²⁷ is very similar, although

¹²⁶ Article 12 and 13, Law no. 25 of 1929.

¹²⁷ Selangor Administration of Muslim Law Enactment, 1952, s.128; Penang Administration of Muslim Law Enactment, 1959, s.123; Malacca Administration of Muslim Law Enactment, 1959, s.122; Negeri Sembilan Administration of Muslim Law Enactment, 1960, s.123; Kedah Administration of Muslim Law Enactment, 1962, s.123; Kelantan Shariah Courts and Muslim

it is further provided in Perlis that if the husband is not in the state or it is impossible to serve the notice on him, then such notice shall be served on the nearest relative of the husband. No decree of fasakh shall be pronounced by the qadhi save in accordance with Muslim law and in pursuance of the evidence of the married woman and at least two witnesses. Upon pronouncing a decree for the dissolution of marriage, the qadhi must register it as a divorce and issue a certificate thereof in a prescribed form to the wife.¹²⁸

In the Perak case of *Mashitah v Hussain*¹²⁹, the wife applied for fasakh divorce. She claimed that she was married in January 1974 but her husband had left her in August 1974. He had not given maintenance to her and had no property within the jurisdiction of the court from which maintenance could be obtained. The qadhi ordered the claim to be advertised in the newspaper and when the husband did not appear, and after a suitable adjournment, the qadhi asked the wife to take an oath that she had been faithful to the husband and that he had not given her maintenance. After the wife had taken the oath, the qadhi ruled that the conditions for a fasakh had been fulfilled and allowed the wife to have the fasakh divorce.

3.3.7 Ta'liq

In Muslim jurisprudence, a formula uttered by any sane adult husband as a condition for divorcing his wife upon the occurrence of a specified condition is effective. The condition, according to the majority of jurists of the four schools can be operative, not merely when the husband really desires to terminate the marriage if the specified conditions are fulfilled, but also includes the use of the condition as

Matrimonial Causes Enactment, 1966, s.71; Trengganu Administration of Islamic Law Enactment, 1955, s.106; Perak Administration of Muslim Law Enactment, 1965, s.128.

¹²⁸ Perlis Administration of Muslim Law Enactment, 1963, section 91.

¹²⁹ (1979) 2 J.H. 153.

a threat to the wife, an inducement or deterrent to a third party or an oath to reinforce some assertion or promise made by the husband. This conditional divorce is known in Muslim jurisprudence as Ta'liq al talaq. Thus a husband may bind himself to divorce his wife for example if he cruelly assaults her. This mode of divorce is popular under the Shafi'i school of law and is known by the Malays as "Cerai Taklik" that is divorce by the breaking of a condition.

When a marriage contract is prepared it is possible for the bride's guardian as a means of protecting his ward's interest, to insist upon the attachment of a ta'liq. The usual form of ta'liq is the condition set down giving the wife the right to seek divorce if the husband fails to maintain her for a period of three to four months or if the husband absents himself for six months on land or a year at sea without sending any letter or money to the wife. If such a thing happens, the wife, on the evidence of the breaking of this condition, may make a complaint to the qadhi and apply for a divorce by ta'liq. Upon receiving such application, the qadhi shall serve a notice on the husband and if the husband does not appear to show just cause for his break of the condition, the qadhi will then record the sworn statement of the wife and of at least two witnesses. If he is satisfied that the provisions of Muslim law have been complied with, he will proceed to make an order or decree as is lawful. The particulars and the nature of the divorce are then entered into the register and a certificate of divorce issued. Ta'liq as described above is perhaps the easiest way of getting a divorce because all the wife needs to establish is the breach of the promise on the part of the husband.¹³⁰

The form of ta'liq prescribed in Selangor is as follows;

¹³⁰ IFLA, section 50.

“Every time that I fail to provide maintenance to my wife for a period of four months or more, she can make a complaint to the qadhi’s court and if her complaint is proved, then she is divorced by one talaq, and every time I revoke the divorce and my wife refuses to agree to it, she is divorced by one talaq.”¹³¹

Under the previous law, it was provided that a qadhi may receive from a married woman an application for cerai ta’liq. Notice of the application was required to be served on the husband and the qadhi was required to record the evidence of the wife and at least two witnesses. The qadhi could make the order if he was satisfied that the provisions of the Muslim law had been complied with.¹³²

Under IFLA, it is provided that a married woman may, if entitled to a divorce in pursuance of the terms of a ta’liq certificate made upon a marriage, apply to the court to declare that such divorce has taken place. The court shall examine the application and make an inquiry into the validity of the divorce, and shall, if satisfied that the divorce is valid according to Hukum Shara’, confirm and record the divorce.¹³³ The provision under IFLA is therefore wider than the previous enactment as ta’liq could be exercised according to Hukum Shara’ rather than limiting it to the Shafi’i school of thought only.

In the Kuala Lumpur case of *Rokiah v Mohamed Yunus*,¹³⁴ the wife claimed divorce by ta’liq, alleging that the husband had not given her maintenance in breach of the ta’liq agreement, agreed to by the husband after the marriage. She produced witnesses in support of her claim. The husband gave evidence alleging that he had given her some

¹³¹ Selangor Rules relating to Marriage, Divorce and Revocation of Divorce, 1962.

¹³² Section 128, Administration of Islamic Law Enactment, Selangor.

¹³³ IFLA, section 50.

¹³⁴ (1981) 5 J.H. 80.

maintenance. The court gave judgement in favour of the wife and decided that whoever makes a ta'liq to grant a divorce on a condition and the condition takes place this effects a talaq in accordance with the terms of the ta'liq. The court also referred to a hadith to the effect that a believer is bound by his agreement.

Although ta'liq is not compulsory under the Hukum Shara', it is a practice based on the agreement between the parties. In the recent case of *Aisny bte Mohd Daris v Haji Fahro Rozi bin Mohdi*,¹³⁵ the wife applied to the Sharia Subordinate Court for confirmation of a divorce under ta'liq under section 50(1) of IFLA. The husband had pronounced the ta'liq in the statutory form¹³⁶ and the wife claimed that the husband had not complied with the terms of the ta'liq in that he had not given maintenance to his wife and children for over four months. The Subordinate Sharia Court referred in this respect to the verse in the Quran to the effect;

"O you who believe! Fulfil all obligations."¹³⁷ and "And fulfil every engagement for every engagement will be enquired into on the day of reckoning."¹³⁸

It is said in the Qur'an that the liability of the husband to pay maintenance to his wife is based on the condition that the wife is obedient to him.¹³⁹ It is therefore clear that the ta'liq requires the

¹³⁵ [1990] 2 M.L.J xxvi.

¹³⁶ The husband had pronounced a ta'liq in the statutory form as follows; "Every time I do not give my wife named Aisny bt Mohamed Daris such maintenance for her as is sufficient according to the custom for four months or more, my wife can make a complaint to a Sharia judge. If the complaint is proved before the Sharia judge she will be divorced by one talaq. And everytime I revoke the divorce without her consent, one divorce will be effected".

¹³⁷ Al Qur'an, Surah Al Maidah:1.

¹³⁸ Al Qur'an, Surah Al-Isra:34.

¹³⁹ And woman shall have rights similar to the rights against them according to what is equitable; Al Qur'an, Surah Al Baqarah: 228, In another verse it is said that men are the protectors and maintenances of women because Allah has given the one more strength than the other and

obedience of the wife to the husband for in the ta'liq or agreement, what is stated is the obligation of the husband to pay maintenance to his wife, which in law depends on the obedience of the wife.

The Sharia Appeal Board (Kuala Lumpur) confirmed the decision of the Subordinate Sharia Court in holding that although the form of ta'liq does not touch on the question of obedience of the wife to the husband, it mentions maintenance as an obligation of the husband and therefore it is necessary for the wife to show that she is not nushuz.

In most of the other states in Peninsular Malaysia, the situation is similar to Kuala Lumpur. Specifically in Kelantan, Trengganu, Pahang and Perak, the Registrar of Marriage is required, in registering a marriage, to prepare a surat ta'liq in a prescribed form and to obtain the signatures of the parties thereto.¹⁴⁰ In the other states, ta'liq is encouraged even though it is not made compulsory. The general form of the ta'liq for the states is similar although there are differences in various aspects. In all the states except Perlis which has no special provision for ta'liq,¹⁴¹ the procedure for application of a divorce by ta'liq is expressly provided by their respective enactments. The procedure is generally similar. A married woman may apply to the qadhi's court for the declaration that a divorce in pursuance of the terms of a ta'liq made upon marriage has taken place. Notice of the application is required to be served on the husband and the qadhi is required to record the evidence of the wife and at least two witnesses. However, these requirements are not stipulated in Kelantan,

because they support them from their means. Therefore the righteous women are devoutly obedient and guard in the husband's absence what Allah would have them guard; Al Qur'an, Surah An Nisaa':34.

¹⁴⁰ Kelantan, Shariah Courts and Muslim Matrimonial Causes Enactment, 1956, s.67(5); Trengganu Administration of Islamic Law Enactment, 1955, s.102(5); Perak Administration of Muslim Law Enactment, 1965, s.122(5); Pahang Administration of the Religion of Islam and the Malay Custom of Pahang Enactment, 1982, s.63.

¹⁴¹ Perlis Administration Of Muslim Law Enactment, 1963, s.87(8).

Trengganu, Perak and Pahang. The qadhi will then examine and make enquiry into such application and shall if satisfied that the divorce is valid, confirm the divorce and register it. It is interesting to note that ta'liq in customary law in Rembau, Negeri Sembilan is usually employed at the marriage of a Rembau woman to a man from another state and may also be used where the bridegroom is a local man.¹⁴²

3.4 DISSOLUTION OF MARRIAGE BY CONVERSION.

Under the Shafi'i school of thought, a wife may also bring an action to invalidate her contract where the husband does not meet the conditions stipulated in the marriage, for instance provisions relating to the husband's religion. Apostasy from Islam by either of the spouses is in itself sufficient to cause the complete dissolution of the marriage.

A new provision of some significance under IFLA is that the conversion (whether into Islam by a party to a non-Muslim marriage or out of Islam by a party to a Muslim marriage) will not operate to dissolve the marriage until and unless confirmed by the court.¹⁴³

3.5 ARBITRATION BY HAKAM

As discussed, the fundamental principle behind the marriage contract in Islam is permanency. Islam encourages a married couple to treat each other kindly and to build a good relationship with each other. When serious differences or misunderstandings arise between them, Islam enjoins an attempt at reconciliation by the appointment of arbitrators. This attempt at arbitration is served by the institution of hakam. The settlement of marital disputes by arbitration is recommended in the Quran, which says:

¹⁴² Taylor, 1970, p.45.

¹⁴³ IFLA, section 46.

“And if you fear a breach between the husband and wife appoint a hakam (arbitrator) from his family and a hakam from her family; if they shall a reconciliation God will cause them to agree.”¹⁴⁴

By this institution, when there is a conflict between the married couple, the qadhi will appoint two arbitrators, one each from the families of both the husband and the wife, in an attempt to find peaceful means to resolve the conflict. The rationale behind the institution of hakam is to enable parties to a marriage to overcome marital conflicts without having to go through the bitter experience of a divorce and to enable the couple to reach some form of a compromise. Hussein noted that the rules governing the process of reconciliation reveal the Qur'an's emphasis upon the importance of marriage and the gravity of divorce.¹⁴⁵

According to the prevailing view of the Maliki school when arbitrators have been appointed, but have failed to bring about a reconciliation between the couples, the arbitrators have the right to decide whether there should be a divorce. Their decision can be enforced by the court. This opinion is based on the understanding that the two arbitrators are two judges, not agents. On the other hand, according to the prevailing view of the Shafi'i school, if the arbitrators are unable to affect reconciliation between the couple, their powers of arbitration cease. Therefore, it is then the duty of the Ruler or court to give a judgement which can be considered as beneficial to the parties. The arbitrators may arrange a divorce or khulu' only when they have been specially empowered to do so as authorised agents by the husband in a court and by both parties in khulu'. This view is based on the understanding that they are two agents who may act only by consent

¹⁴⁴ Al Qur'an, Surah An Nisaa: 35.

¹⁴⁵ Hussein, S.J. "Marriage Breakdown: Comparative View." International Islamic University Law Journal, Vol.1, No.1, 1989, p.136.

of the parties. However, there is also a minority Shafi'i view that follows the Maliki school and says that the two arbitrators are two judges appointed by the ruler or court.¹⁴⁶ This opinion has been accepted on the grounds that the Qur'an has named each of them as hakam and an agent is not an arbitrator. Accordingly, the consent of the two spouses is not a condition of their appointment, and they may give what decision they consider beneficial, particularly whether the marriage should be continued or that it should be dissolved. In the case where the arbitrators themselves have differed in their finding, their decision cannot be enforced until they have come to a unanimous agreement.¹⁴⁷

IFLA provides that if the court is satisfied that there are shiqaq (constant quarrels) between the parties to a marriage, the court may appoint in accordance with Hukum Shara' two arbitrators or hakam to act for the husband and wife respectively. This provision does not specifically mention that the Shafi'i school of thought should be followed. Therefore, it leaves the task of interpretation to the qadhi to decide which school of thought he wants to adopt.

In other states specifically in Kelantan, Trengganu, Kedah and Penang, and Pahang it is provided that where a qadhi is satisfied that there are constant quarrels between the parties to a marriage he may appoint in accordance with Muslim law, two arbitrators or hakam to act for the husband and the wife respectively. In making such appointment the qadhi shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. The qadhi may give directions to the hakam as to the conduct of the arbitration and they shall conduct it in accordance with such directions as specified by Muslim law. If they are unable to agree or, if the qadhi

¹⁴⁶ Hj. Ibrahim, 1987.

¹⁴⁷ Ibid.

is not satisfied with their conduct of the arbitration, he may remove them and appoint other hakam in their place. The hakam shall endeavour to obtain from their respective principals full authority and may if their authority extends so far, decree a divorce and shall in such an event report it to the qadhi for registration. If the hakam are of the opinion that the parties should be divorced but are unable for any reason to decree a divorce, the qadhi shall appoint other hakam and shall confer on them authority to effect a divorce and shall, if they do so, register the divorce and issue certificates to the parties.¹⁴⁸ These provisions show that the Shafi'i school of thought has been followed where the hakam only acts as agent.

However, the situation in Perlis is quite different. In Perlis it is provided that whenever any misunderstanding arises from the decision of the court, the qadhi shall have the power to order both parties to appoint their representatives to find ways of solving the misunderstanding and the representatives shall have power on behalf of the husband to receive the compensation and on behalf of the wife to receive the divorce. If the two representatives are incompetent and without ability to effect a settlement the qadhi shall have power to appoint two arbitrators, one to act on behalf of the husband and the other to act on behalf of the wife in order to find ways of solving the misunderstanding. The arbitrator representing the husband shall have the power to declare a divorce. If the two arbitrators are unable to solve the misunderstanding between the husband and the wife the qadhi shall refer the matter to the "Majlis" for decision and the decision and the decision of the "Majlis" shall be final. On satisfactory proof being given that the wife is without property and that she still refuses to return to her husband the arbitrators shall have power to

¹⁴⁸ Kelantan Council of Religion and Malay Custom and Kadhis Courts Enactment, 1953, s.150; Trengganu Administration of Islamic Law Enactment, 1955, s. 108; Penang Administration of Muslim Law Enactment, 1959, section 126; Kedah Administration of Muslim Law Enactment, 1962, section 27, Pahang Administration of the Law of the Religion of Islam Enactment, 1956, section 27.

decree a divorce without compensation if it appears to them that to compel her to return to her husband will cause hardship and that a divorce is in the interests of both parties. If a divorce with compensation is decreed and the wife is possessed of property such property is liable to be attached for the recovery of such compensation. If a reconciliation is impossible, the party applying for divorce shall complete the prescribed form. The rights of each party shall be agreed to in the presence of the Registrar. The husband shall deposit a sum of not less than one month's maintenance for the wife with the qadhi unless under the divorce the husband is not required to pay any maintenance of the wife. Each party to the divorce shall return to the other the property to which he or she is entitled. The husband is required to report the divorce to the Registrar within seven days.¹⁴⁹

There is no express statutory provision for the appointment of hakam in the other states of Malaysia. Different Muslim countries have introduced the institution of hakam in different forms. The courts in Pakistan while handling the principle of shiqaq have unequivocally ruled that procedural technicalities cannot become a hindrance in separating the spouses who cannot observe the limits of God. They have declared that a judge will consider whether the rift between the parties is a serious one although he may not consider the reasons of the rift. It must be pointed out here that under the Islamic law, the courts or the qadhi do not probe into the most intimate as well as complex details of relationship between a man and his wife causing humiliation, embarrassment and bitterness. Such things are happening in Western divorce law based on the concept of marriage breakdown and have been greatly denounced. Marriage has been considered as ibadah, an act of worship. What Islam contemplates is that when the legitimate objects of matrimony have been destroyed without any

¹⁴⁹ Perlis Administration of Muslim Enactment, 1963, s. 90A.

prospects of reconciliation, then and only then is divorce allowed. This is the essence of the doctrine of shiqaq.¹⁵⁰

In Pakistan, all applications for repudiation, second marriage and maintenance shall be referred to the Arbitration Council consisting of a Chairman and a representative of each of the parties.¹⁵¹

The Ottoman law of Family Rights of 1917 provides that if quarrelling or discord develops between the spouses and one of them refers the matter to the court, the court shall appoint an arbitrator from the family of each of the parties. If there are no suitable members of the family who can be appointed, then it shall appoint someone suitable from outside. The family council so formed shall investigate complaints and replies of each of the parties and do its best to reconcile them. If this proves impossible, then if the fault is the husband's, the court shall divorce them while if the fault is the wife's, it shall decree a dissolution by khulu'. If the Arbitration Council cannot reach an agreement, the court shall appoint another council of suitable arbitrators or shall appoint a third arbitrator unrelated to either of the parties. The judgement of the arbitrator shall be final.¹⁵²

In Tunisia, when one spouse alleges ill-treatment but has no proof to substantiate the allegation, arbitrators will be appointed. The arbitrators however, have no power to decree a divorce and all their decisions must be referred to the court.¹⁵³

¹⁵⁰ Hussein, 1989.

¹⁵¹ Pakistan Family Law Ordinance, 1961, section 7.

¹⁵² Ottoman law of Family Rights, 1917, Article 130.

¹⁵³ Tunisian Law of Personal Status, 1956, section 25.

In Indonesia, under the regulations of 1955,¹⁵⁴ a husband who desires to divorce his wife is required to apply to either the Consultation Bureau in the Ministry of Religious Affairs or to the Marriage Councils. The parties shall then be summoned and a reconciliation attempted. If the attempt fails, the matter shall be postponed for seven days and the parties shall be asked to reconsider the matter within that period.

The Egyptian Family law Act, 1979, section 7-11 lays down the essential conditions to be possessed by the two arbitrators, the considerations relating to the appointment and the time of the commencement and termination of their duties. The period from commencement to termination should not normally exceed six months. The court should inform the arbitrators and the parties of the order of appointment made and require the arbitrators to take an oath to carry out their duties in good faith. The court has power also to extend the period of the arbitration to an additional period not exceeding three months.

In order to avoid undue prolongation of the arbitration, the amendment provides for the appointment of a third arbitrator, who will act with the other arbitrators. The court will act on the decision of all the arbitrators or a majority of them. If the three arbitrators are still unable to reach a solution or do not submit a report in due time, the court can itself act, take evidence and give its decision, as set out in section 11.

The appointment of the third arbitrator does not appear to be in conflict with the sources of Islamic law. The Qur'an does not forbid it. At the present time it has become necessary as a way of achieving

¹⁵⁴ Marriage and Divorce Regulations, 1955, section 3.

justice and avoiding injustice. In fact some jurists believe that only one arbitrator can be appointed.¹⁵⁵

If the court finds that all its efforts at reconciliation have failed and it is clear that is impossible for the parties to live together in peace and harmony and the wife persists in asking for divorce, the court is given the power to decree an irrevocable divorce and if necessary to order the wife to pay reasonable compensation. These provisions are taken directly or indirectly from the views of the Maliki school.¹⁵⁶

In cases where the application is for a divorce by talaq, the committee should advise the husband against the pronouncement of a talaq. In cases where the application is for another forms of divorce, the committee should first of all attempt a conciliation of the parties. If this fails, the committee should then proceed a step further by conducting a preliminary inquiry into the matter and determine whether the claim for divorce, be it by fasakh, ta'liq or khulu', is justifiable and if so whether the case should be heard by the Court of Qadhi or Chief Qadhi.

In Singapore, legislation as regards conciliatory works was introduced by the Muslim (Amendment) Ordinance 1960.¹⁵⁷ It should be noted however that this Ordinance merely enabled the Shariah Court, before making an order for divorce, to refer the application to the conciliatory body preceding the hearing of the case. In spite of that, since 1960, conciliation has become the principal means by which the Shariah Courts of Singapore have been able to reduce the number of

¹⁵⁵ Hj. Ibrahim, 1987.

¹⁵⁶ Ibrahim, Ahmad bin Mohamed, "Recent Amendments to the Egyptian Family Law," J.M.C.L [1980] p.81.

¹⁵⁷ Number 40 of 1960 which came into force on 27th. May 1960.

divorces among the Muslims in that country.¹⁵⁸ The institution of hakam, therefore, if properly put into practice would serve as a useful and effective means for the Sharia Courts in Malaysia to check the rate of divorce.¹⁵⁹

¹⁵⁸ Siraj, M. "The Shariah Court and its Control of Divorce Rate in Singapore", 1963, Mal L.R., p.148.

¹⁵⁹ Mahmood, 1979, p.98.

PART TWO

CHAPTER 4

EMPIRICAL STUDY OF THE PRACTICE IN THE FEDERAL TERRITORY OF KUALA LUMPUR.

4.1 INTRODUCTION

This chapter reports the results of a divorce survey carried out in Kuala Lumpur on Muslim divorce between 1983-1990 and non-Muslim divorce between 1975-1990. The survey was carried out in a random fashion targeted towards 150 divorce files in each year of the sixteen year period for the non-Muslim population and eight year period for the Muslim population in Kuala Lumpur. This involved in the research of 2305 files (32.3 percent of 7428 files) filed with the High Court of Kuala Lumpur for non-Muslim divorce and 1200 files in the Sharia Court for Muslim divorce. The jurisdiction of these courts covers an area of nearly 243.65 square kilometres with a population of 977,102.¹ The divorce survey form as shown in Appendix II was used as the criterion upon which the survey was carried out. The analysis, to a large extent, represents the divorce behaviour of an urban population with a more liberal attitude towards family life, marriage and also divorce, as compared with the general population of Malaysia.

¹ Information Malaysia, 1990, p.726.

Since one of the primary motivation factors of this study was to analyse the effect of the LRA on the trends and patterns of non-Muslim divorce in Kuala Lumpur, the periods selected were between 1975-1982 and 1983-1990. 1982 is the watershed year as it was on 1st March 1982 that the LRA was brought into force.² Therefore, for most practical purposes, it was assumed that the effect of the LRA was minimal and negligible with respect to the overall trend and patterns of divorce for non-Muslims between 1975 and 1982. Nevertheless, it must be borne in mind that there would be some effects of the LRA in 1982 that would show up as a slight deviation from the norm, which will be pointed out in the appropriate section.

For Muslims, the effect of IFLA could not be properly analysed in a shorter time frame as compared to the LRA. This is due to the fact that the IFLA was in force only on 24th April 1987.³ Nevertheless, the outcome of the data seems to show similarities with the non-Muslims except in certain circumstances.

Besides comparing and contrasting the effect of the two laws, the research was also to investigate whether certain factors can be correlated to a high probability of divorce. As the source of the following analysis is solely from the records, there are certain obvious difficulties in trying to find explanations for behaviour. Some important sociological information concerning educational level, income or background of the couple, is not available. Nevertheless, it should be possible to produce some quite important findings from this limited source of information.

² P.U.(B) 73 82.

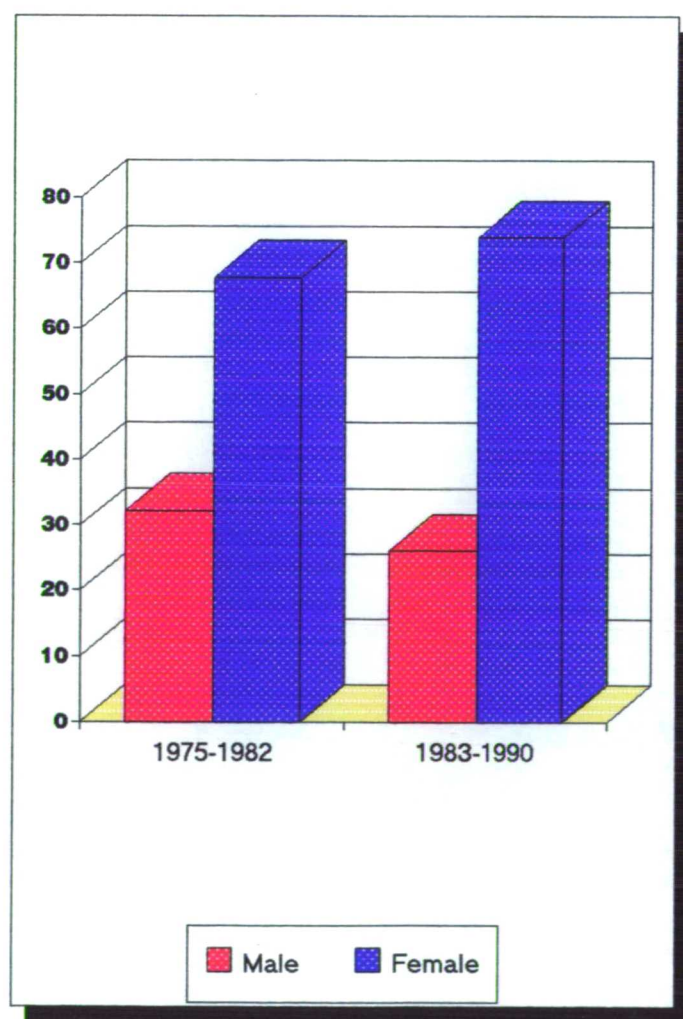
³ Interview with Ustaz Mohd, Nasir, Registrar of Muslim Marriages and Divorces, Jabatan Agama Wilayah Persekutuan (JAWI) in June, 1992.

This analysis is organised into several sections :-

- (a) Sex of petitioner in Muslim and Non-Muslim divorce.**
- (b) Nature of petition in Non-Muslim divorce.**
- (c) Kind of petition in Non-Muslim divorce.**
- (d) Grounds for divorce in Muslim and Non-Muslim divorce.**
- (e) Age at marriage and divorce for Muslim and Non-Muslim divorce.**
- (f) Types of Muslim divorce.**
- (g) Methods of Muslim divorce.**
- (h) Duration of marriage in Muslim and Non-Muslim divorce.**
- (i) Occupational status of husband and wife in Muslim and Non-Muslim divorce.**
- (h) Number of children in Muslim and Non-Muslim divorce.**

TABLE 4.01
Percentage Distribution of Unilateral Petitions By Sex of
Non-Muslim Petitioners from 1975-1990

Description	1975-1982	1983-1990
Male	32.2	26.1
Female	67.8	73.9



4.2 SEX OF PETITIONER

It is obviously of some interest to consider matrimonial proceedings in the light of which spouse initiates them. In this research, an attempt will be made to investigate who usually petitions for divorce, the husband or the wife. Only unilateral petitions were studied because in a joint-petition, it is not possible to conclude who actually initiates the divorce.

Table 4.01 represents the distribution of sex of non-Muslim petitioners in unilateral petitions for the years 1975 to 1990. The LRA appears to have made no difference to the percentage of petitions brought by husbands or wives, hence, the patterns do not change much. In both periods, females predominate with a representation of 67.8 percent in the period 1975-1982 compared with the male percentage of 32.2 percent before the LRA. After LRA, the picture is still the same in that females are still in the majority in unilateral petitions at 73.9 percent with males coming in at 26.1 percent.

Can we assume from this figure that men in general are more committed to sustaining the marriage? The present study is not conclusive on this point but research carried out by Davies and Murch in Bristol in their Conciliation in Divorce Study (1988) concluded that whilst the husband had not wanted a divorce, he had not wanted much of a marriage either, and it was this that prompted his wife to issue proceedings. They also found that not only did women tend to be the initiator of divorce, but were also correspondingly less likely to regret the ending of a marriage.⁴

⁴ Davies, Gwynm and Murch, Mervin, Grounds for Divorce, Oxford, Clarendon Press, 1988, pp.33-34.

Research also show that in the majority of divorce cases the petitions are brought by women. It would be naive to assume that this necessarily reflect a greater dissatisfaction with marriage on the part of the women. In an urban society the Kuala Lumpur, economic dependence is the main deterrent to divorce, and women have traditionally been more constrained in this respect than men.⁵ Women sometimes make an application for divorce for economic reasons, such as to receive money for child maintenance and custody orders, whereas the husband' reasons are more simply to obtain termination of marriage. The legal process of divorce, in practice, involves the division of property, settling maintenance and arrangements for children. These are matters that are particular concern to women who are most likely to retain prime responsibility for the children and are least likely to be the major wage earner. ⁶

Law and custom gave wives who are economically dependent on their husbands, limited choice but to stay in an unhappy marriage. As poignantly put by Huber,

*"In preindustrial societies, marriage was situated in a web of economic reciprocities. Tearing that web decreased the durability of marriages, not because modern husbands and wives get along less well but they are open to other options if they grow to dislike one another."*⁷

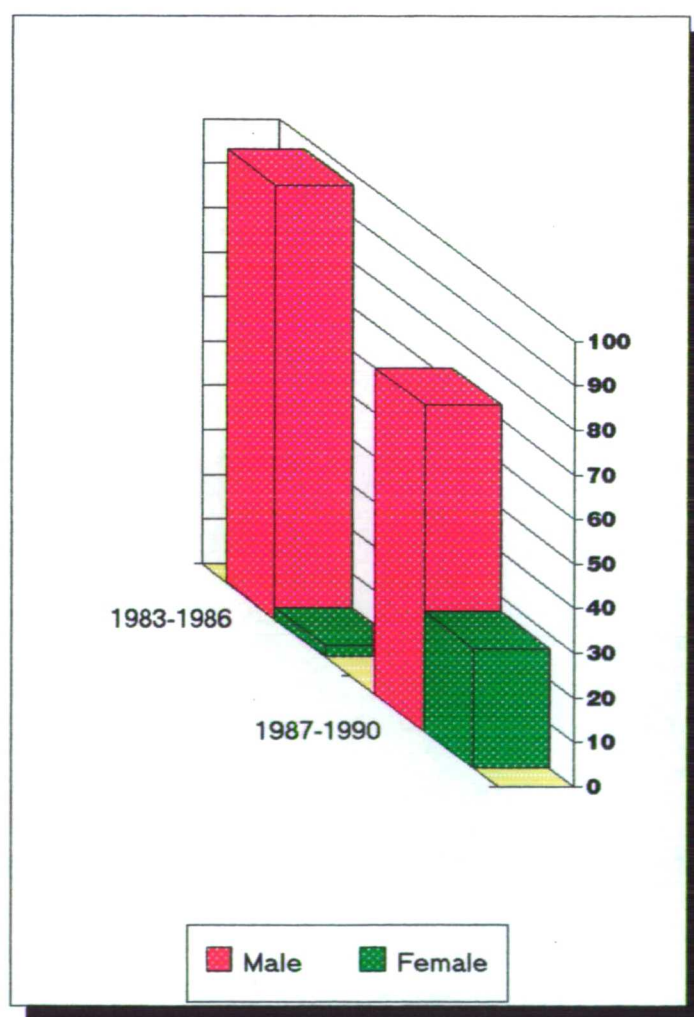
⁵ For further discussion on this point see Chapter 5 pp.398-404.

⁶ Martin, Richards, The Changing Role of Men, in Change in Marriage, Rugby, National Marriage Guidance Council, 1982, p.125.

⁷ Huber, Joan and Spitze Glenna, Sex Stratification: Children, Housework and Jobs, New York, Academic Press, 1983, p.88.

TABLE 4.02
Percentage Distribution of Unilateral Petition by Sex of
Muslim Petitioners from 1983-1990

Description	1983-1986	1987-1990
Male	97.5	73.2
Female	02.5	26.8



The increase in women's paid employment has been a primary influence in the rise of the female petitioners rate. Another factor has been the Legal Aid Scheme which was first introduced in 1971 through the Legal Aid Act 1971 to enable litigants of limited means to initiate divorce proceedings.⁸

The increase in women petitioners also suggests that traditional roles within the family have also been challenged on an unprecedented scale. Women have become much more articulate in complaining about their domestic lot, claiming equality and seeking choices as between home-making, motherhood and career. This study on non-Muslim divorce confirms research made by Choudhary on Indian divorces in which he concludes that the trend in India indicates that increasing education among women, greater female employment opportunities, and changing sex roles of women will increase marital disruption.⁹

As for the Muslim population in Kuala Lumpur, from 1983-1986, it was observed that the majority of petitioners were males (see Table 4.02). At 97.5 percent, males were overwhelmingly in the majority, compared to only 2.5 percent for females. This was the case for the period 1987-1990 as well. However, the numbers of male petitioners dropped to 73.2 percent and the proportion of female petitioners increased to 26.8 percent after the new law was enforced.

Prima facie, the findings in this study seem to confirm research done by Tan (1987)¹⁰ that in Malay divorces, it is the husband who is more

⁸ Section 15 and 16 of the Legal Aid Act, 1971; The number of applicants increased after legal aid was introduced.

⁹ Choudhary, 1988, p.47.

¹⁰ Tan Poo Chang, 1987, p.24.

inclined towards divorce. Other studies such as Kuchiba (1979)¹¹ and Jones (1981)¹² indicate that in most cases the wife instigates the divorce and persuades the husband to divorce her by talaq.

It is interesting to note that a report by the Unit Perunding dan Pembangunan Keluarga (Consultation and Development of Family Unit) points to the fact that most of the cases covered by the report are complaints made by the wives against their husbands. These cases are brought up to the Sharia Court after failure of reconciliation. In most of the cases, both parties would mutually agree to divorce.¹³ According to Wan Sulaiman, to facilitate the divorce process, the husband would petition for the divorce through talaq.¹⁴ Therefore, it would seem on the paper records that it is the males who do the petitioning whereas the true situation is that both agree to divorce after consultation with the officer at the Unit Perunding dan Pembangunan Keluarga.

Divorce proceedings in the Sharia Court show that securing a divorce can be a trying experience. This is especially so for rural and poorly educated women. In fact, going to court is regarded as something embarrassing and undesirable in Malay culture. It is often avoided unless necessary. Due to financial hardship, parties often cannot afford to engage lawyers to plead their cases. The petitioners also run a great

¹¹ Kuchiba, Masuo, Yoshihiro Tsubouchi and Narfumi Maeda (eds), Three Malay Villages: A Sociology of Paddy Growers in West Malaysia translated by Peter and Stephanie Hawkes, Honolulu, The University Press of Hawaii, 1979, pp. 162.

¹² Jones, 1981, p.264.

¹³ Laporan Unit Perunding dan Pembangunan Keluarga, Jabatan Agama Islam Wilayah Persekutuan, 1990.

¹⁴ Personal Conversation with Ustaz Wan Sulaiman, Head of Counselling Unit, Department of Religious Affairs, Kuala Lumpur, March, 1992.

risk of their divorce petitions being rejected through no fault of their own but because of the strict way with which the law is upheld.¹⁵

In a study of Muslim divorces in Kedah, Sharifah noted that a divorce petition is normally settled after an average of three court sittings that covered a span of about seven to eight months. Hearings are often adjourned on the slightest excuse. As far as the petitioner is concerned, this practice has been known to cause undue financial and psychological hardships. The rigorous procedures which the women are subjected to, before and during court hearings, can leave them spiritually demoralized and financially worse off.¹⁶

However, from the point of view of the qadhi, adjourning hearings may help estranged couples to become reconciled. In fact, according to the professional ethics of the qadhi, it is his obligation to attempt a reconciliation first before giving the permission to divorce.¹⁷

However, Sharifah commented that the overriding concern of the court officers to make sure that God's laws are administered and that everything should be done according to the stipulations demanded in the Sharia, has resulted in a certain degree of rigidity, which is intensified by the strict rules associated with the modern bureaucracy that Malaysian courts are a part of.¹⁸

It can be seen from Table 4.03, that quite apart from the overall preponderance of female petitioners in the non-Muslim divorce, the

¹⁵ New Straits Times, February 17, 1989.

¹⁶ Syed Hassan, Sharifah Zaleha bt, "Women, Divorce and Islam in Kedah", SOJOURN, No. 2, 1986, pp.183-199.

¹⁷ Personal Conversation with Ustaz Abdul Aziz bin Mashuri, Judge of the Sharia Court, Kuala Lumpur in July, 1993.

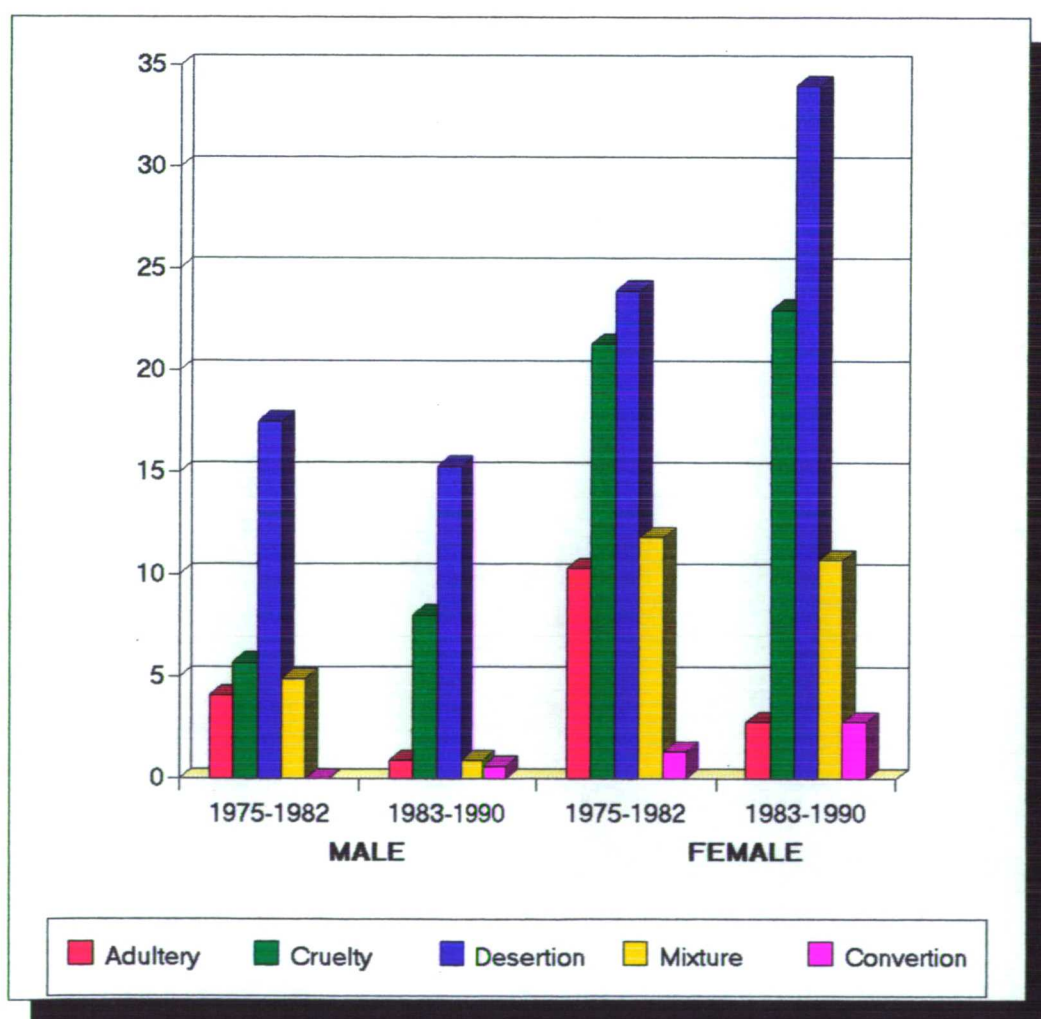
¹⁸ Syed Hassan, 1986.

proportionate use of the grounds for divorce varies significantly between the sexes. The most significant feature is the wives' virtual monopoly of cruelty and desertion ground. For male petitioners, desertion is the most popular ground.

TABLE 4.03

Percentage Distribution of Unilateral Petitions by Grounds for Divorce and Sex of Non-Muslim Petitioner from 1975-1990

GROUP	MALE		FEMALE	
	1975-1982	1983-1990	1975-1982	1983-1990
Adultery	04.1	00.9	10.3	02.8
Cruelty	05.7	08.0	21.3	23.0
Desertion	17.5	15.3	23.9	34.0
Mixture	04.9	00.9	11.8	10.7
Conversion	00.0	00.6	01.3	02.8



Under the ground of desertion, males had a percentage of 17.5 percent which decreased to 15.3 percent after the LRA. It is difficult to ascertain why the husband petitioner prefer desertion to the other grounds. It may be due to the fact that reasons which led to the desertion of wife are usually unspecific, unlike the case of adultery and cruelty which are specific matrimonial offences of which details must be given to the court. Moreover, according to the records, adultery and cruelty are the more usual matrimonial offences committed by the husbands. Table 4.03 showed that before the LRA, the percentage of males using adultery as a ground for divorce was only 4.1 percent whereas of females petitioner it was 10.3 percent. As for the ground of cruelty, males using this ground accounted for only 5.7 percent, while female petitioners showed a higher percentage of 21.3 percent, and after the LRA, males were only at 8 percent while the percentage of female petitioners using these grounds increased to 23 percent.

As can be seen, most wife petitioners rely on the grounds of cruelty, desertion and separation. Due to the nature of traditional upbringing in most Asian homes, large number of wives are still economically dependent and subservient to their husbands. This has resulted in husbands feeling superior to their wives.¹⁹

The above results confirmed findings made by Chester and Streather in England that wives have been the principal users of cruelty as grounds for divorce since its introduction in 1937. It is interesting to note, however, that the definition of what constitutes "cruelty" came to be broadened considerably, going well beyond the original conception of physical violence.²⁰

¹⁹ For further discussion on this point see Chapter 1.

²⁰ Chester, R. and Streather J., "Cruelty in English Divorce: Some Empirical Findings", Journal of Marriage and the Family, 34, (1972) 706.

As for desertion and separation, studies in Philadelphia and Chicago showed that desertion, popularly known as the “poor man’s divorce”, was prevalent among the foreign population and in the slum districts. Desertion rivalled divorce in frequency of occurrence, and the enquiries further indicated that these two phases of marital disruption somewhat overlapped. Cahen quoted a study carried out by Colcord in 1919 which concluded that desertion is not the poor man’s divorce since the deserter does not generally consider his absence from home to amount to anything so final and definite as a divorce. The consensus of opinion of social workers seems to be that desertion is merely the “poor man’s vacation”.²¹

Under the mixture of grounds (combination of adultery, cruelty, desertion and separation), male petitioners were quite low at 4.9 percent whereas females recorded a percentage of 11.8 percent and after the LRA, for these grounds, males are at 0.9 percent and females at 10.7 percent. The grounds of conversion which were only introduced in 1982 had no effect on males but was used by females as grounds for divorce at 0.4 percent, and after the LRA, 0.6 percent of males used these grounds and the percentage of females increased to 2.8.

The change in the law could have brought about these changes as was the case in New Zealand. Although the 1898 law in New Zealand gave women equal access to divorce for the grounds of adultery, the number of women’s petitions on the grounds of adultery scarcely changed at all. Although women’s organisations in New Zealand agitated for equality, what turned out to be most useful to women in reality was not equalization, but liberalisation of divorce law. This is because women’s petitions for divorce far outnumbered men’s when founded on the newly recognised matrimonial offenses of desertion and drunkenness.

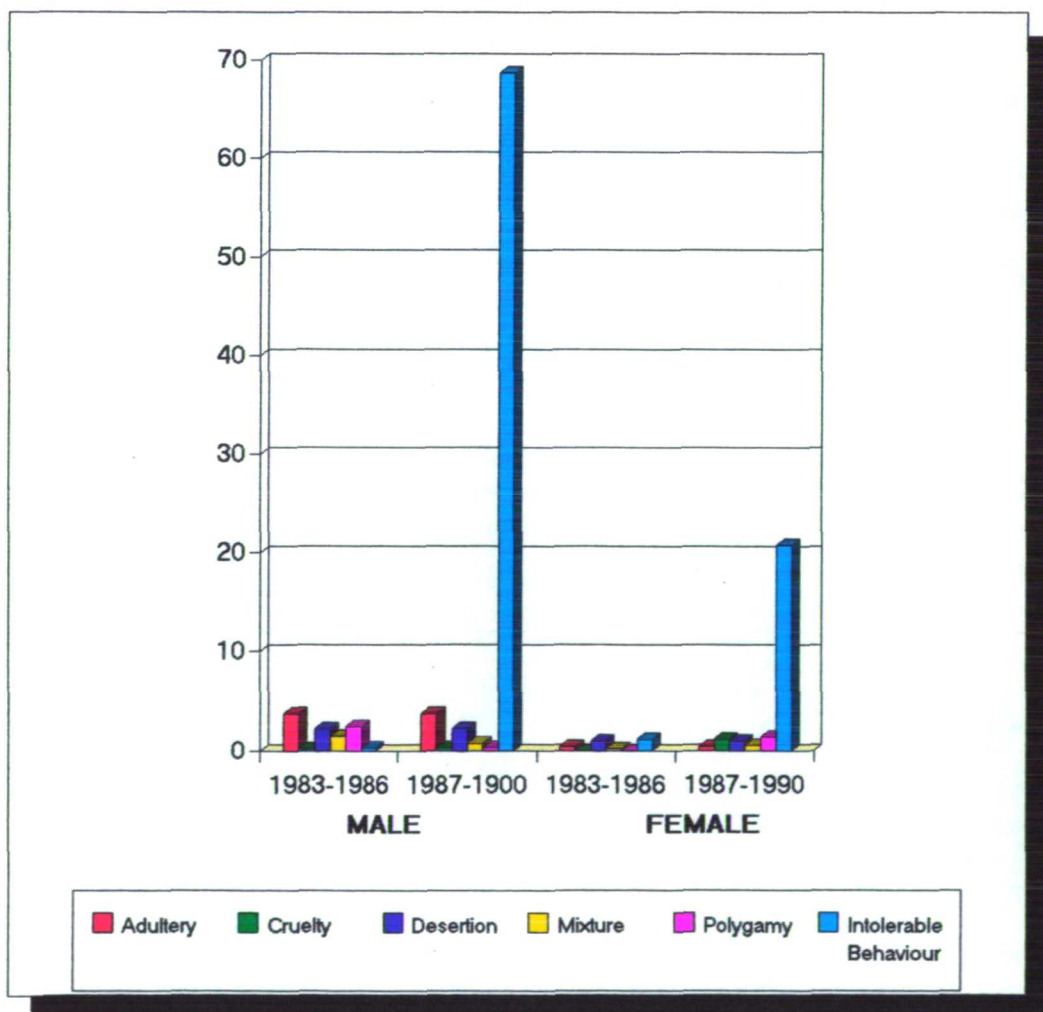
²¹ Cahen, Alfred, Statistical Analysis of American Divorce, New York, Columbia University Press, 1932 p.16.

TABLE 4.04

Percentage Distribution of Petitions by Grounds for Divorce and Sex of Muslim Petitioners from 1983-1990

GROUP	MALE		FEMALE	
	1983-1986	1987-1990	1983-1986	1987-1990
Adultery	3.8	03.8	0.4	00.4
Cruelty	0.2	00.3	0.0	01.2
Desertion	2.2	02.2	0.9	00.9
Mixture	1.5	00.7	0.2	00.5
Polygamy	2.5	00.3	0.0	01.4
Intolerable Behaviour ¹	0.3	68.7	1.1	20.8

¹ Intolerable behaviour for women includes drinking, gambling, and womanising and inability or refusal of the husband to maintain (nafaqah) the wife and the family. For the husband, intolerable behaviour would mean that the wife is recalcitrant (nushuz) or disobedient.



Phillips concluded that it was these new grounds for divorce which reversed the sex ratio of divorce petitions.²²

Whereas, Chester (1970) has shown that the English experience regarding the male-female share of petitions varies according to factors such as duration of marriage and fertility and he also notes that the issue is further obscured by the effects of the 1969 Divorce Reform Act. Evidence from his field study suggests that the pattern does not represent agreed arrangements between the spouses about petitioning²³.

As observed previously, males were predominant in the Muslim divorce scene and this is exemplified by the low frequencies of females petitioning for divorce under the various grounds available in Table 4.04.

It was observed that intolerable behaviour was the ground used most frequently by females in the 1987-1990 period at 20.8 percent. This was followed by polygamy at 1.4 percent, cruelty at 1.2 percent, desertion at 0.9 percent and adultery at 0.4 percent.

Males mostly divorced under intolerable behaviour at 68.7 percent, followed by adultery at 3.8 percent and desertion at 2.2 percent. The least used grounds were cruelty and polygamy at 0.3 percent each. Desertion on the part of husband in the Muslim divorce is deemed to upset the marital relationship. In an uncontested case, desertion is relatively easy to ascertain. In most cases, the wife's oath, the witnesses' evidence and the prolonged absence of the husband in

²² Phillips, R., Divorce in New Zealand: A Social History, Auckland, Oxford University Press, 1981, pp.65-71.

²³ Chester, Robert, Divorce in England and Wales, in Divorce in Europe, edited by Robert Chester, Leiden, Martinus Nijhoff, Vol. 3, 1977, pp. 81-92.

subsequent hearings together confirm the qadhi's suspicion that the man has indeed abandoned his wife. Even then, some women may encounter difficulties in this matter because they produce witnesses who give conflicting evidence about the exact date when their husbands were supposed to have left them. Conflicting evidence can cause a petition for ta'liq divorce to be dismissed. It is not surprising that witnesses make this error because women often submit petitions for ta'liq divorce two or more years after they have been abandoned by their husbands. Newspapers have disclosed many instances of desertion in "wanted" advertisements seeking husbands to attend court hearings for petitions based on fasakh or ta'liq filed by their wives.

Very few respondents divorced because of a desire to remarry. Women in Tan's study were more likely to do so than men, partly because a Muslim man can marry up to four wives at any one time while a Muslim woman can only marry one man at a time.²⁴

There is quite a difference in the trend before and after IFLA came into force. Except for desertion and adultery, the proportion of females increased over all the various grounds of divorce. The percentage of females using intolerable behaviour increased tremendously from 1.1 percent to 20.8 percent and males using the same grounds increased from 0.3 percent to 68.7 percent. Polygamy (inability to treat wives equally) as grounds for divorce for males decreased in percentage from 2.5 percent to 0.3 percent due to the stringency of the law in permitting polygamy. However, for the females, the percentage using inequality of treatment in polygamy as grounds for divorce increased from 0 percent to 1.4 percent. This probably shows that the law has been more sympathetic towards wives who were ill-treated in a polygamous marriage.

²⁴ Tan Poo Chang, 1987, pp.41-2.

It is interesting to note that in Tan's study, about one third of the male respondents practised polygamy and it is the practice of polygamy, which may have contributed towards the failure of some marriages. Female respondents in his study stated that it is better to be divorced than to share the spouse.²⁵

The practice of polygamy appears to have declined in recent years, partly as a result of higher education of women, increasing urbanisation and increasing awareness among women of their rights.²⁶ Under the LRA, polygamy for Non-Muslims was abolished.²⁷ There has been no similar proposal for Muslims but under the new law a Muslim man will be allowed to marry a second wife only with the consent of the Judge of the Sharia Court.²⁸

²⁵ Ibid. p.20.

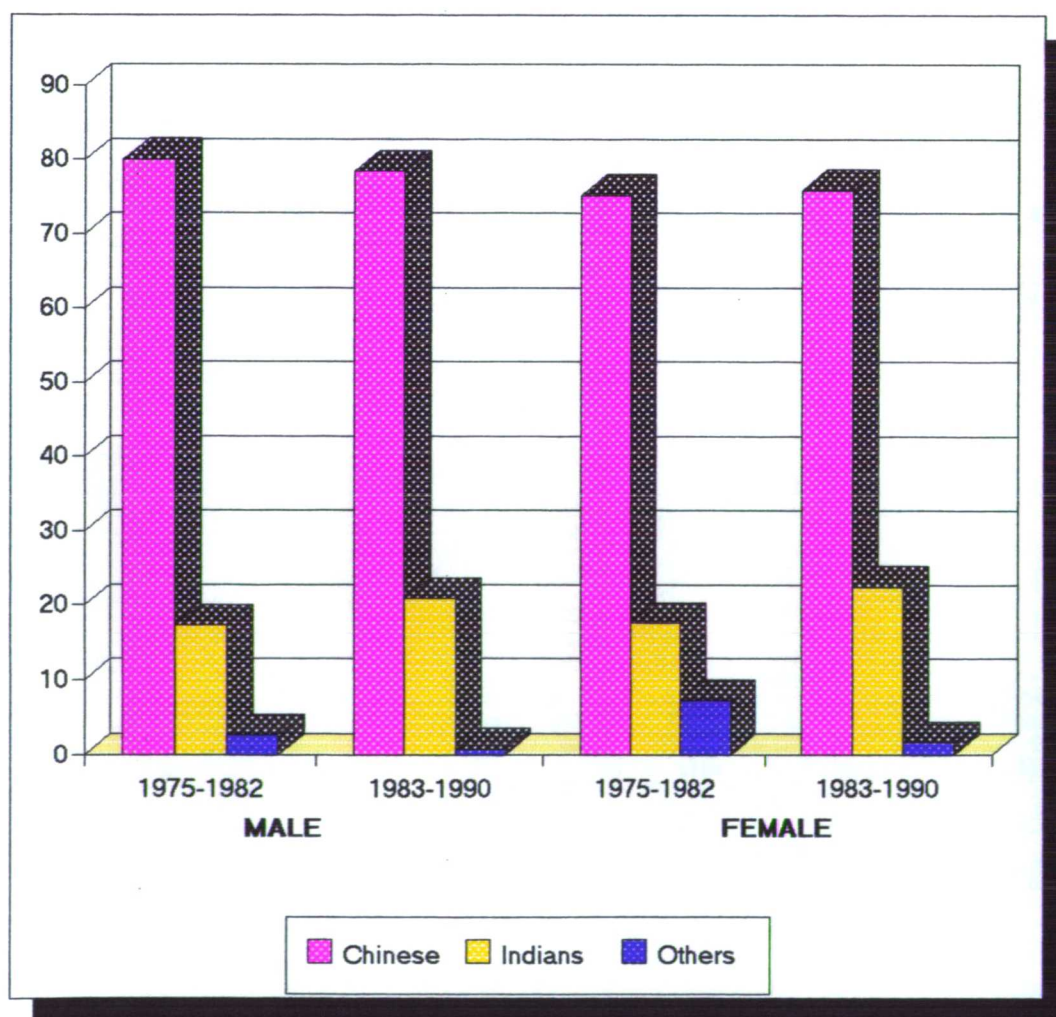
²⁶ See Aziz, 1981; p.34.

²⁷ See Chapter 3.

²⁸ IFLA, section 23.

TABLE 4.05
Percentage Distribution of Petitioners by Sex of
Non-Muslim Petitioners and Ethnic Group from 1975-1990

ETHNIC GROUP	MALE		FEMALE	
	1975-1982	1983-1990	1975-1982	1983-1990
Chinese	80.1	78.4	75.2	75.9
Indians	17.3	20.9	17.6	22.5
Others	02.6	00.7	07.2	01.6



To see how far the ethnicity of a petitioner affects the initiation of the divorce petition, a Table was constructed by cross tabulating the sex of the petitioner by ethnic group of the petitioner. Table 4.05 shows that the overwhelming majority of non-Muslim divorcees are Chinese, followed by Indians and finally Other races. Before LRA, the percentages were 80.1 percent, 17.3 percent and 2.6 percent respectively for the males. After LRA, this changed slightly to 78.4 percent, 20.9 percent and 0.7 percent respectively. For the ethnic groups of the wives, it was observed that the frequency for Chinese, Indians and other races were 75.2 percent, 17.6 percent and 7.2 percent respectively. After LRA the frequencies were 75.9 percent, 22.5 percent and 1.6 percent respectively. This appears to reflect the known pattern of the population of Kuala Lumpur in which the Chinese account for 51.9 percent, the Indians 14.3 percent and other races at 1.0 percent of the total non-Muslim population in Kuala Lumpur.²⁹ It can be observed that there is a slight increase in the representation of Chinese in divorce cases.

²⁹ See Department of Statistics, Population and Housing Census of Malaysia in General Report of the Population Census, edited by Khoo Teik Huat, Vol 1, Kuala Lumpur, Government Printers, 1980, p.22.

TABLE 4.06

Percentage Distribution of Petitioners by Sex of
Muslim Petitioners and Ethnic Group from 1983-1990

ETHNIC GROUP	MALE		FEMALE	
	1975-1982	1983-1990	1975-1982	1983-1990
Malay	99.3	97.3	99.2	98.3
Chinese	00.2	01.0	00.2	00.2
Indians	00.5	01.3	00.5	00.5
Others	00.0	00.3	00.2	00.1

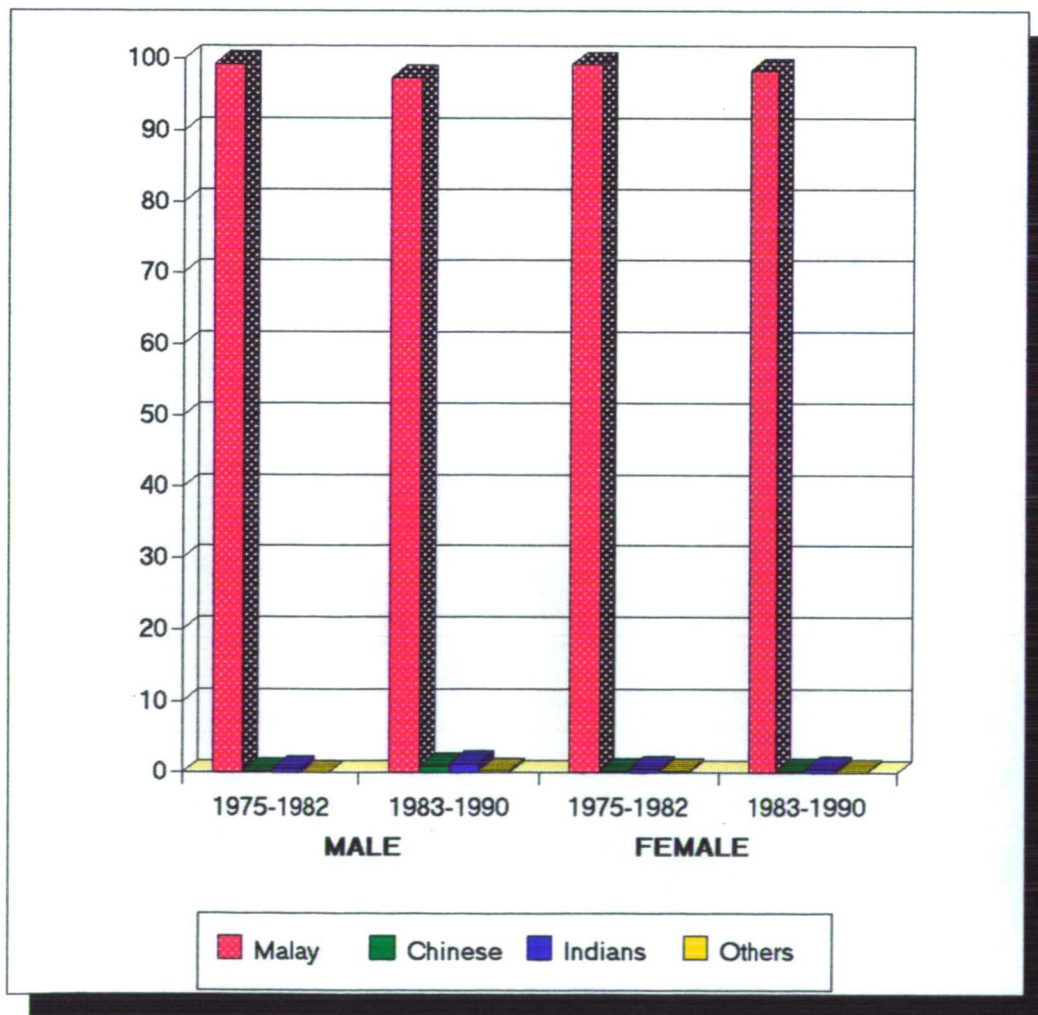


TABLE 4.07
Percentage Distribution of Unilateral Petitions of
Non-Muslim Male Petitioners by Ethnic Group from 1975-1990

ETHNIC GROUP	1975-1982	1983-1990
Chinese male	72.79	57.32
Indian male	23.61	39.02
Others male	03.61	03.66

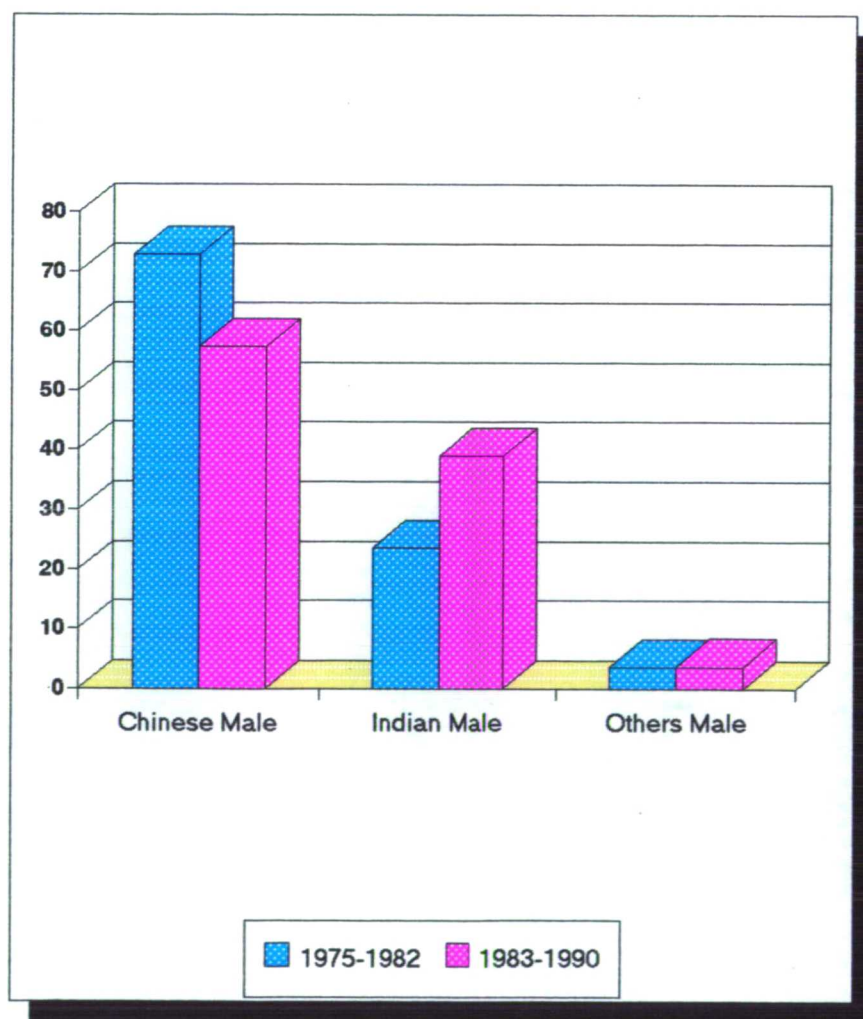


TABLE 4.08

Percentage Distribution of Unilateral Petitions of
Non-Muslim Female Petitioners by Ethnic Group from 1975-1990

ETHNIC GROUP	1975-1982	1983-1990
Chinese female	77.36	68.1
Indian female	16.59	30.62
Others female	06.05	01.3

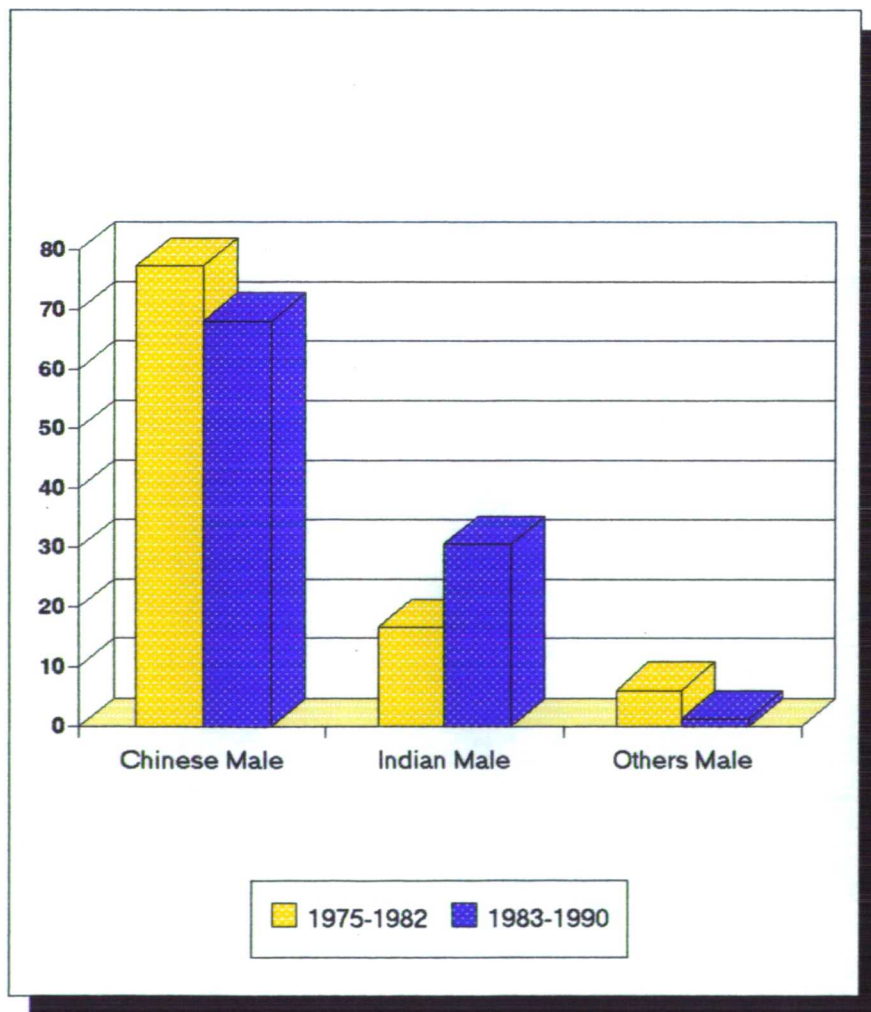


Table 4.06 reflects the fact that the majority of Muslims in Kuala Lumpur are Malays. 99.3 percent and 97.3 percent of the males who divorced in the periods 1983-1986 and 1987-1990 were Malays. Chinese, Indians and "Other" races in the Muslim community made up 0.2 percent, and 0.5 percent of all Muslim divorces respectively. For the period 1987-1990, the figures were 0.2 percent, 0.5 percent and 1 percent respectively for the Chinese, Indians and "Other" races. This phenomenon is reaffirmed in the same Table by the female percentage whereby 99.2 percent for the period 1983-1986 and 98.3 percent from 1987-1990 of all females divorced in Kuala Lumpur were Malays. There were minimal representations by the Chinese, Indian, and Other races in the Muslim community for the period from 1983-1986 and 1987-1990.

Table 4.07 shows that before and after LRA, unilateral petitions initiated by Chinese males made up the overwhelming majority at 72.7 percent and 57.3 percent respectively of the total non-Muslim male petitioners. In second place are Indian males which made up most of the remainder at 23.6 percent. This figure increased substantially to 39 percent after the LRA came into force. Others constitute 3.6 percent only.

As seen in Table 4.08, the same pattern repeats itself for female petitioners. Before and after the LRA, unilateral petitions initiated by Chinese females were 77.4 percent and 68.1 percent respectively. This was followed by Indian females at a rate of 16.6 percent but the percentage increased substantially to 30.6 percent after the LRA. This was followed by Others at 6.0 percent of the total female petitioners.

The present research does not show why there is a difference in ethnic tendency when it comes to divorce but from the statistics, Chinese wives seem to be the most litigious when it comes to petitioning for a divorce. Indian wives seem comparatively quite reluctant. This may be

due to Indian culture which is still traditionally very conservative and does not tolerate divorce.³⁰

4.3 NATURE OF PETITION

For the purposes of this research, nature of petition means whether the petition is defended or undefended. The nature of petition is only applicable to “unilateral petitions”, that is petitions brought by one party, as opposed to a joint petition which is brought by both parties of the marriage.

Before the LRA, all petitions were unilateral petitions and a petition for divorce could only be brought by one party alone. However, since 1982, with the introduction of LRA and the new grounds of divorce by mutual consent, a joint petition by both parties is possible.

The meaning of “undefended cause” has a different meaning under the Divorce and Matrimonial Causes Rules, 1953 from the Divorce and Matrimonial Proceedings Rules, 1980, that is the new law. Under the former, “undefended cause” means a matrimonial cause in which no answer has been filed or in which all answers filed have been struck out, but does not include:

- (i) a cause in which relief is sought under section 7(1)(d), 7(2)(f) or 15(1)(g) of the Ordinance,
- (ii) a cause in which a co-respondent, party-cited or person named, whether made a respondent or not, denies in accordance with Rule 16, a charge of adultery without filing an answer; or
- (iii) a cause in which a co-respondent claims to be heard as to damages without filing an answer.

“Defended causes” means a matrimonial cause not being an undefended cause.

³⁰ For further details see Chapter 1.

Under the Proceedings Rules, (Rule 2) of the new law, “undefended cause” means:

- (a) in the case of an application under section 50 of the Act, a cause in which the respondent has not given notice of intention to defend within the time limit.
- (b) in any other case
 - (i) a cause in which no answer has been filed or an answer filed has been struck out, or
 - (ii) a cause which is proceeding only on the respondent’s answer and in which no reply or answer to the respondent’s answer has been filed or any such reply or answer has been struck out; or
 - (iii) a cause to which to which Rule 16(4) applies and in which no notice has been given under that rule or any notice so given has been withdrawn. “defended cause” means a cause not being an undefended cause.

For the purposes of this research, the meaning of “undefended cause” used corresponds to the Rules applicable to the said petition; therefore a case decided before the LRA will follow the meaning under the new Rules.

TABLE 4.09

Percentage Distribution of Nature of Petitions from 1975-1990

DESCRIPTION	1975-1982	1983-1990
Defended	10.5	01.8
Undefended	89.5	98.2

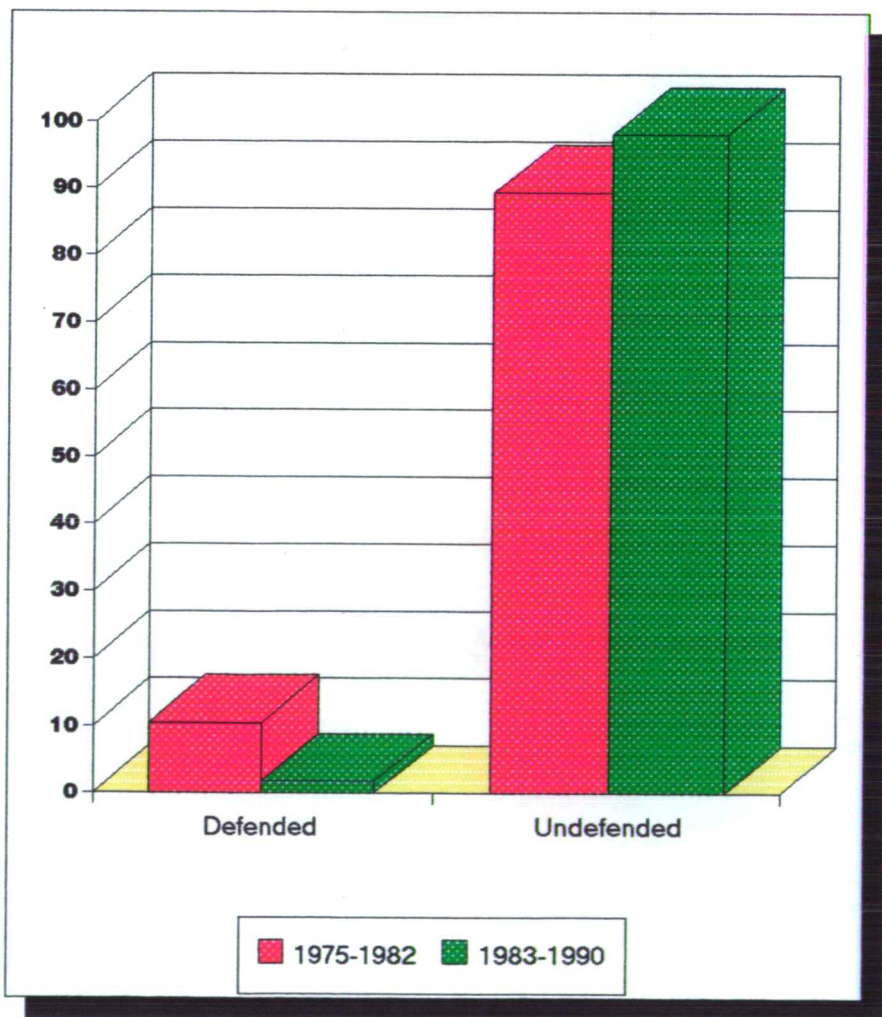


TABLE 4.10

Percentage Distribution of Nature of Petitions by Sex of
Non-Muslim Petitioners from 1975-1990

NATURE OF PETITION	MALE		FEMALE	
	1975-1982	1983-1990	1975-1982	1983-1990
Defended	05.9	00.0	04.5	01.5
Undefended	26.4	26.2	63.2	72.0

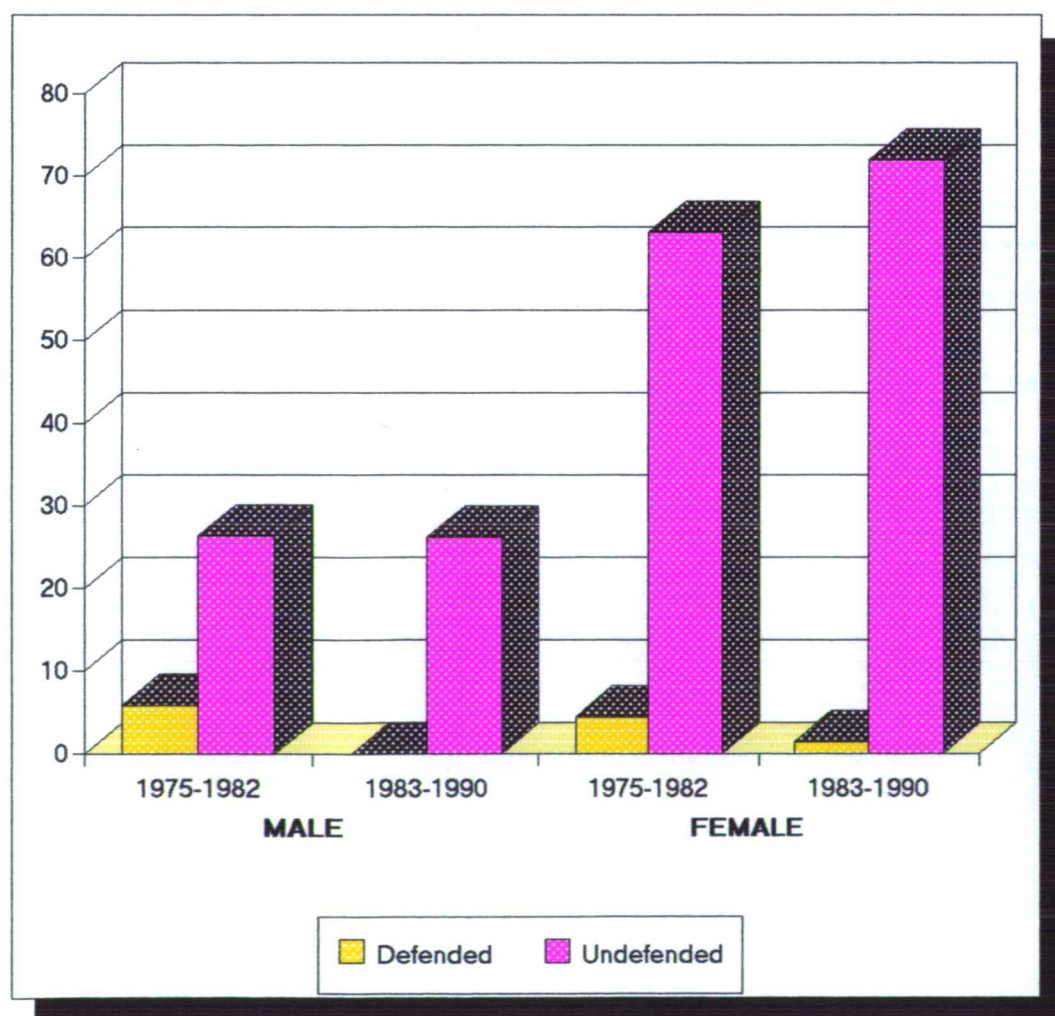


Table 4.09 shows that overall, there is a change in the nature of petitions submitted before and after the enforcement of the LRA. In both cases, undefended petitions predominate with a percentage of 89.5 percent in the period 1975-1982 and a percentage of 98.2 percent from 1983-1990. The representation of defended petitions dropped substantially from 10.5 percent before the LRA to 1.8 percent after the LRA.

Table 4.10 deals with the nature of petition according to sex of petitioner, petitioners were predominantly female and mostly undefended. Before the LRA, for defended petitions, males accounted for 5.9 percent whereas females accounted for only 4.5 percent. However in undefended petitions, it was observed that females made up the majority at 63.2 percent compared to the male percentage at only 26.4 percent. After the LRA, surprisingly, there were no cases of males defending divorce petitions. The rate for females was also reduced to 2.1 percent.

In undefended cases, the pattern remains unchanged. Males accounted for 26.4 percent before the LRA, and 26.2 percent afterwards. However the percentage of female involved in undefended cases increased to 72 percent of the total petitions after the LRA, from 63.2 percent previously.

It is not possible to discover the reason for this change, but it is hypothesized that the reason for the reduction in defended petitions is due mainly to the presence of mutual consent which was introduced in the LRA. Whereas previously, the petitioner's spouse may have wished to defend the petition and in so doing remove any possible stigma arising from the charge of adultery, cruelty, desertion or separation, this was no longer the case under the LRA. With the enforcement of the LRA, a more amicable reason for divorce can be used. Hence, the use of mutual consent where there is irretrievable

breakdown of the marriage minimises the social stigma attaching to divorce. Perhaps this is also partially due to financial constraints or it maybe that the wife freely consented to the divorce. Hence, the reduction in the percentage of defended cases.

There are small numbers of contested divorce suits, the majority of which are probably of a technical nature concerning matters such as the disposition of children, alimony or the jurisdiction of the court, and are not genuine attempts to prevent the divorce. The overwhelming prevalence of mutual consent reflects the accuracy of the above statement.

4.4 KIND OF PETITION

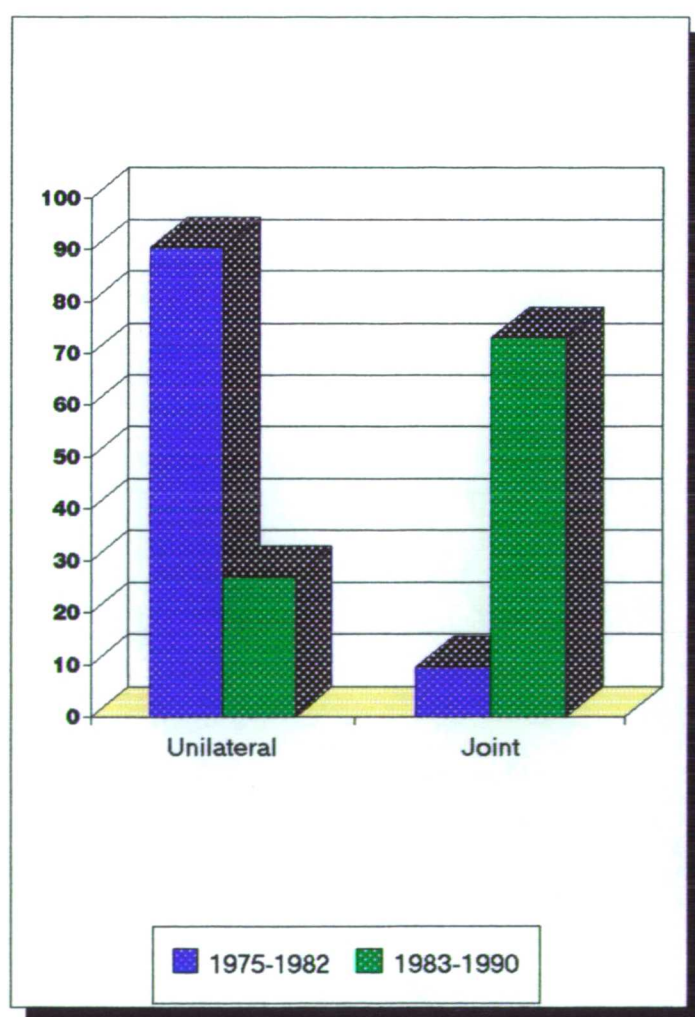
Kind of petition for the purposes of this research means whether the petition is unilateral or joint. It may be observed from Table 4.11 that from 1975-1982, unilateral petitions predominated with 90.4 percent of all petitions being unilateral in nature and joint petitions only 9.6 percent. However, from 1983-1990, that is after the enforcement of the LRA, unilateral petitions dropped to 26.9 percent of all petitions filed and joint petitions rose to 73.1 percent. This figures illustrate the popularity of joint petitions with divorcing couples.

This may be explained by the fact that under the previous Ordinance, there were limited number of grounds under which divorce could be granted. Grounds such as adultery, cruelty, desertion and separation do not lend themselves well to joint divorce petitions.

TABLE 4.11

Percentage Distribution of Kind of Non-Muslim Petitions from 1975-1990

NATURE OF PETITION	1975-1982	1983-1990
Unilateral	90.4	26.9
Joint	09.6	73.1



It was only after the coming into force of the LRA that this change occurred. The LRA provided for two additional cases for divorce, namely conversion to Islam and mutual agreement. It is the latter grounds upon which joint petitions may be submitted as these grounds require proof from both parties that their marriage has broken down.

There are various reasons why couples preferred a joint petition. The high number of undefended causes in the years before 1982 suggests that most respondents agreed or consented to the divorce. Basically, a joint petition or divorce by mutual consent means both the parties agree and freely consent to the divorce.

By submitting a joint petition, a great deal of animosity and bitterness is reduced. More importantly, the parties need not provide the grounds or reasons for their divorce and therefore, need not allege the faults of the other party. Most persons prefer their divorce to be a private matter and the joint petition provides for this.

In America, no-fault divorce led to less costly divorce. American lawyers advertised easy, inexpensive divorces more frequently than any other legal services.³¹ Where divorce costs little, according to Goode, there will be a high divorce rate. This is a reciprocal and reinforcing relationship. Easy divorce means in effect that there are fewer strong factors to maintain the boundaries of the family unit. Where divorce is difficult and costly, it is primarily an upper-class phenomenon.³²

In Malaysia, it is also cheaper to divorce by submitting a joint petition. Legal sources have quoted an estimate of one thousand and five hundred RM equivalent to approximately 300 pounds) as legal fees for

³¹ Riley, Glenda, Divorce: An American Tradition, New York, Oxford University Press, 1991, p. 165.

³² Goode, William, " Marital Satisfaction and Instability : A Cross-Cultural Class Analysis of Divorce Rates" International Social Science Journal, Vol. 14, No.3, (1962), pp.507-526.

a joint petition while lawyers charge between \$1500-\$2000 as legal fees for a unilateral petition or even higher, if the case is complicated and lengthy.

Besides, there is less chance for a reluctant spouse to delay the divorce process in a joint petition. In a single petition, the respondent can delay the process by avoiding service of the petition or by defending the cause. However, there is no need for service of the petition nor is there the need to defend it in a joint petition. Hence, the overall process is less time-consuming.

This analysis which is structured around the time of changes in divorce legislation (1975-1990) indicate the importance of changes in the law. The clear tendency was for petitioning under the new grounds, of mutual consent and conversion. This is evidence that the legislative reforms themselves responded to needs within the married population of Malaysia.

TABLE 4.12

Percentage Distribution of Kind of Petition by Occupational Group of
Non-Muslim Husbands from 1975-1990

GROUP	UNILATERAL		JOINT	
	1975-1982	1983-1990	1975-1982	1983-1990
Professional	11.7	10.8	09.5	12.3
Administrative	19.0	12.2	14.3	15.8
Clerical	14.8	10.1	10.7	10.3
Sales	21.7	27.9	29.8	26.9
Service	05.6	03.5	04.8	06.2
Agriculture	00.5	01.0	00.0	00.4
Labour	22.9	31.0	22.6	24.1
Unemployed	00.7	00.7	01.2	00.4
Outside Labour	01.9	02.1	04.8	02.8

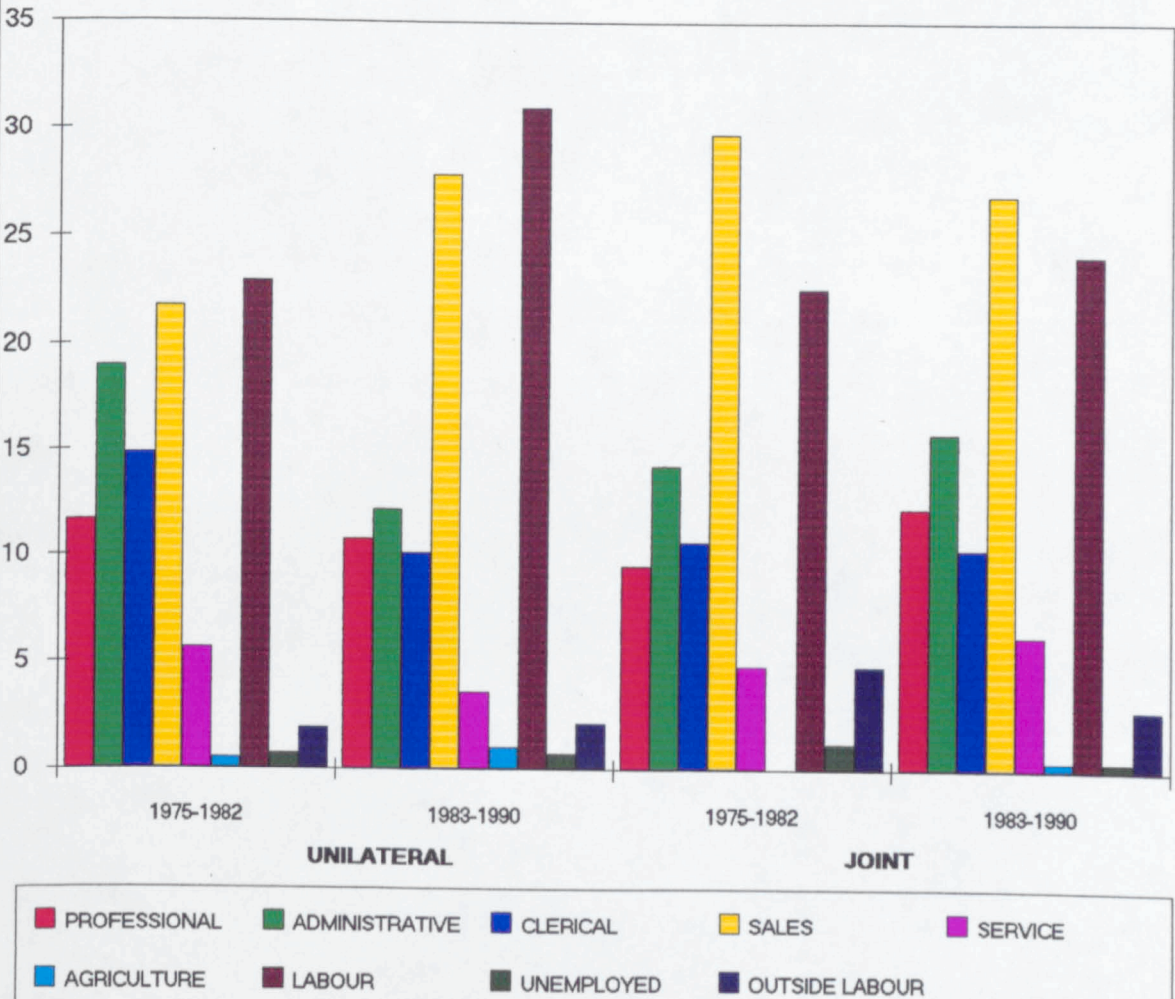


TABLE 4.13

Percentage Distribution of Kind of Petition by Occupational Group of

Non-Muslim Wives from 1975-1990

GROUP	UNILATERAL		JOINT	
	1975-1982	1983-1990	1975-1982	1983-1990
Professional	01.8	03.1	02.4	03.2
Administrative	03.5	02.4	03.6	04.5
Clerical	25.4	19.2	29.8	31.1
Sales	03.8	14.3	03.6	04.5
Service	11.9	04.9	11.9	05.9
Agriculture	00.2	n/a	00.0	n/a
Labour	13.9	09.8	10.7	08.5
Unclassified	00.5	00.0	04.8	00.4
Unemployed	36.6	43.6	31.0	33.5
Outside Labour	02.3	02.8	02.4	02.6

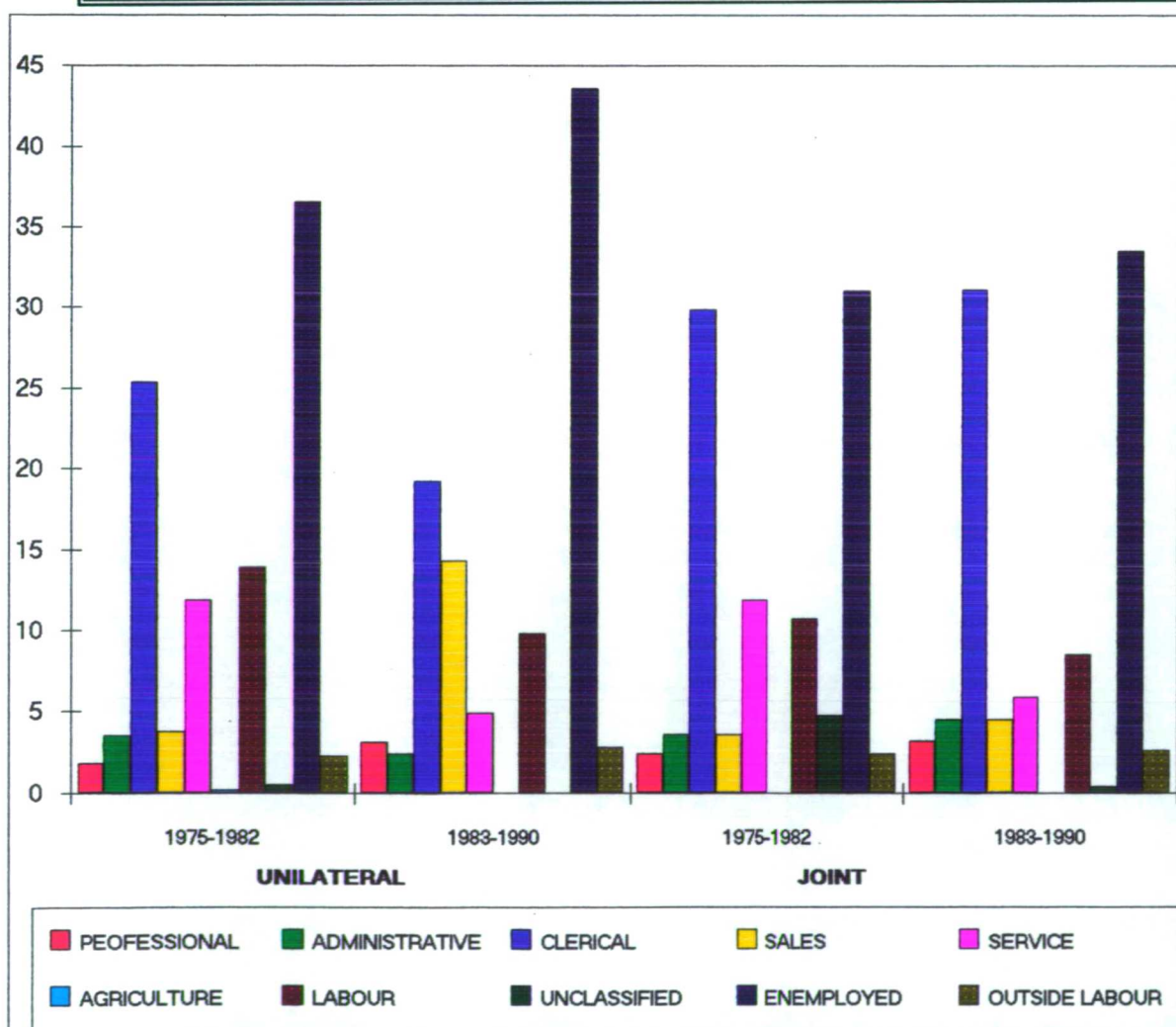


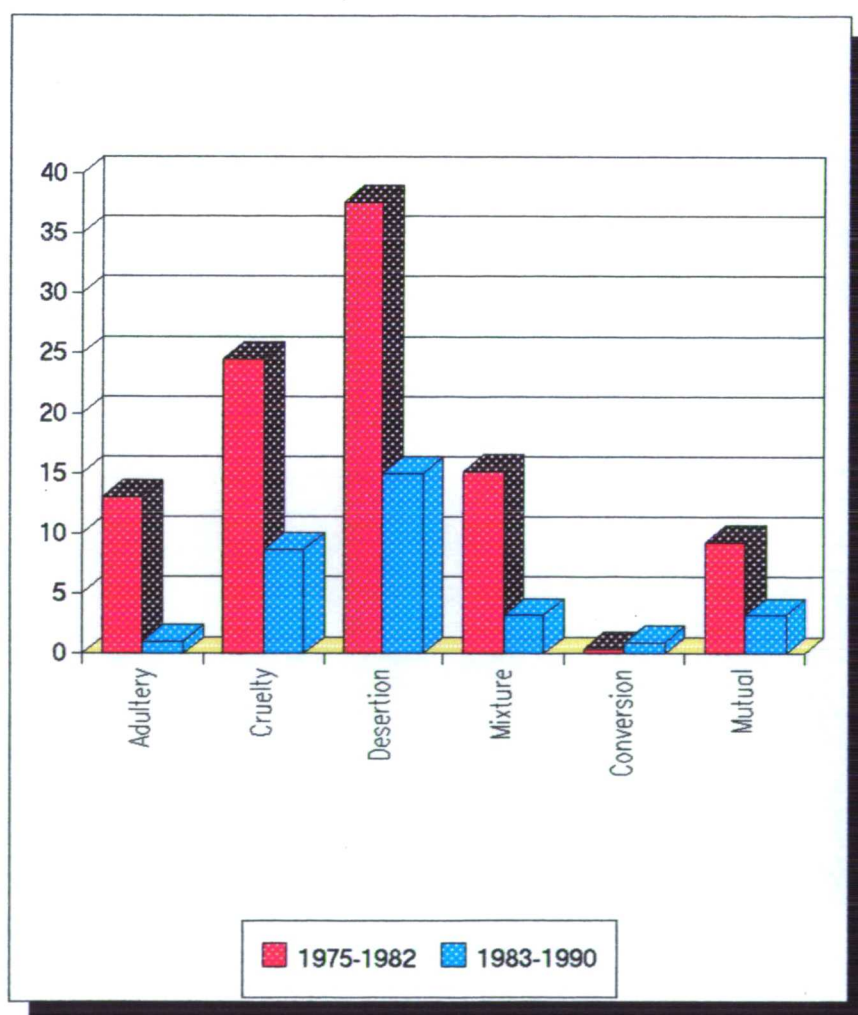
Table 4.12 shows that before LRA, male petitioners in the labour group seemed to top the list for unilateral petitions (22.9 percent), followed by those in sales. In joint petitions, males in sales were top at 29.8 percent followed by those in the labour group. The pattern does not change after the LRA. Males in labour remained at the top (31 percent) followed by males in sales at 27.9 percent. For joint petitions, sales were at 26.9 percent and labourer at 24.1 percent. As for female petitioners, Table 4.13 shows that before the LRA, unemployed wives seemed to be the top (36.6 percent) of petitioners using unilateral petitions followed by those in clerical were at 25.4 percent. The pattern remains unchanged for joint petitions. Unemployed wives constituted 31 percent followed by women in clerical work at 29.8 percent. After the LRA, the percentage of unemployed wives involved in unilateral petitions increased to 43.6 percent. Those using joint petitions rose to 33.5 percent. Clerical workers came next but the percentage decreased to 19.2 percent for unilateral petitions and increased to 31.1 percent for joint petitions.

The data above shows that whether the petition is unilateral or joint, male divorcees are mainly from the group of labourers and sales, whereas females are mostly housewives and those involved in clerical work. This is due to the over representation of those in these fields in Kuala Lumpur.

TABLE 4.14
Percentage Distribution of Grounds for Divorce of
Non-Muslims from 1975-1990

GROUND	1975-1982	1983-1990
Adultery	13.0	01.0
Cruelty	24.5	08.7
Desertion	37.6	15.0
Mixture ¹	15.2	03.2
Conversion	00.4	00.9
Mutual	09.3	03.2

¹ The item listed as combination causes (mixture) in the study to more than one ground cited for divorce has been arranged for a more refined distribution



4.5 GROUNDS FOR DIVORCE IN UNILATERAL PETITIONS

“Grounds for divorce”, however defined, bear only little relationship to divorce complaints as they appear in divorce petitions. The basis upon which a divorce petition is filed need not, of itself be the root cause of marriage breakdown. In general, the rule in such petitions is that the legally most effective and morally least accusatory grounds are asserted in the suit.

Cahen quoted the US Marriage and Divorce Report, 1928 which stated that:

“The legal cause shown by the court records may or may not, of course, be the true cause underlying the action for divorce.... Frequently too, the actual cause is not a legal cause in the particular state in which the court action takes place.... For this reason it may truthfully be said that in a compilation of statistics covering divorce, there is no phase of the subject so unsatisfactory as the causes assigned for the granting of the decrees”³³

Thus, it is safe to say that in almost every divorce case there are far more basic conflicts in the marriage than are asserted in the petition, and that these more basic conflicts would have been aired if the stated grounds had not been accepted by the court.

An attempt to glean the real causes of divorce from statistics regarding the grounds for divorce for the year before and after LRA is not very illuminating. Grounds for divorce seem to be employed interchangeably according to the wishes of the applicants.

Five major categories of grounds for divorce are presented in Table 4.14 which shows the percentage distribution for 1975-1982 and 1983-1990 for the grounds of divorce in unilateral petitions. It may be

³³ Cahen, 1932, p.39.

observed that from 1975-1982, desertion and separation were the main grounds of divorce cited with 37.6 percent. Cruelty was next at 24.5 percent followed by adultery at 13.0 percent of the total. A variety of grounds cited as "mixture" was represented at 15.2 percent. Conversion was last at 0.4 percent but mutual consent was represented at 9.3 percent. These last two grounds were grounds introduced only under the LRA. As observed, conversion had very little effect on the overall divorce trend. However it is interesting to note that even though the LRA was enforced in March 1982, it made a substantial impact as 98 couples or 9.3 percent of the population was divorced under these grounds.

This was even more pronounced from 1983-1990 as divorces under the grounds of mutual consent increased to 72.1 percent of the total divorces granted. Desertion and separation had declined to 15 percent, cruelty to 8.7 percent and mixture to 3.2 percent. Adultery had gone down to 1.0 percent and conversion was once again last at 0.9 percent of the total.

From the research which was based on the kind of petition and ground of divorce, it can be inferred that most petitioners prefer a private and peaceful means to end a bad marriage. Most of them agree to the divorce even if they are the respondent. If there is a more efficient, cheaper and less time-consuming way out most of them would choose it, given that more than 72.1 percent of the cases are joint petitions after the LRA. Also, the petitioners, if possible will try to keep as much of the marital trouble and faults away from the courts by choosing either neutral grounds like desertion and separation or submitting a joint petition where no reasons need be given.

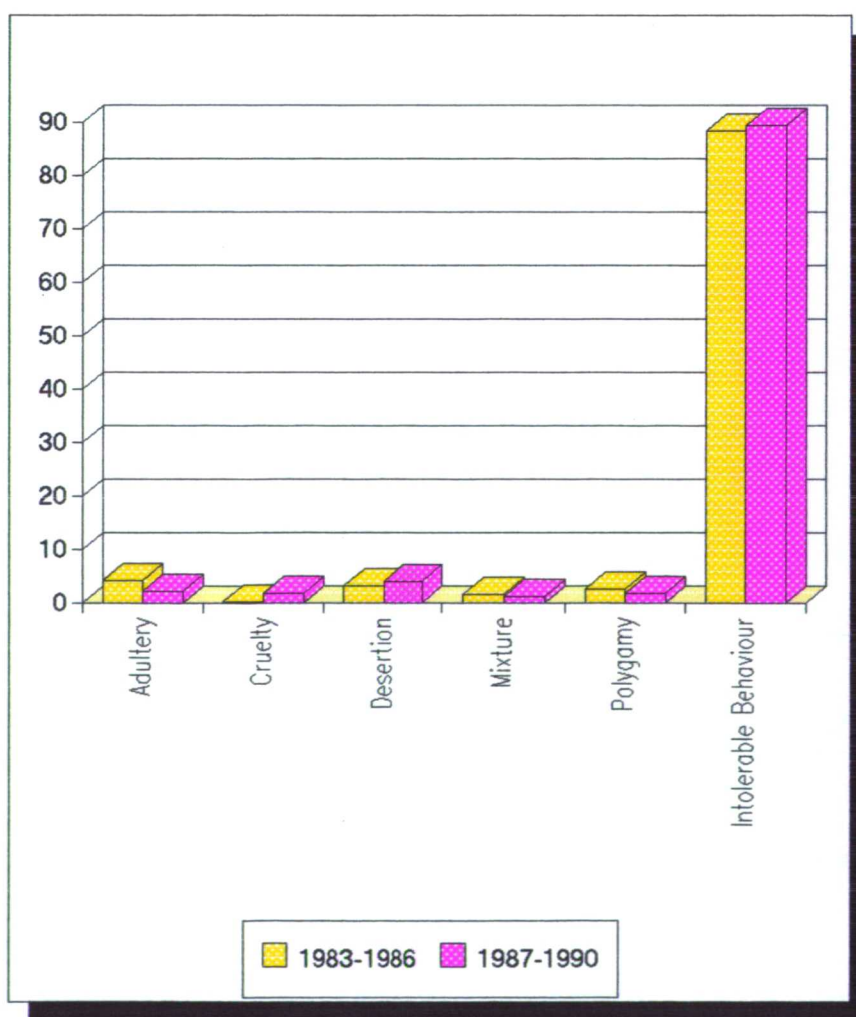
Desertion which never reached the courts also appears to have been rampant, but because no statistics are available, it is impossible to measure the extent of duration of desertion or the causes for it.

Adultery as grounds for divorce is perhaps the best illustration of changes in the norms of society. Before LRA, it was broadly used in about 13 percent of cases. The decrease use of this ground to 1 percent only shows that those involved in divorce do not wish to “wash their dirty linen in public.”

TABLE 4.15

Percentage Distribution of Grounds for Divorce of
Muslims from 1983-1990

GROUND	1983-1986	1987-1990
Adultery	04.2	02.2
Cruelty	00.2	01.7
Desertion	03.1	03.9
Mixture	01.6	01.2
Polygamy	02.5	01.7
Intolerable behaviour	88.4	89.4



From Table 4.15, it can be seen that intolerable behaviour was cited as the major grounds for divorce among the Muslims. From 1983-1986, 88.4 percent of divorces cited intolerable behaviour as their reason for divorce. Data from 1987-1990 also agrees with this conclusion in that 89.4 percent of all divorces in this period cited intolerable behaviour.

From a frequency of 4.2 percent in the 1983-1986 year period, the percentage for adultery decreased to only 2.2 percent in the 1987-1990. This was followed by desertion at 3.1 percent which later increased to 3.9 percent. Due to the strict nature of the law relating to polygamy, these grounds declined from 2.5 percent in 1983-1986, to only 1.7 percent after the new law was enforced. Cruelty at 0.2 percent were the grounds cited for the least number of divorces in the 1983-1986 period. But, in the 1987-1990 period, it increased to 1.7 percent. "Mixture" became the least used grounds at 1.2 percent in 1987-1990.

Riley has suggested that the growing use of cruelty as grounds for divorce may have resulted, at least in part, from the inclination of legislator to extend its scope.³⁴ The situation described by Riley perhaps bore the same effect on Muslim divorces as the grounds of cruelty under the new law also includes "mental suffering."³⁵

³⁴ Riley, 1991, p.89.

³⁵ IFLA section 2 "Darar Syarie" means harm, according to what is normally recognised by Islamic law, affecting a wife in respect of religion, life, body, mind, or property, for proposal of this definition, see Appendix II.

TABLE 4.16

Percentage Distribution of Grounds for Divorce by Sex of
Non-Muslim Petitioner (Male) and Ethnic Group from 1975-1990

GROUNDS	CHINESE MALE		INDIAN MALE		OTHERS	
	1975-1982	1982-1990	1975-1983	1983-1990	1975-1982	1983-1990
Adultery	11.6	02.0	13.9	05.6	27.3	n/a
Cruelty	16.1	38.3	20.8	19.4	27.3	n/a
Desertion	57.1	53.1	47.2	66.7	66.7	n/a
Mixture	15.2	04.1	18.1	02.8	00.0	n/a
Conversion	00.0	02.0	00.0	02.8	n/a	n/a

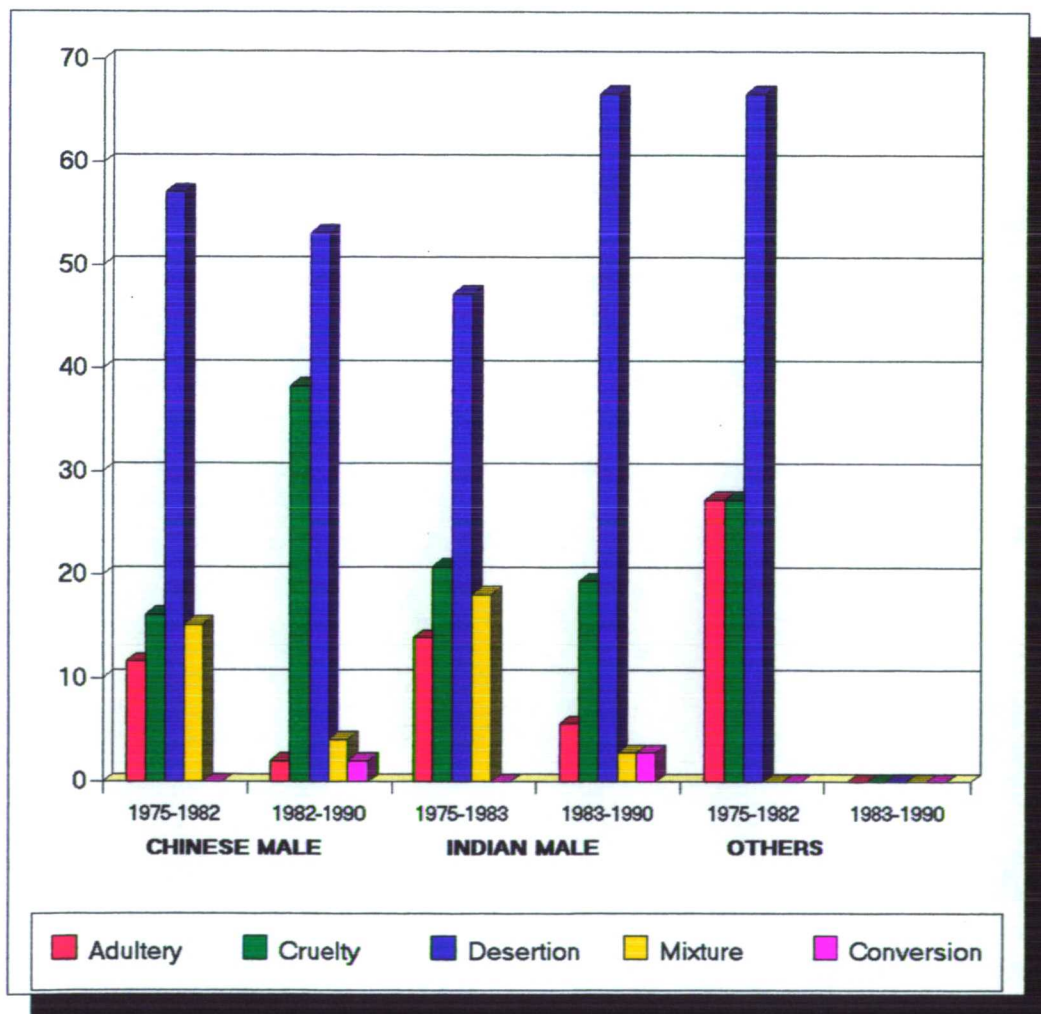


TABLE 4.17

Percentage Distribution of Sex of Petitioner by Ethnic Group and Grounds of Divorce for Muslims (Male) from 1983-1990

GROUNDS	MALAY		CHINESE		INDIANS		OTHERS	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Adultery	03.9	02.1	0	0	0	00.0	0	0
Cruelty	00.2	00.5	0	0	0	00.0	0	0
Desertion	02.3	02.1	0	0	0	01.5	0	0
Mixture	01.5	00.9	0	0	0	00.0	0	0
Polygamy	02.6	00.5	0	0	0	00.0	0	0
Intolerable behaviour	89.5	93.8	100	100	100	75.0	0	0

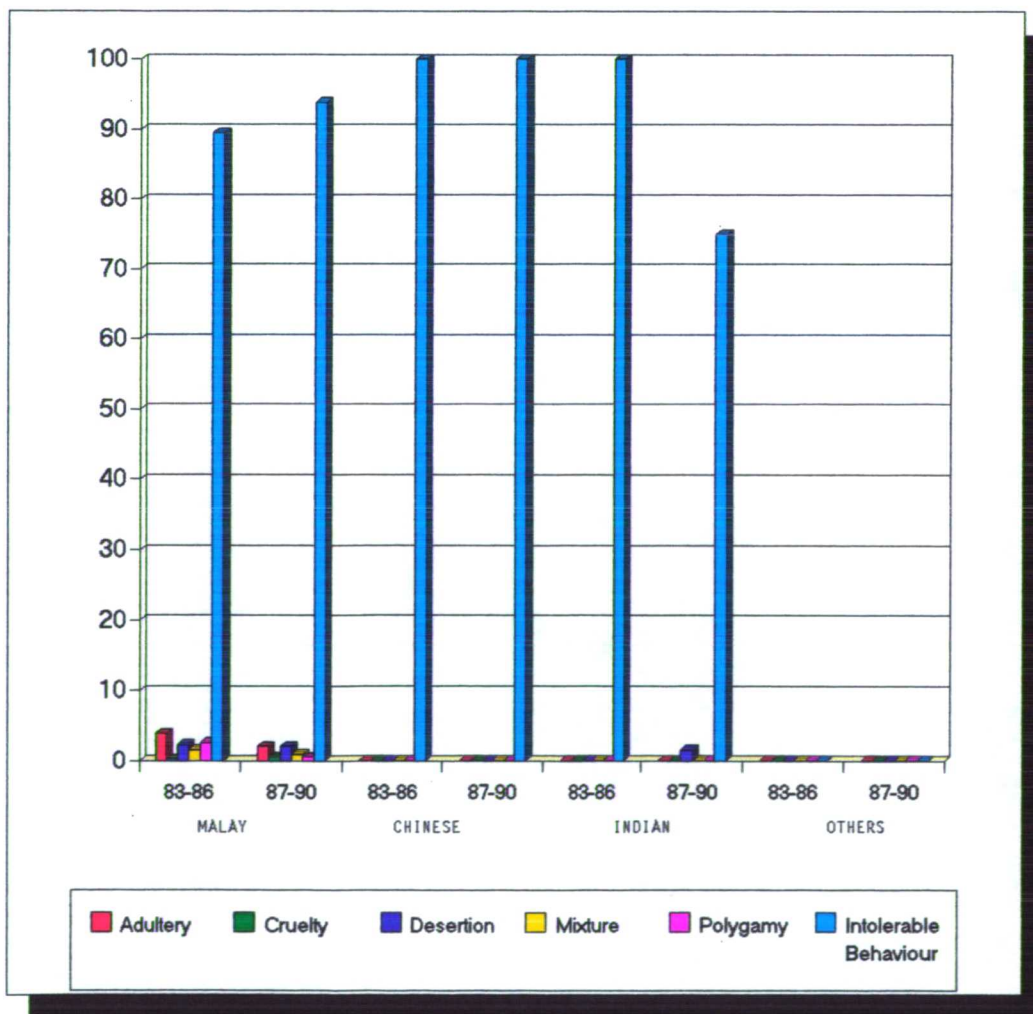
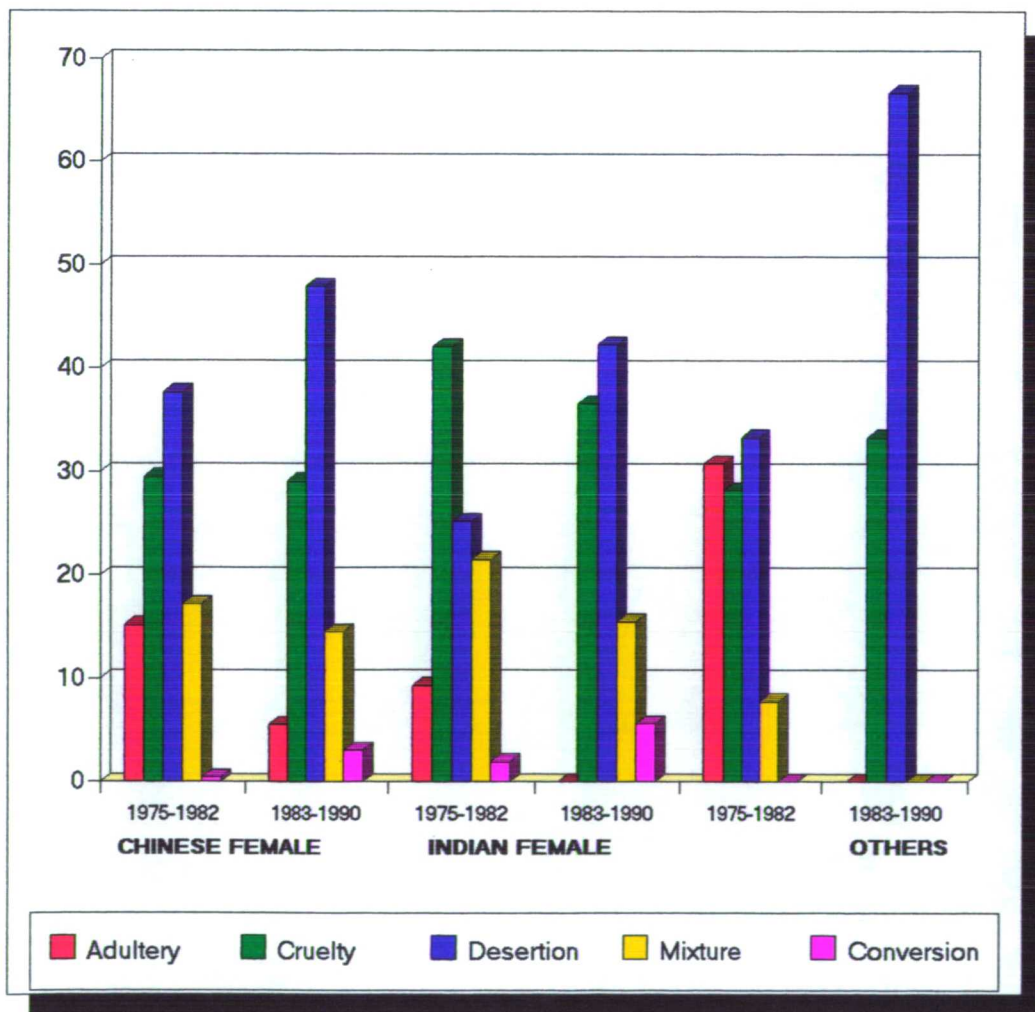


TABLE 4.18

Percentage Distribution of Grounds for Divorce by Sex of
Non-Muslim Petitioners (Female) and Ethnic Group from 1975-1990

GROUNDS	CHINESE MALE		INDIAN FEMALE		OTHERS	
	1975-1982	1983-1990	1975-1982	1983-1990	1975-1982	1983-1990
Adultery	15.2	05.5	09.3	n/a	30.8	n/a
Cruelty	29.5	29.1	42.1	36.6	28.2	33.3
Desertion	37.7	47.9	25.2	42.3	33.3	66.7
Mixture	17.2	14.5	21.5	15.5	07.7	n/a
Conversion	00.4	03.0	01.9	05.6	n/a	n/a



Is there a tendency for different ethnic groups to have particular reasons for divorce? As shown in Table 4.16, before LRA, for the grounds of adultery, "Others" had the highest percentage using these grounds at 27.3 percent followed by Indian males at 13.9 percent and then Chinese males at 11.6 percent. After the LRA, unfortunately no data is available for Others, but there was a decrease in percentage of Indians using these grounds only 5.6 percent and Chinese male petitioners to only 2 percent.

For the grounds of cruelty, not before after the LRA, Chinese males seem to lead. They accounted for about 38.8 percent followed by the Indian males at only 19.4 percent. For desertion and separation, the Indian males were 66.7 percent and Chinese 53.1 percent. For Mixture of Grounds, Chinese males were 4.1 percent and Indian males only 2.8 percent. Conversion for Chinese males was only 2.0 percent and Indian males 2.8 percent.

Examining this trend further in Table 4.17, it was found that from 1983-1986, the Chinese Muslims, Indian Muslims and Other Muslim races divorced exclusively due to intolerable behaviour. Malay males showed a wider variation, divorcing at 3.9 percent for adultery, 0.2 percent for cruelty, 2.3 percent for desertion, 1.5 percent for "Mixture", 2.6 percent for polygamy and an overwhelming 89.5 percent for intolerable behaviour.

The trend continues in the 1987-1990 period except for the Indian Muslim males, 1.5 percent of whom used desertion as their ground for divorce. This is a similar trend to that seen in non-Muslim Indian males.

According to Table 4.18, the grounds of adultery seem to be very popular amongst the wives of Others, that is about 30.8 percent. They are followed by the Chinese female petitioners using adultery as

grounds for divorce at 15.2 percent. As expected, after the LRA, the percentage dropped to only 5.5 percent. As for the Indian female petitioners, before the LRA, the percentage was quite low, that is 9.3 percent.

As for the grounds of cruelty, the Indian females used these grounds the most (42.1 percent) which shows that cruelty exists more in the Indian community than in to the Chinese, where the percentage of females using these grounds was 29.5 percent. After the enforcement of the LRA, the percentage for the Indian females dropped slightly to 36.6 percent whereas for the Chinese, there is slight drop to 29.1 percent.

After the enforcement of LRA, about 66.7 percent of other use the grounds of desertion and separation, followed by the Chinese at 47.9 percent which was only 37.7 percent before the LRA. As for female Indian petitioners, the percentage doubled from only 25.2 percent before the LRA to 42.3 percent after the enforcement of the LRA.

Under the mixture of grounds, the Indian female petitioners lead at a percentage of 21.5 before the LRA which dropped to 15.5 percent after the enforcement of the LRA. For the Chinese female petitioners using these grounds, the percentage decreased slightly from 17.2 percent before the LRA to 14.5 percent after the LRA.

Conversion seems to be popular among Indian males, as female Indian petitioners used these grounds most frequently at 5.6 percent after the LRA followed by the Chinese at 3.0 percent.

From the above data, Indian males were more likely to cite desertion than any other reason for divorce. This seems to imply that their spouses would go back to their parents in cases of marital disruption for customary support. It is reported in Negeri Sembilan that parental

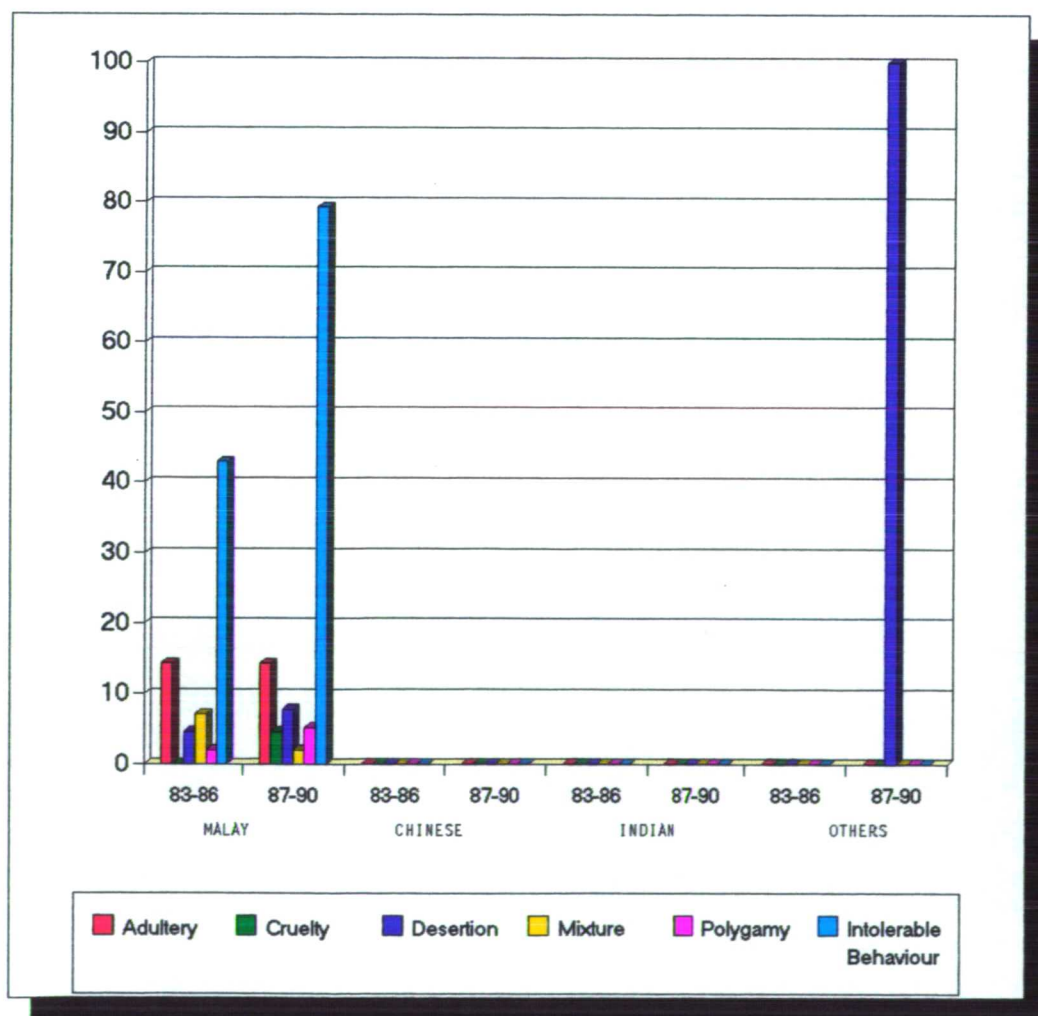
meddling is one of the major causes for divorce.³⁶ But the problem is not peculiar to Malaysia. A psychologist, Mat Saad Baki believes that parental interference is a common problem in all Asian societies. But even if such conflicts occur, studies indicate that they do not necessarily lead to divorce. Rather, they merely aggravate problems in a relationship that is already sour.

³⁶ New Straits Times, April 2, 1991.

TABLE 4.19

Percentage Distribution of Sex of Petitioner by Ethnic Group of
the Muslims (Female) and Grounds of Divorce from 1983-1990

GROUNDS	MALAYS		CHINESE		INDIANS		OTHERS	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Adultery	14.3	14.3	0	0	0	0	0	0
Cruelty	00.0	04.6	0	0	0	0	0	0
Desertion	04.6	07.8	0	0	0	0	0	100
Mixture	07.1	02.0	0	0	0	0	0	0
Polygamy	02.0	05.2	0	0	0	0	0	0
Intolerable behaviour	42.9	79.2	0	0	0	0	0	0



For Muslim females from 1983-1986 (Table 4.19), a similar trend emerges where Malays showed more variation than any other race. Females of Other races divorced exclusively for desertion but Chinese and Indian female divorced exclusively on account of intolerable behaviour. At 79.2 percent, intolerable behaviour was widely used by Malay females after 1987 as the grounds for divorce.

From 1987-1990, there were no Chinese or Indian females who were divorced. Females of Other races divorced exclusively for desertion. Malay females show more variation, with a frequency of 76.2 percent under intolerable behaviour, 10.1 percent under desertion and cruelty at 6.9 percent. The incidence of polygamy was 4.8 percent, cruelty at 4.2 percent and 2.4 percent for adultery and a mixture of grounds.

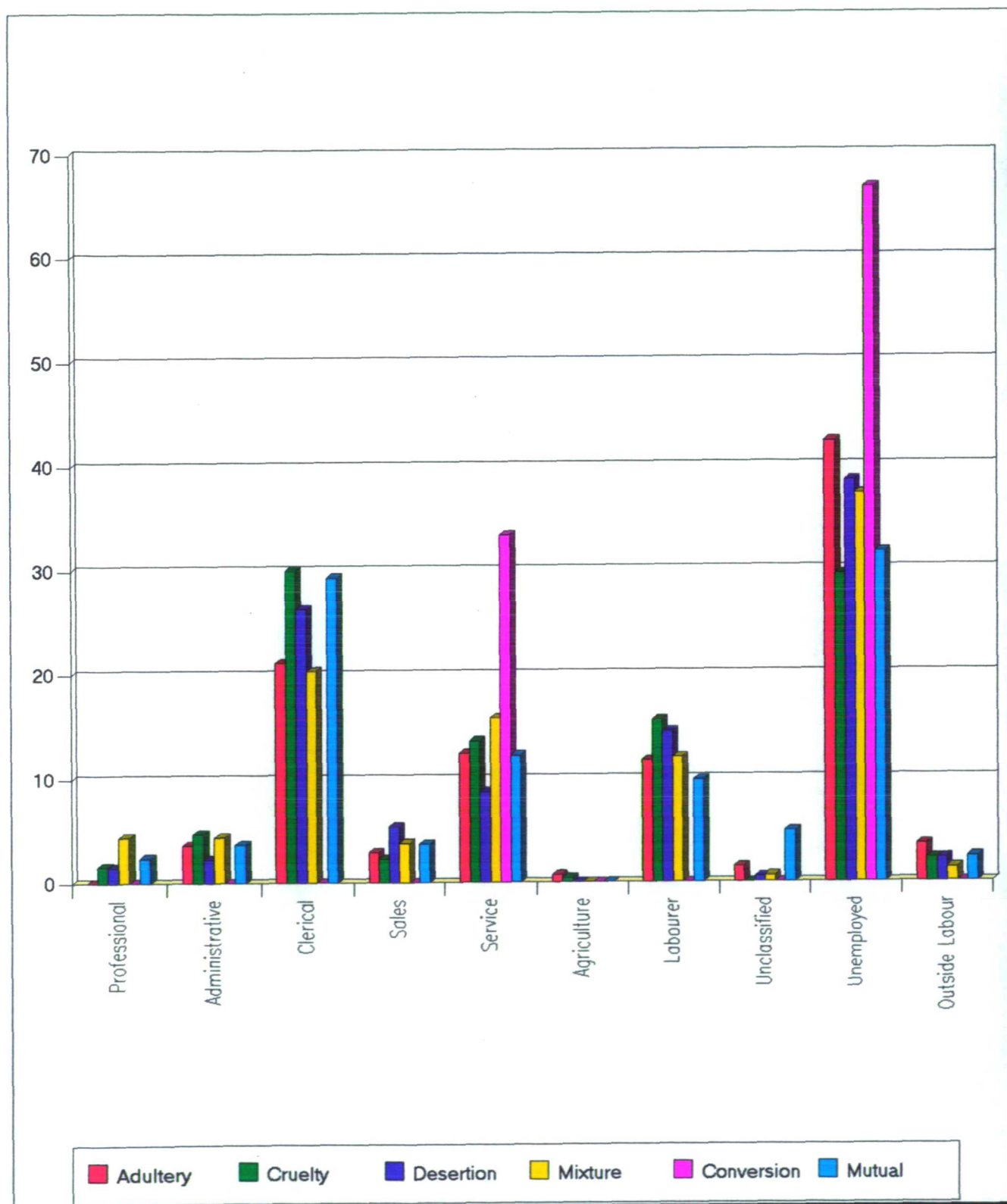
TABLE 4.20

Percentage Distribution of Grounds for Divorce by Occupational Group of

Non-Muslim Wives from 1975-1990

GROUPS	ADULTERY		CRUELTY		DESERTION		MIXTURE		CONVERSION		MUTUAL	
	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90
Professional	00.0	00.0	01.6	02.2	01.5	03.3	04.4	06.1	00.0	00.0	02.4	03.2
Administrative	03.6	00.0	04.7	03.2	02.3	01.3	04.4	06.1	00.0	00.0	03.7	04.6
Clerical	21.1	00.0	30.0	20.4	26.3	20.4	20.3	15.2	00.0	09.1	29.3	31.1
Sales	02.9	18.2	02.3	13.8	05.4	13.8	03.8	12.1	00.0	09.1	03.7	10.3
Service	12.4	18.2	13.6	05.9	08.7	05.9	15.8	03.0	33.3	00.0	12.2	06.0
Agriculture	00.7	n/a	00.4	n/a	00.0	n/a	00.0	n/a	00.0	n/a	00.0	n/a
Labourer	11.7	00.0	15.6	06.5	14.5	11.2	12.0	15.2	00.0	09.1	09.8	08.5
Unclassified	01.5	00.0	00.0	00.0	00.5	00.0	00.6	00.0	00.0	00.0	04.9	00.4
Unemployed	42.3	54.5	29.6	46.2	38.5	41.4	37.3	33.3	66.7	72.7	31.7	33.4
Outside Labour	03.6	09.1	02.3	01.1	02.3	02.6	01.3	09.1	00.0	00.0	02.4	02.5

4.20a
Percentage Distribution of Ground for Divorce by Occupational Group of
Non-Muslim Wives from 1975-1982



4.20b
Percentage Distribution of Ground for Divorce by Occupational Group of
Non-Muslim Wives from 1983-1990

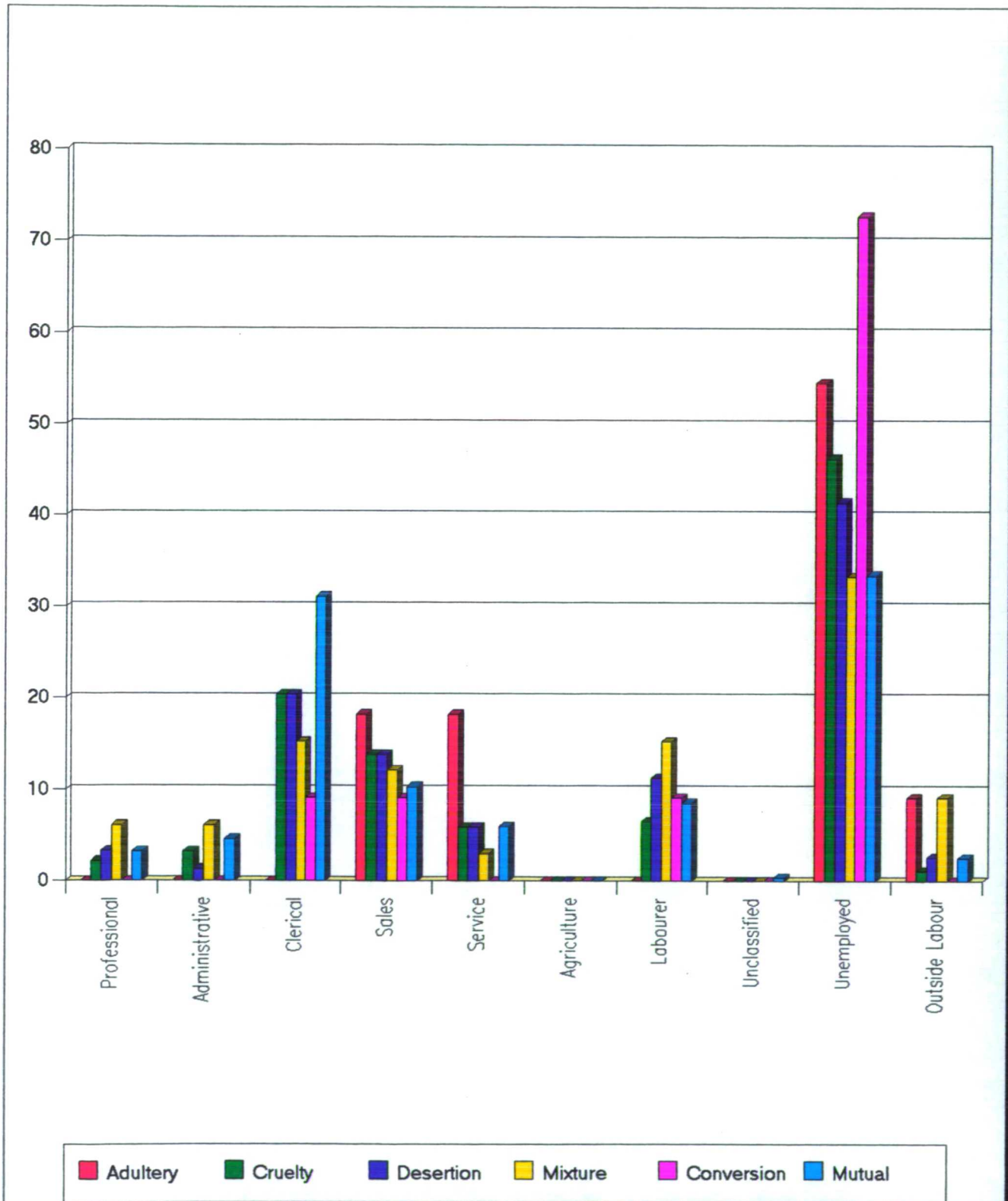


Table 4.20 shows that before the LRA, wives who were unemployed seemed to be the leading group using the ground of adultery for divorce (42.3 percent). This is followed by wives in clerical work at 21.1 percent and wives in service at 12.4 percent. Surprisingly, there are no professional wives using these grounds for divorce. After the LRA, the percentage for unemployed wives using these grounds increased to 54.5 percent, followed by wives in sales and service at a lower percentage of 18.2 percent.

Concerning cruelty as grounds for divorce, wives in clerical work seem to lead at a percentage of 30 percent followed by unemployed wives at 29.6 percent. After the LRA, unemployed wives used cruelty more often as grounds for divorce given that the percentage has risen to 46.2 percent. The lowest percentage is that of wives working as professionals and also those outside labour force.

As for desertion, the unemployed wives seem to be the ones who are always being deserted (38.5 percent) before the LRA this increased to 41.4 percent after the LRA. Second in line are the wives from the clerical field at 26.3 percent before the LRA which dropped to 20.4 percent after LRA. This pattern seems to repeat itself in all grounds of divorce.

On the grounds of "Mixture", again the housewives stay at the top of the list with a percentage of 37.3 percent before and 33.3 percent after the LRA. This is as usual followed by wives in clerical work at 20.3 percent and 15.2 percent after the LRA.

The grounds of conversion tell an interesting story in that the highest percentage involves spouses of housewives, at 66.7 percent before and 72.7 percent after the LRA. Conversion also happens to spouses of those in service, at 33.3 percent but surprisingly none after the LRA. The Others are not involved in any significant way.

Divorce initiated by mutual consent showed an interesting picture in that after its introduction it has changed the pattern of grounds for divorce and as expected the housewives used these grounds at 33.4 percent followed by those in clerical work at 31.1 percent.

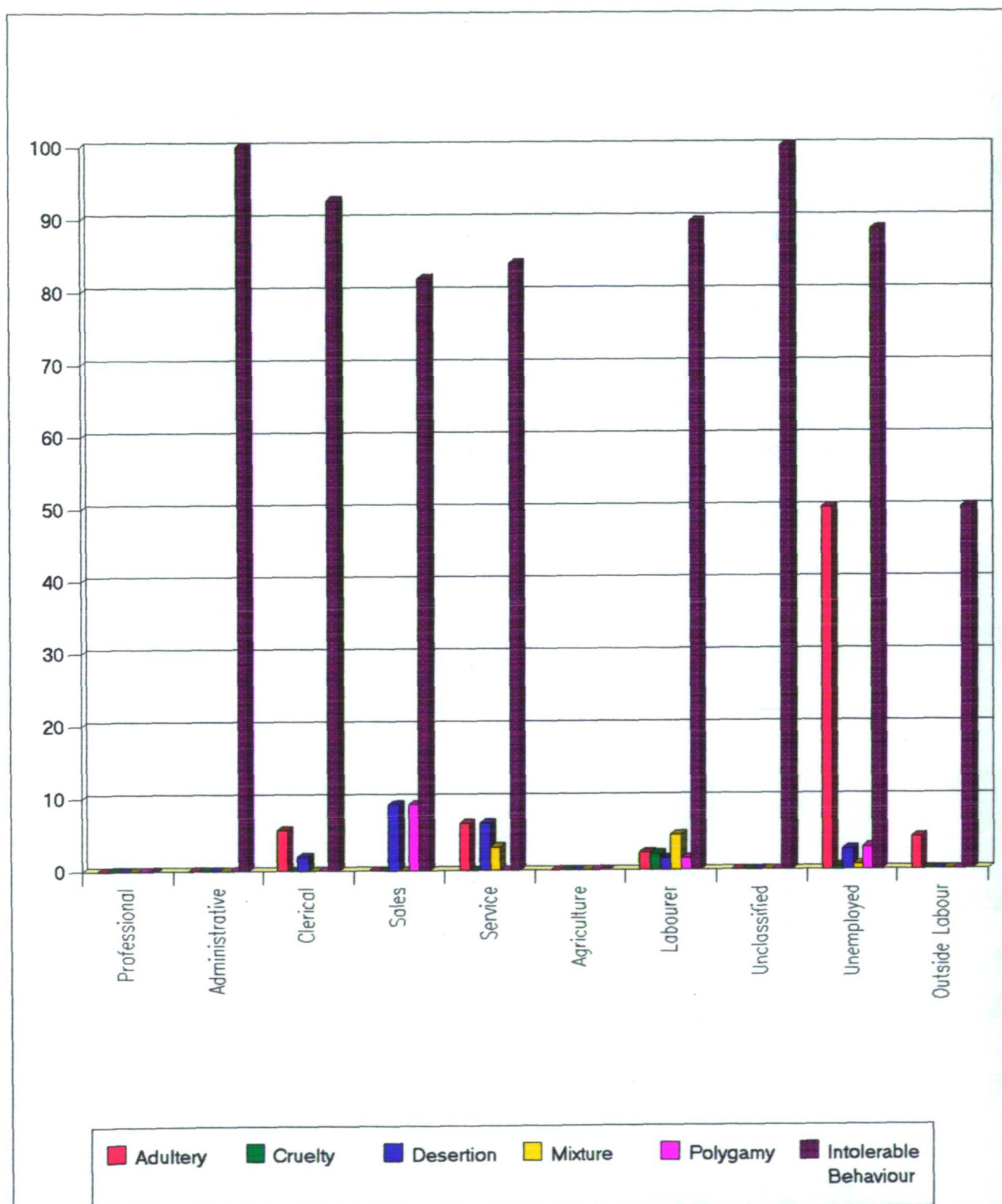
TABLE 4.21

Percentage Distribution of Grounds of Divorce by Occupational Group of

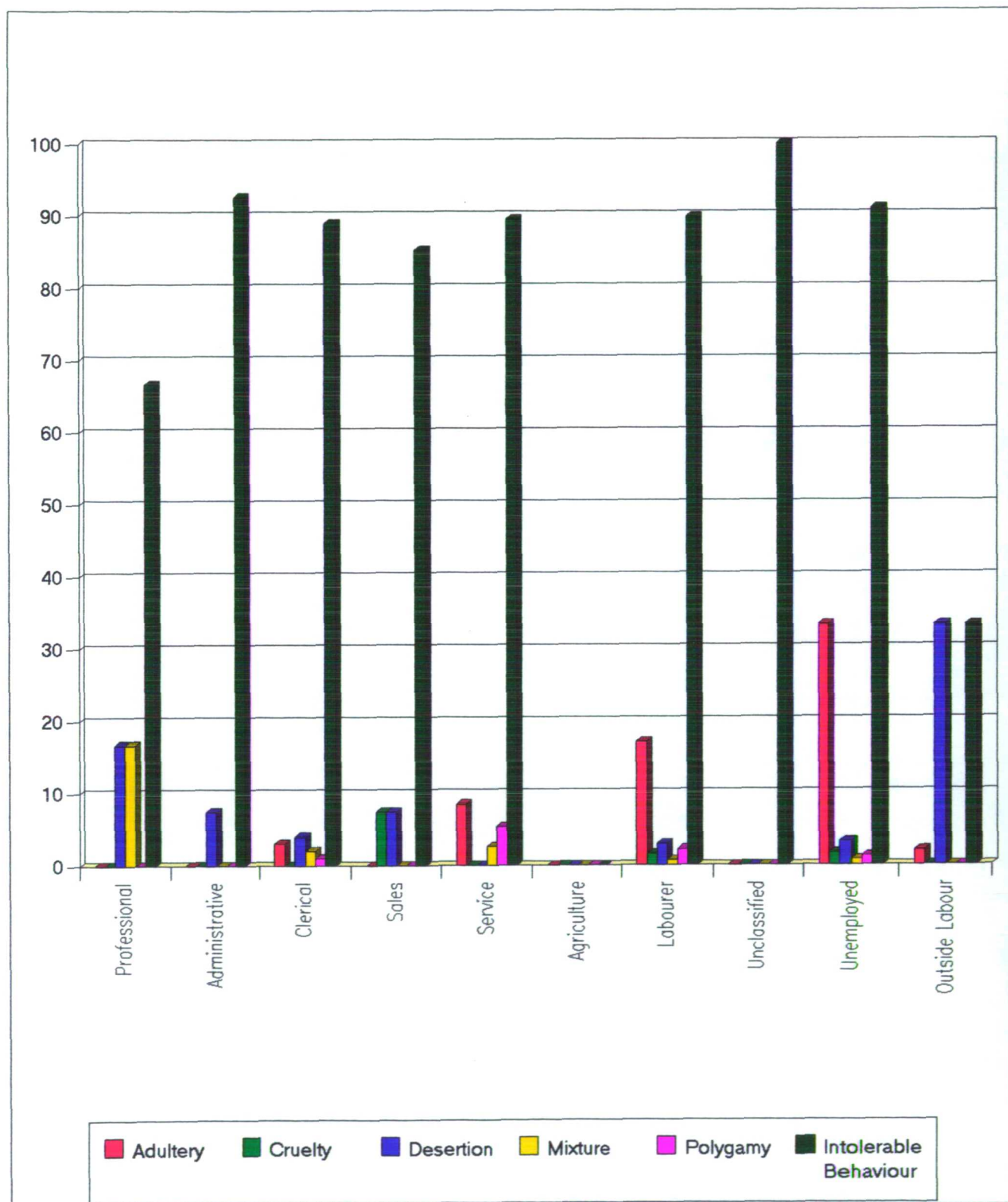
Muslim Wives from 1983-1990

GROUPS	ADULTERY		CRUELTY		DESERTION		MIXTURE		POLYGAMY		INTOLERABLE BEHAVIOUR	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Professional	00.0	00.0	00.0	00.0	00.0	16.7	00.0	16.7	00.0	00.0	00.0	66.7
Administrative	00.0	00.0	00.0	00.0	00.0	07.4	00.0	00.0	00.0	00.0	100.0	92.6
Clerical	05.6	03.0	00.0	00.0	01.9	04.0	00.0	02.0	00.0	01.0	92.6	88.9
Sales	00.0	00.0	00.0	07.4	09.1	07.4	00.0	00.0	09.1	00.0	81.8	85.2
Service	06.5	08.5	00.0	00.0	06.5	00.0	03.2	02.6	00.0	05.3	83.9	89.5
Agriculture	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0
Labourer	02.4	17.1	02.2	01.6	01.6	02.9	04.8	00.7	01.6	02.2	89.9	89.8
Unclassified	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	00.0	100.0	100.0
Unemployed	50.0	33.3	00.4	01.7	02.8	03.3	00.7	00.8	03.1	01.2	88.5	90.9
Outside Labour	04.5	02.0	00.0	00.0	00.0	33.3	00.0	00.0	00.0	00.0	50.0	33.3

4.21a
Percentage Distribution of Ground of Divorce by Occupational Group of
Muslim Wives from 1983-1986



4.21b
Percentage Distribution of Divorce by Occupational Group of
Muslim Wives from 1987-1990



From Table 4.21, it may be observed that 50 percent of all Muslim women who used adultery as ground for divorce was unemployed, followed by 6.5 percent in service, 5.6 percent in clerical work, and 4.5 percent those outside labour. By contrast, from 1987-1990, the percentage for unemployed decreased to 33.3 percent, followed by clerical workers at 3 percent, service at 2.6 percent and labourers at 2.2 percent.

0.4 percent of those who divorced on grounds of cruelty between 1983-1986 were unemployed. There was more variation from 1987-1990. The percentage of unemployed increased to 1.7 percent, but the percentage for those in sales rose to 7.4 percent. Labourer and clerical worker rates rose to 2.2 percent and 1 percent respectively.

Between 1983-1986 desertion is at 0 (zero) percent for professional, followed by 9.1 percent for those in sales, 6.5 percent for those in service and 2.8 for the unemployed.

From 1983-1986, it was observed that 4.8 percent of wives who were divorced for a mixture of reasons including adultery, cruelty and desertion were labourers while 3.2 percent were those in service. From 1987-1990, the percentage decreased to 0.7 percent.

Wives in sales accounted for 9.1 percent of those using the grounds of polygamy for divorce from 1983-1986 followed by the unemployed and labourers at 3.1 percent and 1.6 percent respectively. In the time period 1987-1990, however, service workers who divorced due to polygamy rose to 5.3 percent followed by the unemployed at 1.2 percent. Service workers are represented at 8.7 percent compared to 0 percent before. However, the frequencies of clerical workers increased to 1 percent.

TABLE 4.22

Percentage Distribution of Grounds for Divorce by Occupational Group of

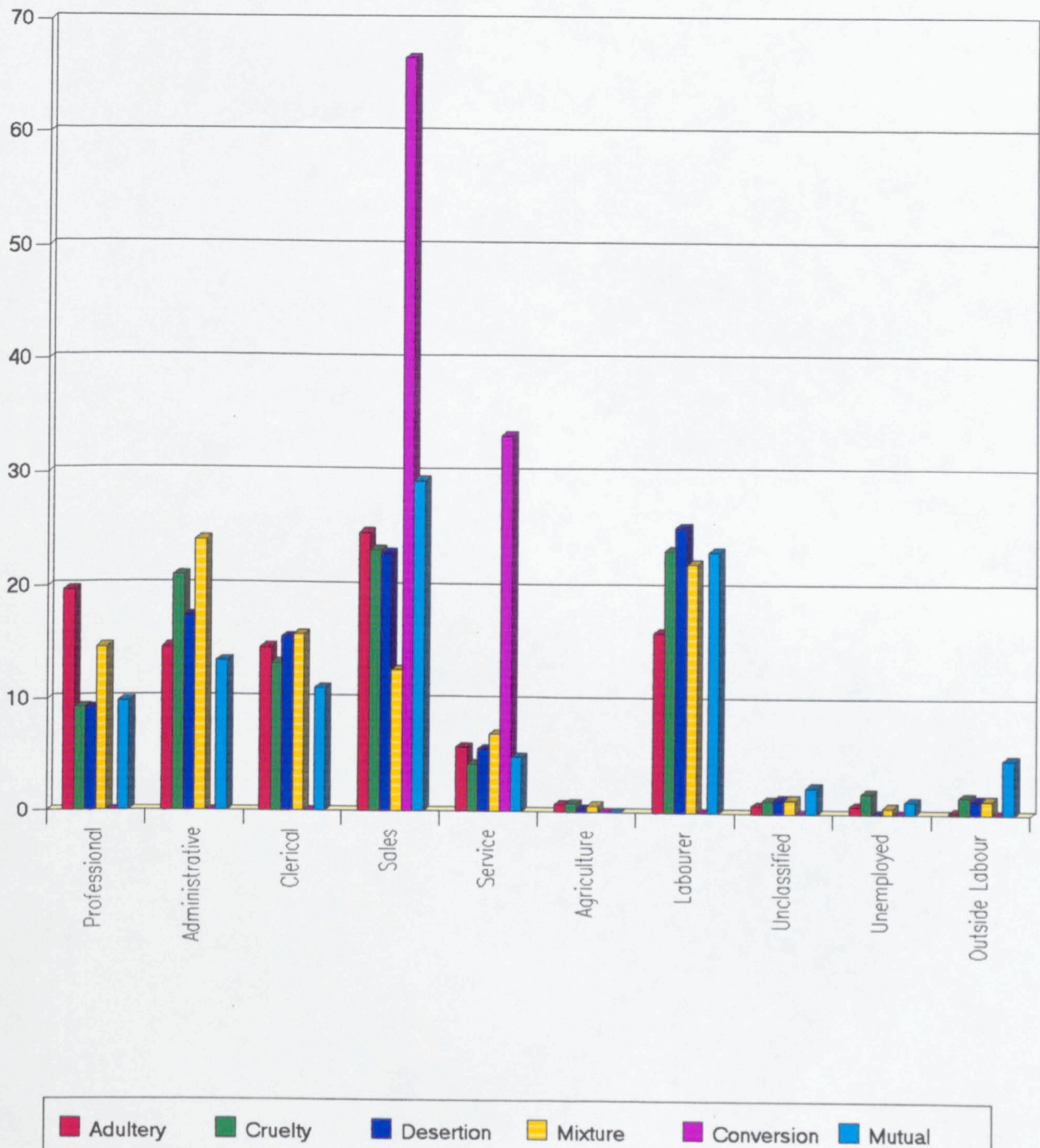
Non-Muslim Husbands from 1975-1990

GROUPS	ADULTERY		CRUELTY		DESERTION		MIXTURE		CONVERSION		MUTUAL	
	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90	75-82	83-90
Professional	19.7	09.1	09.3	08.6	09.2	11.8	14.6	09.1	00.0	18.2	09.8	12.3
Administrative	14.6	09.1	21.0	15.0	17.4	09.9	24.1	18.2	00.0	00.0	13.4	15.8
Clerical	14.6	09.1	13.2	09.7	15.6	11.2	15.8	03.0	00.0	18.2	11.0	10.2
Sales	24.8	18.2	23.3	31.2	23.0	26.3	12.7	27.3	66.7	36.4	29.3	26.9
Service	05.8	00.0	04.3	03.2	05.6	04.6	07.0	00.0	33.3	00.0	04.9	06.2
Agriculture	00.7	00.0	00.8	00.0	00.3	02.0	00.6	00.0	00.0	00.0	00.0	00.4
Labourer	16.1	27.3	23.3	30.1	25.3	31.6	22.2	36.4	00.0	27.3	23.2	24.2
Unclassified	00.7	00.0	01.2	00.0	01.3	01.3	01.3	00.0	00.0	00.0	02.4	00.9
Unemployed	00.7	09.1	01.9	00.0	00.0	00.7	00.6	03.0	00.0	00.0	01.2	00.2
Outside Labour	00.2	18.2	01.6	00.2	01.3	00.7	01.3	03.0	00.0	00.0	04.9	02.9

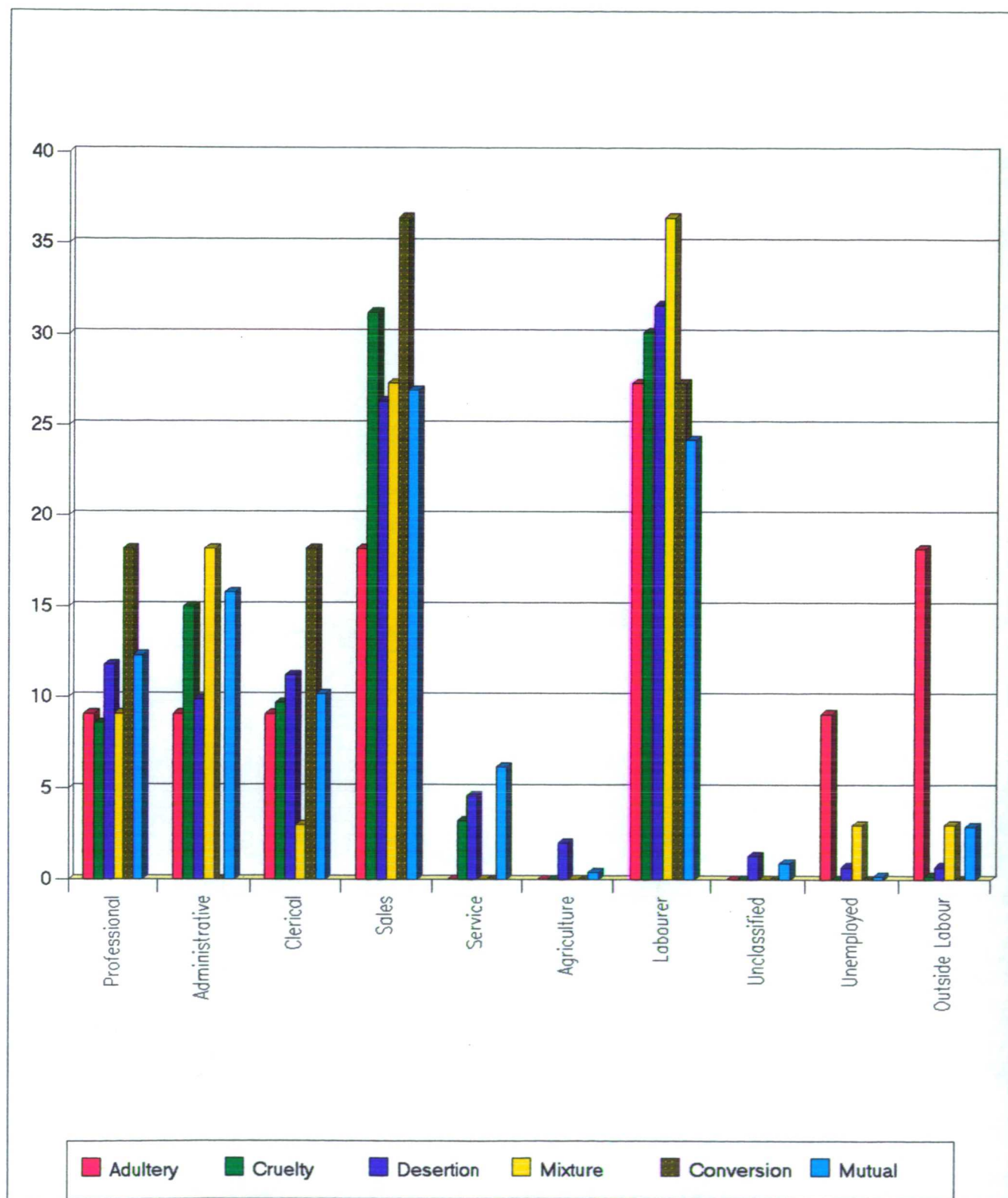
4.22a

Percentage Distribution of Ground for Divorce by Occupational Group of

Non-Muslim Husbands from 1975-1982



4.22b
Percentage Distribution of Grounds by Occupational Group of
Non-Muslim Husbands from 1983-1990



The administrative workers and the unemployed were the majority of those who divorced by reason of intolerable behaviour. 83.3 percent of divorces in this category from 1983-1986 and 92 percent from 1987-1990 were attributed to the administrative and the unemployed. Table 4.22 indicates that adultery seems to be the most popular grounds used by husbands involved in sales, at 24.8 percent. They were followed by the professionals. After the LRA, these grounds are used less in that only 18.2 percent used it for divorce whereas for the professionals, this ground decreases to only 9.1 percent. Perhaps the increase in divorce by mutual consent was a contributing factor.

It is very interesting to note that husbands who are labourers and those involved in sales seem to be those using the grounds of cruelty for divorce at 23.3 percent. After the LRA, the percentage using cruelty increased to 31.2 percent for those in sales and for labourers, the percentage also increased to 30.1 percent. It is rather interesting to note that before the enforcement of the LRA, husbands outside labour force used adultery as grounds for divorce at a rate of only 2.2 percent but after the LRA, it increased to 18.2 percent.

The same pattern seems to happen to husbands working as labourers. Before the LRA, they account for only 16.1 percent, but after the LRA, the percentage increased to 27.3 percent.

As regards desertion, the same pattern repeats itself where the people involved in sales and labourers used these grounds for divorce. After the LRA, the percentage increased to 26.3 percent for sales and 31.6 percent for labourers.

On top of the list for husbands using "Mixture" of grounds for divorce are the administrators who account for 24.1 percent. This rate dropped tremendously after the LRA to 18.2 percent. The labourers accounted for 22.2 percent which then increased to 36.4 percent.

For conversions, interesting trends seem to occur in that, sales workers topped the list at 66.7 percent followed by service workers at 33.3 percent. After the LRA, the percentage in sales decreased tremendously to only 36.4 percent followed by labourers at 27.3 percent of which before LRA there were no such cases. This is followed by those in professional and clerical categories.

Before the LRA, those in sales tended to use mutual consent as a ground for divorce most frequently at 29.3 percent followed by those in labour at 26.9 percent. After the LRA, the percentage decreased to 26.9 percent for sales workers and 24.2 percent for labourers.

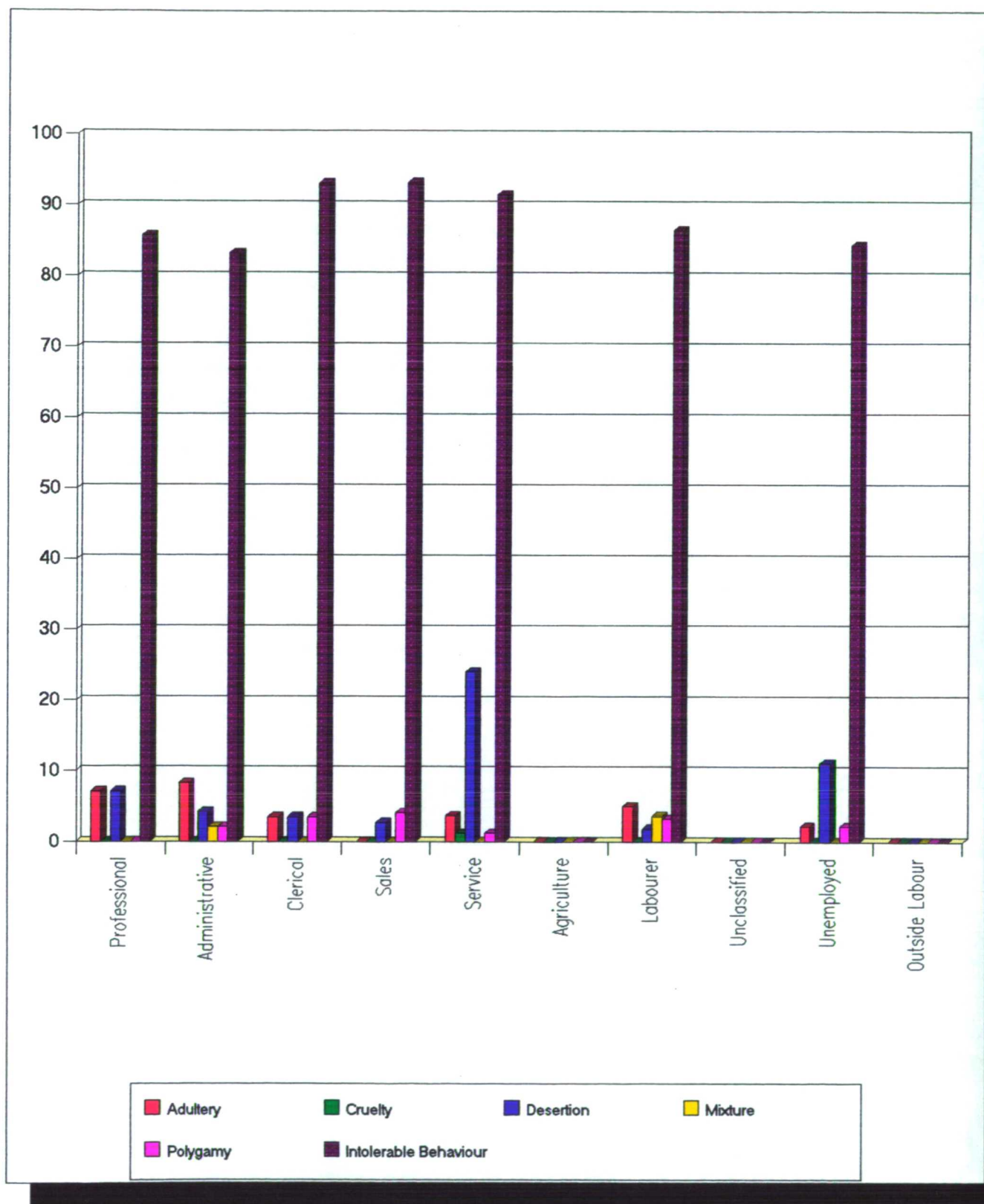
TABLE 4.23

Percentage Distribution of Grounds for Divorce by Occupational Group of

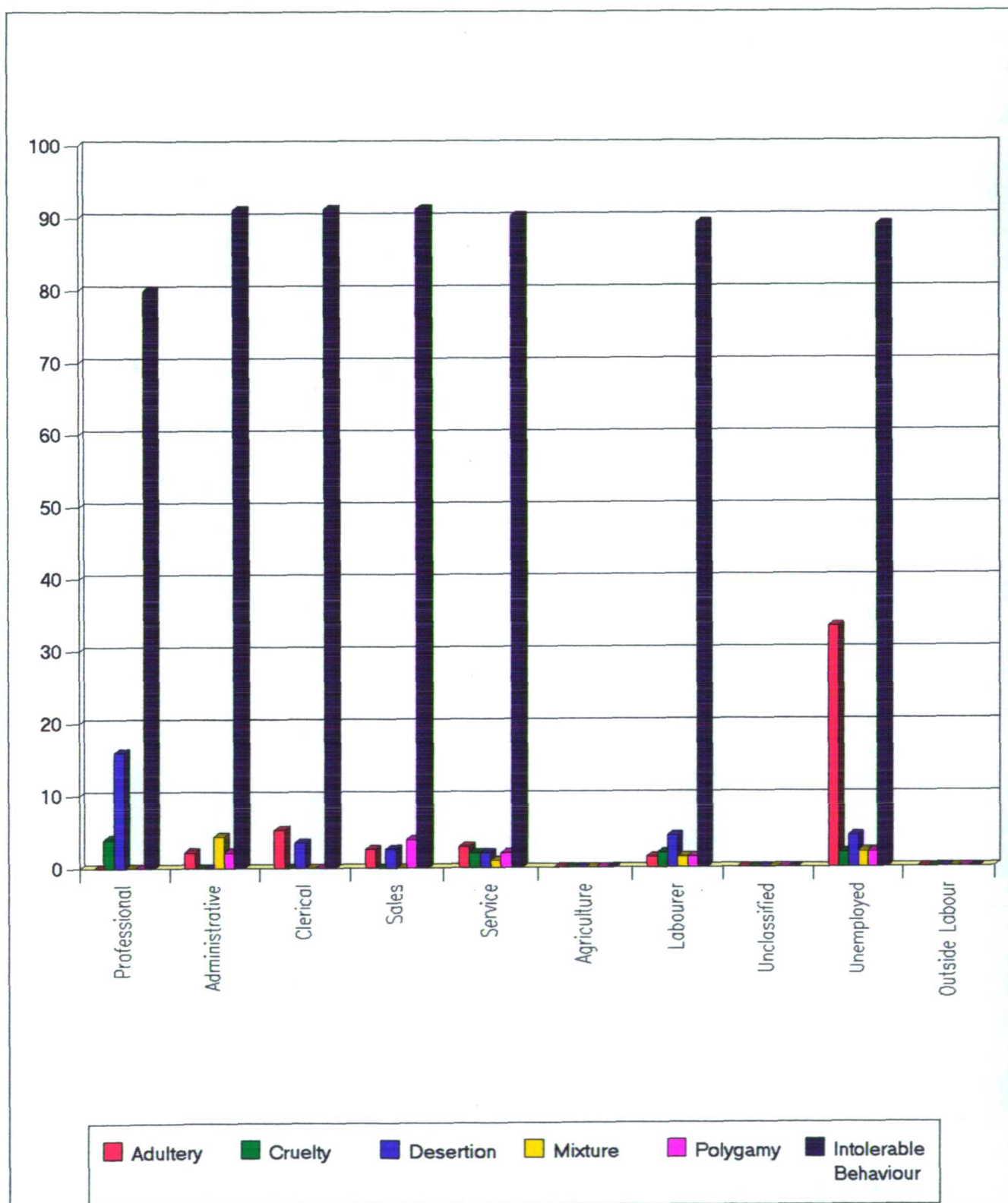
Muslim Husbands from 1983-1990

GROUPS	ADULTERY		CRUELTY		DESERTION		MIXTURE		POLYGAMY		INTOLERABLE BEHAVIOUR	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Professional	7.1	0.0	0.0	4.0	07.1	16.0	0.0	0.0	0.0	0.0	85.7	80.0
Administrative	8.3	2.2	0.0	0.0	04.2	00.0	2.1	4.4	2.1	2.2	83.3	91.1
Clerical	3.5	5.3	0.0	0.0	03.5	03.5	0.0	0.0	3.5	0.0	93.1	91.2
Sales	0.0	2.6	0.0	0.0	02.7	02.6	0.0	0.0	4.1	3.9	93.2	91.2
Service	3.7	2.9	1.2	2.0	24.0	02.0	0.0	1.0	1.2	2.0	91.5	90.2
Agriculture	0.0	0.0	0.0	0.0	00.0	00.0	0.0	0.0	0.0	0.0	00.0	00.0
Labourer	5.0	1.5	0.0	2.0	01.8	04.4	3.6	1.5	3.2	1.5	86.5	89.3
Unclassified	0.0	0.0	0.0	0.0	00.0	00.0	0.0	0.0	0.0	0.0	00.0	00.0
Unemployed	2.2	33.3	0.0	2.0	11.1	04.4	0.0	2.2	2.2	2.2	84.4	88.9
Outside Labour	0.0	0.0	0.0	0.0	00.0	00.0	0.0	0.0	0.0	0.0	00.0	00.0

4.23a
Percentage Distribution of Grounds for Divorce by Occupational Group of
Muslim Husbands from 1983-1986



4.23b
Percentage Distribution of Grounds for Divorce by Occupational Group of
Muslim Husbands from 1987-1990



Intolerable behaviour was cited as the major grounds of divorce amongst Muslims. As shown in Table 4.23, from 1983-1986, 88.4 percent of petitioners cited intolerable behaviour as their reason for divorce. Cruelty at 0.2 percent were the grounds cited least cited. Data from 1987-1990, also agree with this conclusion in that 89.4 percent of all divorces in this period are based on intolerable behaviour. "Mixture", were the least cited grounds for divorce at only 1.2 percent.

It may be observed from Table 4.23, that from 1983-1986, administrative workers accounted for 8.3 percent of petitions under adultery, followed by 7.1 percent for professionals, followed by 5 percent for labourers. From 1987-1990, all the percentages for adultery decreased except for clerical staff, increasing from 3.5 percent to 5.3 percent.

Regarding cruelty, from 1983-1986, only those in service used these grounds at 1.2 percent. From 1987-1990, cruelty seems to be favoured by the professionals at 4 percent, sales at 2.6 percent, unemployed at 2.2 percent followed by the labourers at 2 percent.

The unemployed make up the majority of those divorced due to desertion of their wives. In 1983-1986 and 1987-1990, there were 11.1 percent and 4.4 percent respectively of the unemployed using desertion as ground for divorce. From 1983-1986, the professionals made up 7.1 percent and 4.2 percent respectively, followed by clerical workers at 3.5 percent. Comparison with the data from 1987-1990, showed that whereas the rate for professionals rose to 16 percent, the unemployed had decreased to 4.4 percent followed by clerical and sales workers at 3.5 and 2.6 percent respectively.

Divorce due to mixture of grounds was most pronounced among labourers at 3.6 percent with 2.1 percent frequency for administrative workers from 1983-1986. The frequency for the labourers decreased to

1.5 percent from 1987-1990 in this category. The percentage for administrative workers increased from 2.1 percent to 4.4 percent. There was an increase in the proportion of the unemployed from 0 percent to 2.2 percent.

Sales was pronounced as the major occupational group who divorced due to polygamy as evidenced by a 4.1 percent figure from 1983-1986 and 3.9 percent from 1987-1990. Clerical workers were next with 3.5 percent followed by the labourers for the period 1983-1986. During this same period, administrative staff and the unemployed recorded rates of 2.1 and 2.2 percent respectively. No polygamy was found as grounds for the professional group. From 1987-1990, there was a decrease in all the percentages.

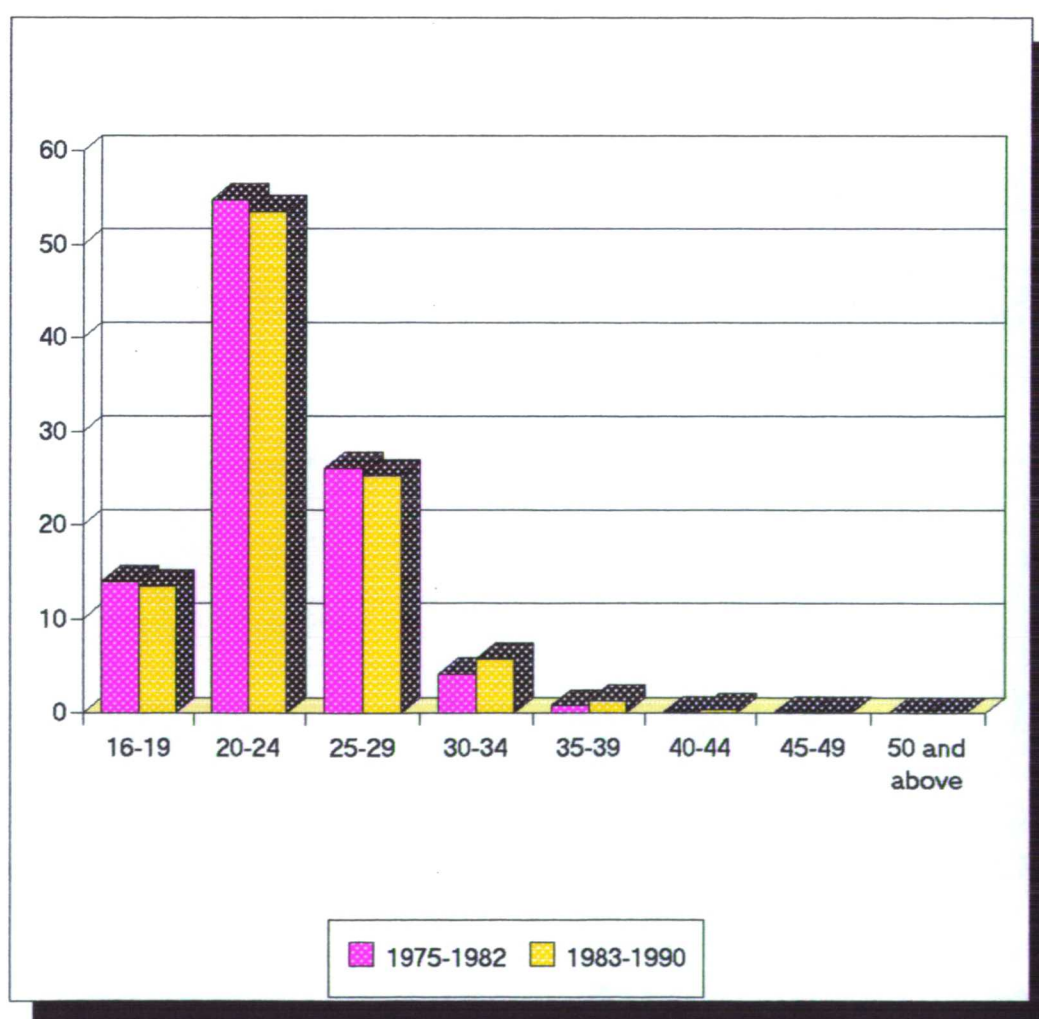
Every occupational group was represented in divorce due to intolerable behaviour. At 93.1 percent and 93.2 percent, clerical workers and sales were the majority, followed by service workers and professionals.

For the period 1987-1990, the proportion of clerical workers who divorced due to intolerable behaviour had dropped to 91.2 percent. This was made up by increase in every other occupational group except for administrative workers, labourers and the unemployed.

TABLE 4.24

Percentage Distribution of Age of Non-Muslim Wives at
First Marriage from 1975-1990

AGE GROUP	1975-1982	1983-1990
16-19	14.0	13.5
20-24	54.8	53.5
25-29	26.1	25.3
30-34	04.2	05.8
35-39	00.8	01.3
40-44	00.1	00.4
45-49	00.1	00.1
50 and above	00.0	00.0



4.6 AGE AT MARRIAGE AND DIVORCE

Table 4.24 shows the distribution of divorces by the age of marriage. Age of female divorcees at marriage before and after the LRA is mostly from the age group of 20-24. The mean age of marriages of the general male and female is not available. Therefore, statistics from the Population Census taken in 1980 are referred to. The median age (for the purposes of this research, the median age is assumed to be the same as the mean age; statistically, the difference is usually small) of the first marriage for the Malaysian male of non-Malay origin is 24.2-26.2; for the Malaysian female it is 18.3 to 23.1. It is interesting to note that there is a large gap between the sexes in the median age at first marriage. As is customary in most countries of the world, the figures confirm that males enter first marriage at a later age than females. However, the difference is seen to be exceptionally high among the Indians.³⁷

Comparing the mean of marriage of the divorcees with the median age of first marriage of the general population, the figures do not support the hypothesis that divorcees marry at a younger age.

However, it may not be prudent to compare the age of marriage of divorcees with that of the general population. Given that Kuala Lumpur is an urban area with a high percentage of professionals and working people, the mean age of marriage of male and female here may be higher than that of the general population. However, the lack of specific statistics make it impossible to arrive at any definite conclusion.

It can be observed from Table 4.24 that there is no significant deviation in the patterns before and after the introduction of the LRA

³⁷ Department of Statistics, 1980, pp.42-5.

for the age of wife at marriage. From 1975-1982, 54.8 percent of all women who married were in the age group 20-24. This was also observed in the period 1983-1990 where 52.2 percent of all women in the survey married between the ages of 20-24.

TABLE 4.25

Percentage Distribution of Age of Muslim Wives at
First Marriage from 1983-1990

AGE GROUP	1983-1986	1987-1990
16-19	29.7	31.7
20-24	41.0	41.0
25-29	15.9	16.6
30-34	08.3	05.8
35-39	03.3	03.9
40-44	00.7	00.5
45-49	00.5	00.3
50 and above	00.1	00.2

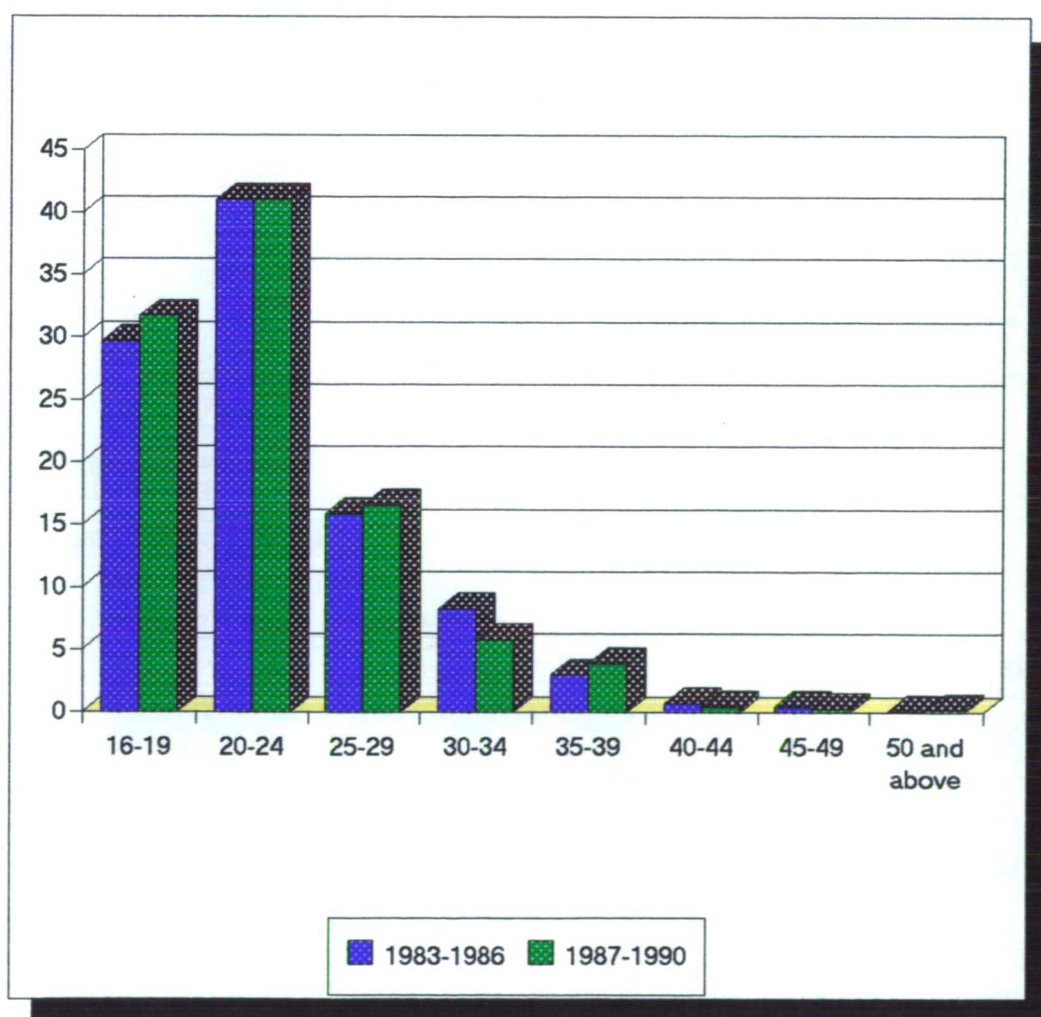


Table 4.25 for the Muslim wives shows that between 1983-1986, the majority of Muslim women who married were between 16-24 years of age with an overall frequency of 70.7 percent of the total population. This can be subdivided into a percentage of 29.7 percent and 41 percent for the age group 16-19 and 20-24 years of age respectively. As age increased, there were fewer and fewer number of women who married resulting in only 1 percent of all women in Kuala Lumpur who got married aged 50 and above.

Generally, this could also be observed for the ages of wife at marriage for the period 1987-1990. The figures peaked at the age group 20-24 with 41 percent followed by the age group 16-19 at 31.7 percent of the female population. Again, there was a rapid decrease in the number of women who married at an increasing age, dropping to a low of 0.2 percent for women aged 50 and above.

TABLE 4.26

**Percentage Distribution of Age of Non-Muslim Husbands at
First Marriage from 1975-1990**

AGE GROUP	1975-1982	1983-1990
16-19	01.6	01.2
20-24	35.8	30.3
25-29	40.6	44.8
30-34	16.4	15.1
35-39	03.9	00.9
40-44	01.1	01.7
45-49	00.4	00.5
50 and above	00.2	00.5

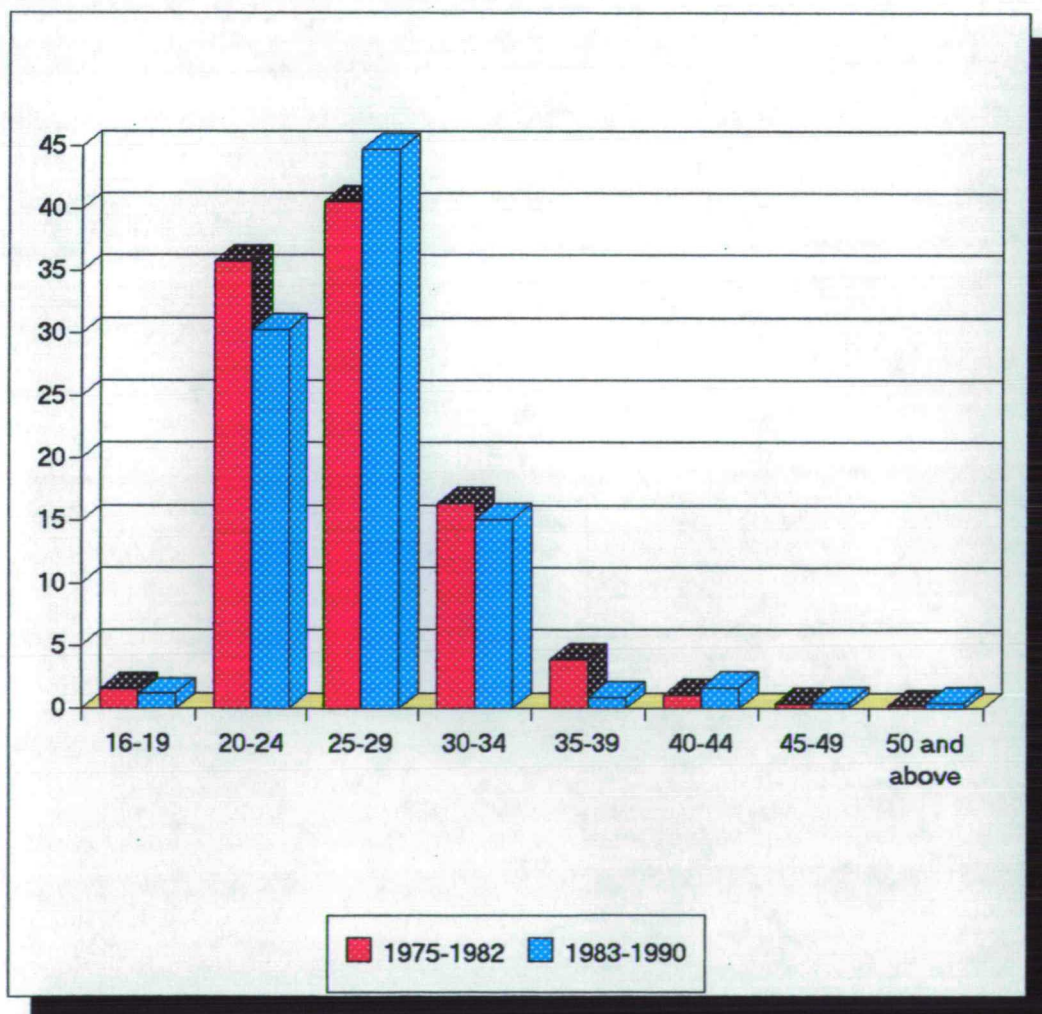
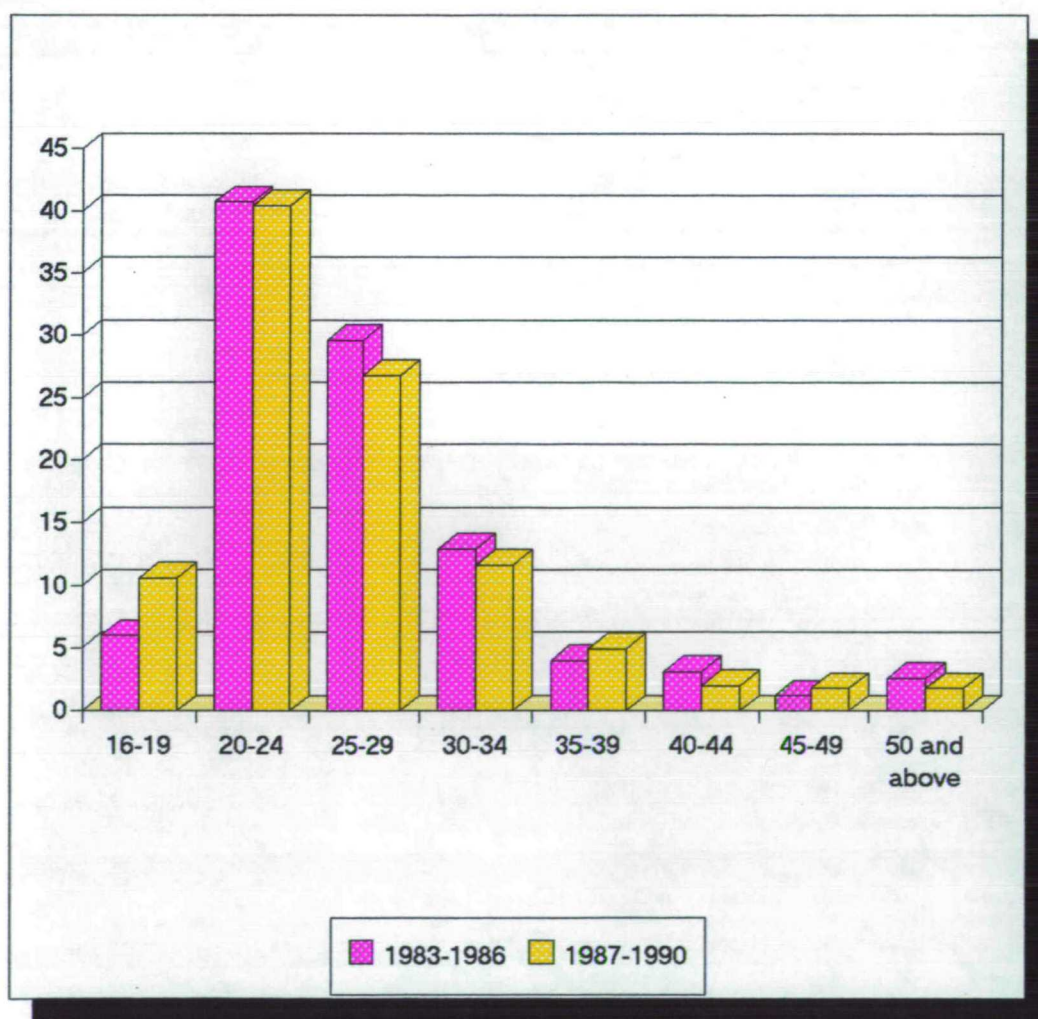


TABLE 4.27

Percentage Distribution of Age of Muslim Husbands at
First Marriage from 1983-1990

AGE GROUP	1983-1986	1987-1990
16-19	06.0	10.6
20-24	40.7	40.4
25-29	29.6	26.8
30-34	12.9	11.6
35-39	04.0	04.9
40-44	03.1	02.0
45-49	01.2	01.8
50 and above	02.6	01.8



In the case of age of husband at marriage, it can be observed from Table 4.26 that in both time periods, two co-dominant age groups could be found. Between 1975-1982, it could be observed that the age group 20-24 and 25-29 recorded percentages of 35.8 and 40.6 percent respectively. Similarly for the period 1983-1990, the age group 20-24 and 25-29 were represented by 30.3 and 44.8 percent respectively. Hence, over 75 percent of all males who married between 1975-1990 were between 20-29 years old. Very few men, that is 0.2 percent and 0.5 percent for 1975-1982 and 1983-1990 respectively married over the age of fifty.

For Muslims, from Table 4.27, it may be observed that between 1983-1986, 40.7 percent of all Muslim men who married in Kuala Lumpur were between 20-24 years of age, followed by 25-29 years at the frequency of 29.6 percent. Together, they made up a majority at 70.3 percent of men who marry between the ages of 20-29. Then, as the ages increased, there was a decreasing representation of males culminating in a frequency of 1.2 percent for the ages 45-49. There was a slight increase in representation of men aged 50 and above at 2.6 percent of the total male population.

The same trend was also observed in the periods after IFLA was enforced, that is 1987-1990 where 40.4 percent and 26.8 percent of all men who married during this period were of the ages 20-24 and 25-29 respectively. As noticed previously, there was a proportionate drop in the frequencies as age increased until the ages of 45-49 where only 1.8 percent of men who were married were from this age group. Men aged 50 and above were represented by a 1.8 percent of the total population.

TABLE 4.28

Percentage Distribution of Age of Non-Muslim Wives at
Divorce from 1975-1990

AGE GROUP	1975-1982	1983-1990
16-19	00.7	00.3
20-24	08.1	08.7
25-29	31.0	38.7
30-34	31.6	28.2
35-39	17.1	15.0
40-44	08.0	04.0
45-49	03.0	03.1
50 and above	00.5	01.9

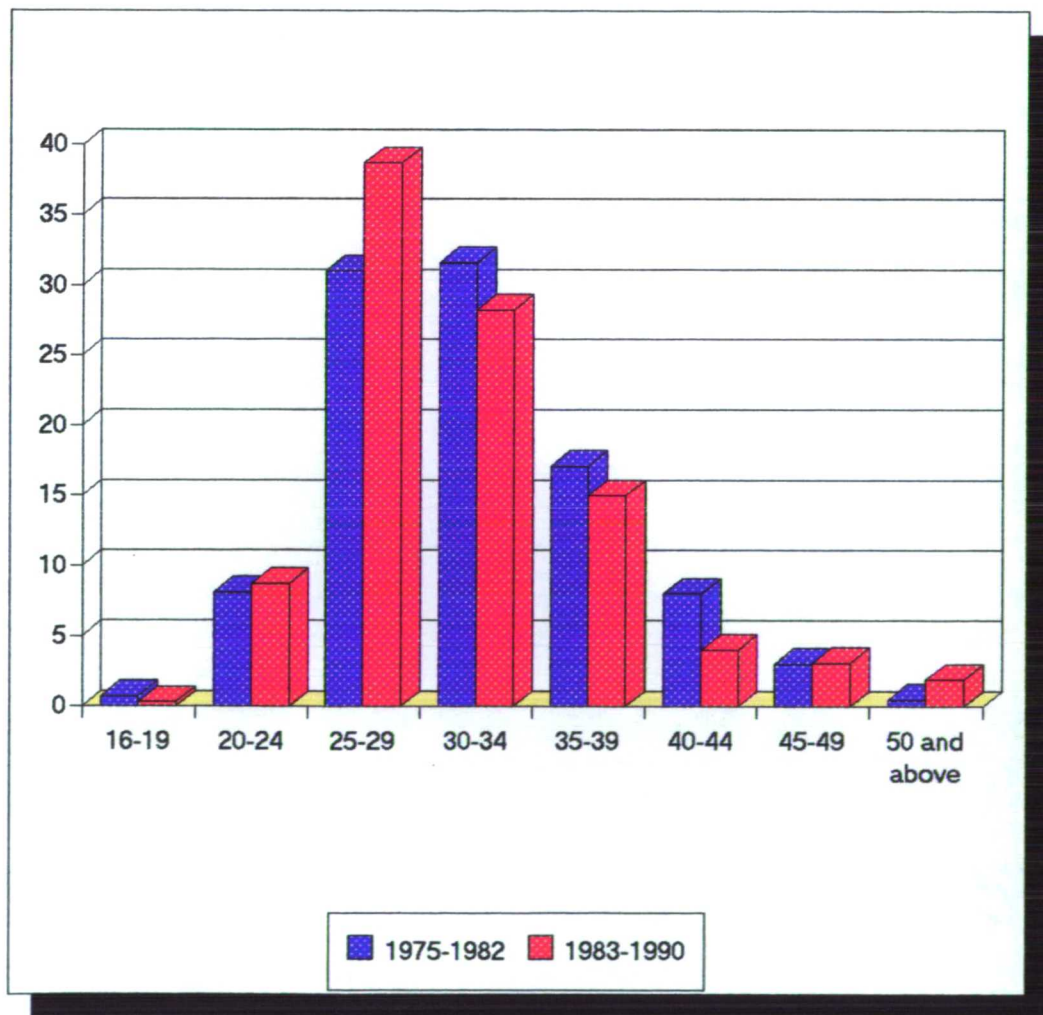


TABLE 4.29

Percentage Distribution of Age of Muslim Wives at
Divorce from 1983-1990

AGE GROUP	1983-1986	1987-1990
16-19	04.1	03.0
20-24	24.1	15.6
25-29	31.2	29.3
30-34	21.0	25.4
35-39	10.3	15.6
40-44	03.8	06.3
45-49	03.1	02.9
50 and above	02.4	02.0

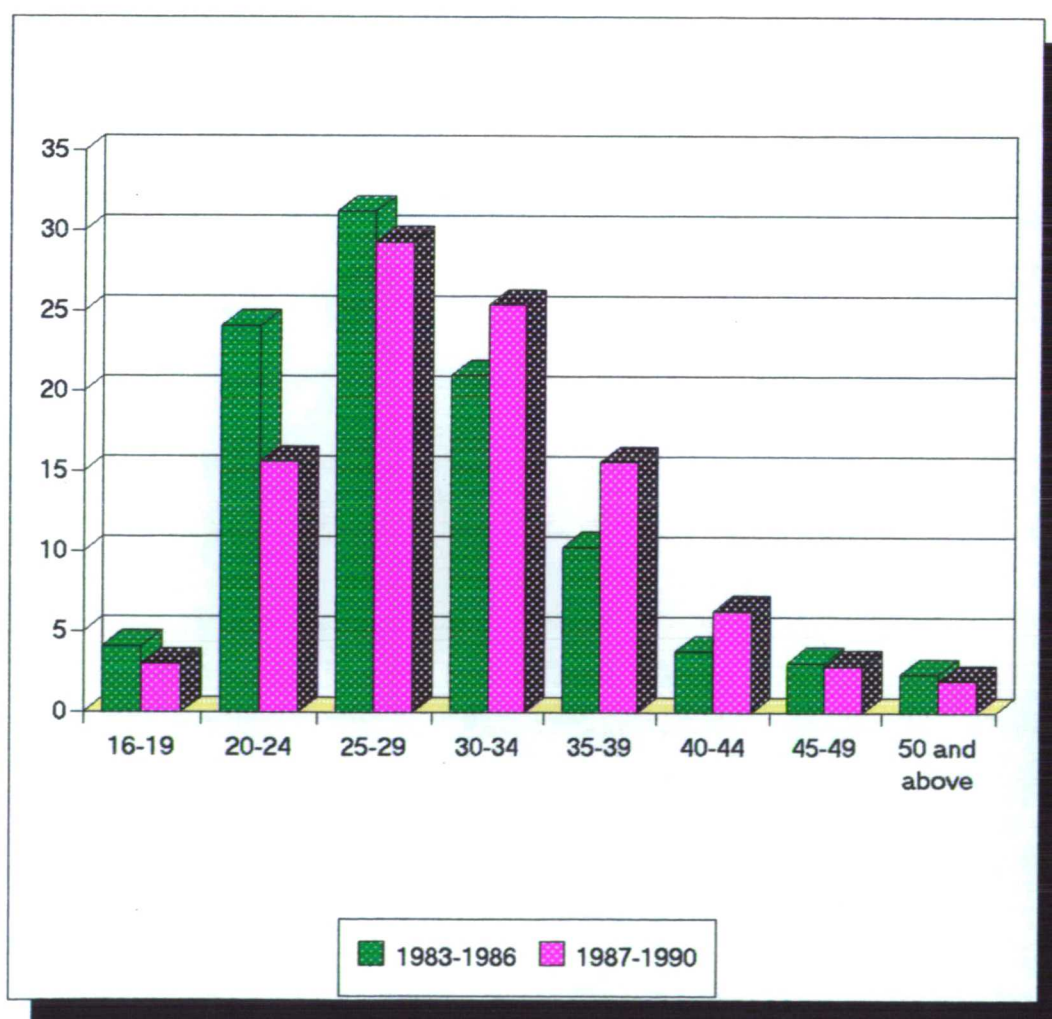
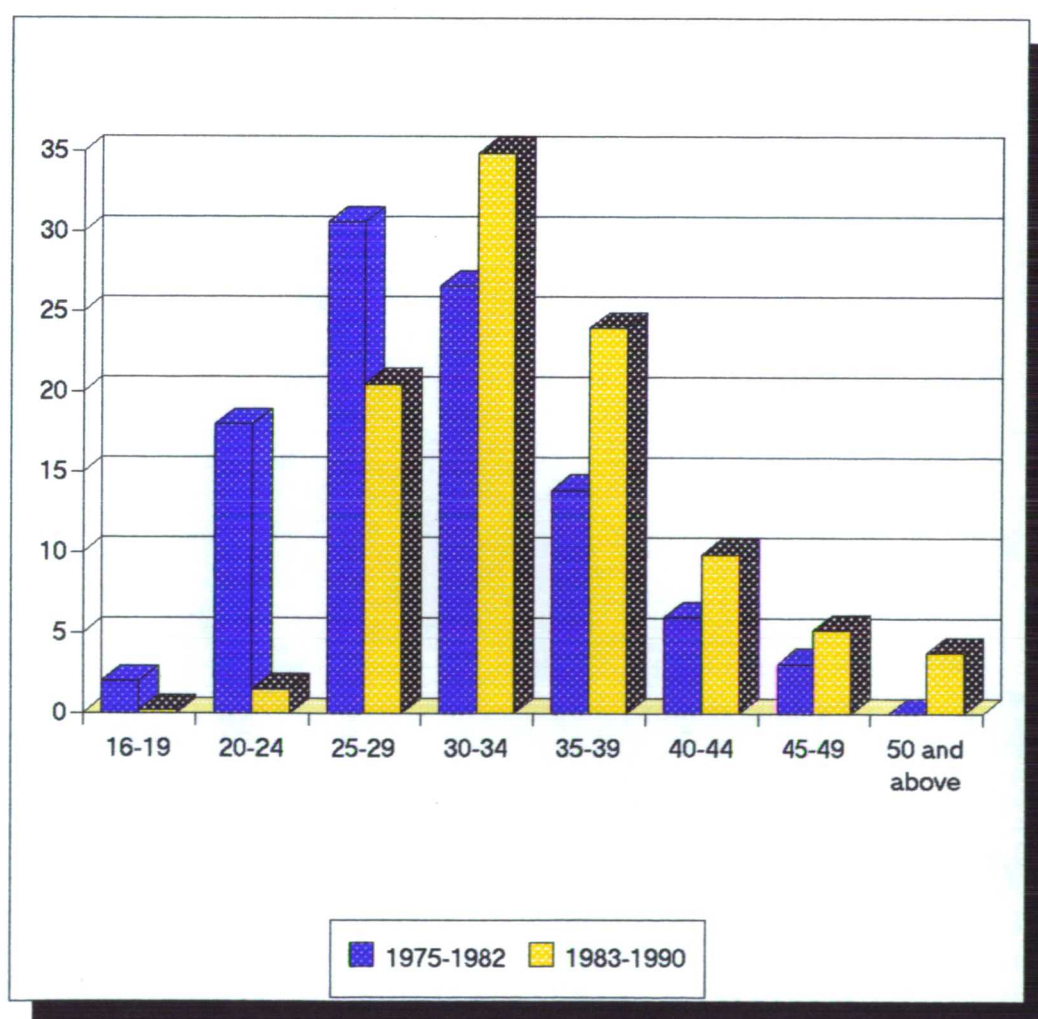


TABLE 4.30

Percentage Distribution of Age of Non-Muslim Husbands at Divorce
from 1975-1990

AGE GROUP	1975-1982	1983-1990
16-19	02.0	02.0
20-24	18.0	01.5
25-29	30.6	20.5
30-34	26.6	34.9
35-39	13.9	24.0
40-44	06.0	09.9
45-49	03.1	05.2
50 and above	00.0	03.8



From Table 4.28, it may be observed that there are two dominant age groups at which women are divorced. From 1975-1982, the age groups 25-29 and 30-34, predominate at 31 percent and 31.6 percent. After the introduction of the LRA, a more pronounced trend can be observed in that the percentage of divorce for the 25-29 age group it was 38.7 percent whereas for the 30-34 age group was 28.2 percent.

Table 4.29 highlights the distribution pattern of the ages of Muslim women at divorce. From 1983-1986, it may be observed that from a 4.1 percent frequency of divorce in the age group of 16-19, there was a sharp rise to 15.6 percent for the age group 20-24 years, peaking at 29.3 percent for women aged between 25-29. There was a steady decrease in the number and percentage of divorces with increasing age to a minimum of 2 percent at the age of 50 and above.

This pattern is repeated between 1987-1990, where it starts off with a 3 percent frequency of divorce in the 16-19 age group, followed by an increase to 15.6 percent for the 20-24 years and finally peaks at 29.3 percent for the ages 25-29 years. Again, there was a steady drop of divorces with increasing age to finally bottom out at 2 percent for women aged 50 and above.

Table 4.30 shows another co-dominant pattern emerging whereby the age group 30-34 years of age gave a percentage of 30.6 and the age group 35-39 giving 36.9 percent of the total male divorces from 1975-1982. After the LRA, this pattern changed slightly with the most popular age to be divorced between 30-34 with a total rate of 34.9 percent.

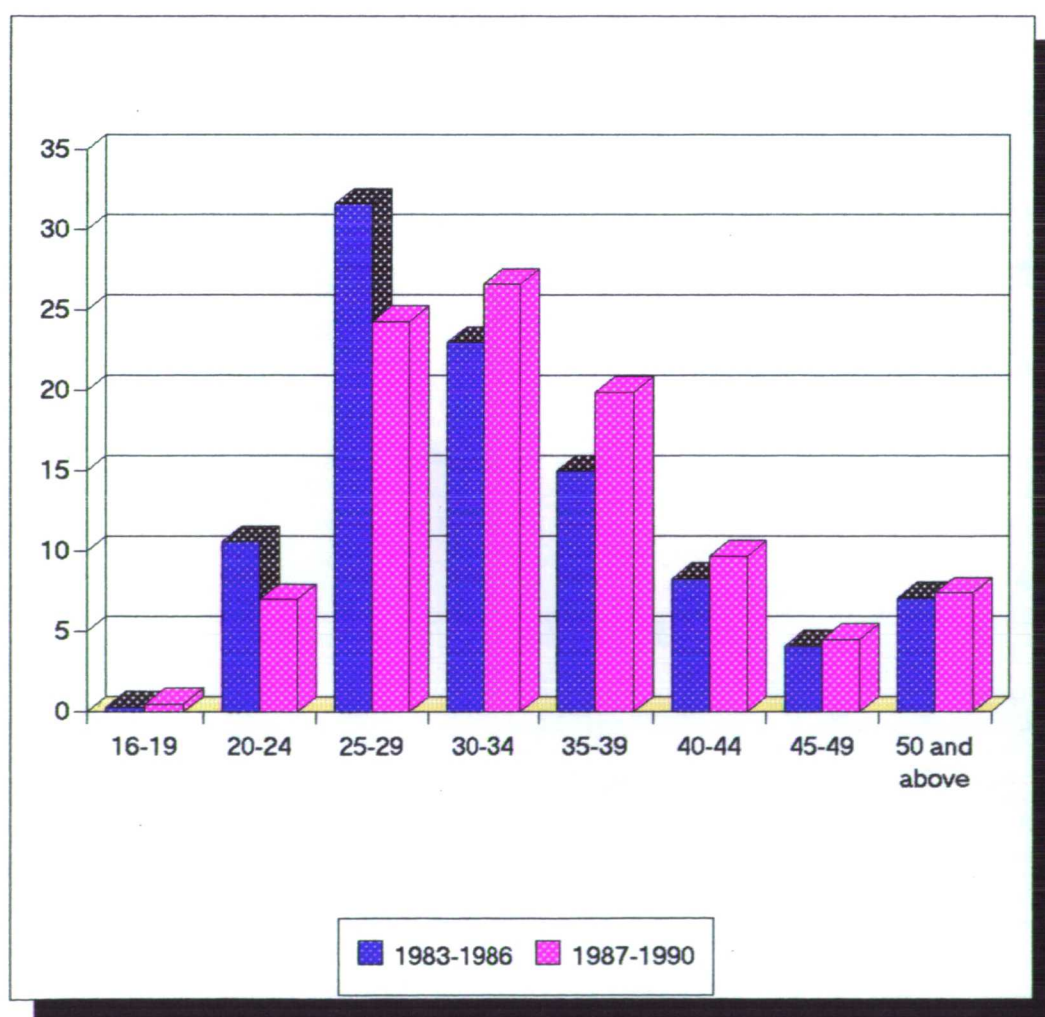
From this data, it could be concluded that generally the men are older than the women at marriage and there are no significant changes due to the introduction of the LRA. For both males and females, the critical age of divorce lies between 25-39 because the highest

percentage of males and females were divorced at this age. Generally, men divorce at a later age than women. This is due to the fact that they marry at a later age compared with women. This decline in age at divorce was a consequence of the decreasing age at marriage and the trend towards shorter duration of marriage.

TABLE 4.31

Percentage Distribution of Age of Muslim Husbands from 1983-1990

AGE GROUP	1983-1986	1987-1990
16-19	00.3	00.5
20-24	10.6	07.0
25-29	31.6	24.3
30-34	23.0	26.6
35-39	15.0	19.9
40-44	08.3	09.7
45-49	04.1	04.5
50 and above	07.1	07.4



It may be noticed from Table 4.31 that the majority of men who divorced in the period 1983-1986 were between the ages of 25-29 with a frequency of 31.6 percent followed by the age group of 30-34 years who contributed 23 percent of the total male divorcees. The percentage of men who divorced decreased on either side of these two peaks until only 4.1 percent of all marriages were dissolved by men aged 45-49 years old. There was a slight increase to 7.1 percent of marriages dissolved when the men were aged 50 and above. However, the lowest percentage of all was 0.3 percent of men who were divorced between the ages of 16-19.

From 1987-1990, it may be observed that this trend did change with the age group 30-34 peaking at 26.6 percent, followed by the 25-29 years age group at 24.3. At 45-49 years there were only 4.5 percent of men who divorced at that age. However, there was an increase to 7.4 percent for men aged 50 and above. The lowest percentage, however occurs in the age group 16-19 years who only accounted for 0.5 percent of all divorced men in this period.

Rimmer also showed that the younger the wife at marriage, the greater the risk of divorce irrespective of how long the marriage lasts. For marriages which have lasted at least three years, the divorce rate for women married between twenty to twenty four are three times as high as for those who married between the ages of twenty five and twenty nine.³⁸

Elliot and Merrill also concluded that women who married early have a very high divorce and separation rate. In fact, those who married

³⁸ Rimmer, Lesley, *Changing Patterns of Marriage and Remarriage*, in Change in Marriage, Rugby, National Marriage Guidance Council, 1982, p. 102.

under 18 have a much higher divorce rate than those who married a few years later.³⁹

The tendency to focus on the age of the women might well be seen as an unconscious attempt to fix greater responsibility for marital breakdown on the wife than on the husband and overlooks evidence that divorced men have also generally been relatively young at marriage compared to men who married but did not subsequently divorce.

Monahan's study also showed that early marriage was risky and tends to be less stable than marriage contracted at later ages. The age at marriage was considered to be a pre-disposing condition. The findings of the study established the fact that people involved in early marriages tend to be unstable in their married life due to emotional immaturity.⁴⁰

On the basis of a study of 425 divorces, Goode arrived at the same conclusion that early marriages (below twenties) reduce the possibility of adjustments.⁴¹ In a study of 500 cases of marital happiness, Hart and Shields found statistically that people getting married under the age of twenty two were more likely to be unhappy than those getting married between the ages of twenty two and twenty nine. The greatest risk seemed to appear when both husband and wife were under twenty two years.⁴²

³⁹ Elliot M and Merrill, F., Social Disorganization, New York, Harper and Brothers, 1961 p.425.

⁴⁰ Monahan, T.P., "Does Age at Marriage Matter in Divorce," Social Force, Vol. 32, 1953, pp.81-87.

⁴¹ Goode, William J., After Divorce, New York, The Free Press, Glencoe, 1956, p.40-1.

⁴² Popenoe, P. Marriage is What You Make It?, New York, The Mac. Millan, 1950, p.14.

Burgess and Cottrell in a study of 526 marriages, found more unhappy marriages among men who married under twenty two and women who married under nineteen years old. The findings of Burgess and Cottrell's study revealed that one of the factors having a moderate correlation with adjustment in marriage was the fact of husband and wife being twenty two to thirty years old at the time of marriage. Two of the important factors found to be statistically correlated with marital adjustment were husband's age being above twenty one years and wife's age being twenty years or over at the time of marriage.⁴³ Cahen summarised his study which indicate the relatively high probabilities of divorce during the early years of married life, even after corrections are allowed for both the marriage rate and the death rate.⁴⁴

In a study of Muslim divorces in Malaysia, Tan found by utilising a sample which was mainly made up of rural Malays that most of the divorced respondents, particularly the females, married at very young ages. Age at divorce for her sample was young. 53 percent of men divorced when they were below the age of 25 years while for females, 82 percent of divorcees were below the age of 20 years at the time of the divorce.⁴⁵

The Islamic Research Centre also considers early marriage as one of the main causes for divorce. They consider that with marriage at an early age either or both spouse may start off on the wrong footing because the parties lack the degree of maturity required to share the responsibilities of married life. Once they discover that they are unable

⁴³ Burgess, Earnest W. and Cottrell, Leonard S. Predicting Success or Failure in Marriage, New York, Prentice Hall, 1939.

⁴⁴ Cahen, 1932, p. 125.

⁴⁵ Tan, 1987, p.14.

to fulfil their obligations, they resort to the simplest solution - divorce.⁴⁶

On the other hand, Palmore and Ariffin, using the 1966-1967 West Malaysian Survey, found that women who were married more than once generally tended to be those who married at young ages. Tan and Siti using the 1974 Malaysian Fertility and Family Survey, found that both education and age at marriage had significant negative effects on the number of times a women married.

Prabu writes that likes and dislikes and the general mental attitude of men and women becomes more formed and fixed as individuals advance in age, so that there is often little or no room left for mutual adjustments and psychological compatibility of a couple which appears to come together at a rather late age.⁴⁷

A survey by the National Population and Family Development Board has shown that more and more people prefer to marry later. Higher education and a greater interest in furthering careers were the two main reasons people gave for not marrying early according to the 1988 nationwide survey. There was a drastic drop in the number of females aged 15-19 who married. This fell from 37 percent in 1957 to only 6 percent in 1988. The number of unmarried women aged 30-39 years old increased from 1 to 10 percent over the last 30 years. Late marriages however, resulted in more stable marriages, with 91 percent of the marriages in 1988 still intact compared with 81 percent in 1974.

⁴⁶ Kertaskerja Bil.2, Perceraian di Dalam Masyarakat Islam di Malaysia, Seminar Kadi-Kadi Seluruh Malaysia, Pusat Penyelidikan Islam, Jabatan Perdana Menteri, 1975; see also Ali, Osman bin, et.al, "The Patterns of Divorce Among Malay Families in Malaysia," Malaysian Journal of Family Studies, No.2, December, 1990, p.66.

⁴⁷ Prabhu, 1963, pp.183-6.

A survey done by the National Population and Family Development Board also shows that marriage among those with little schooling at all are ten times more likely to end up in divorce compared with couples with a higher level of education. The findings found 16.6 percent of couples with no schooling had their marriages dissolved compared with 1.6 percent of those with higher education. The study in 1989 also showed that 3.1 percent of those choosing their own partners eventually divorced compared with 10.6 percent with arranged marriages. There was, however, a drop in the number of divorce cases. The improvement in marital stability was attributed to the decline in the number of people marrying at a young age.⁴⁸

While age at marriage has increased for all ethnic groups, Malays still marry at younger ages compared with the Indians and the Chinese.⁴⁹ From the above arguments, it could be concluded that researchers consistently find age at marriage to be one of the strongest predictors of marital disruption and divorce. This association holds true with controls for such variables as culture, education and income. Unfortunately, these variables are not present in the divorce files in this study. Similar difficulties arise with the determination of the significance of age at marriage for divorce. Although there are credible hypotheses to explain why marriages at a young age might prove especially prone to breakdown, other variables interfere with my ability to draw definite conclusions.

⁴⁸ New Straits Times, October 5, 1991.

⁴⁹ Tan B.A and Chak C.S, Nuptiality, Meeting on the Results of Population Surveys and Policy Implications, National Population and Family Development Board, 1987

Some studies have shown that other factors are also strongly associated with divorce, including pre-marital pregnancy and unskilled manual occupations, which are overrepresented in teenage marriages.⁵⁰ A disproportionately high presence of these factors in any marriage, whatever the age of the couple, would be expected to increase their chances to divorce, with the result that it is difficult to isolate the importance of individual factors such as age at marriage.⁵¹

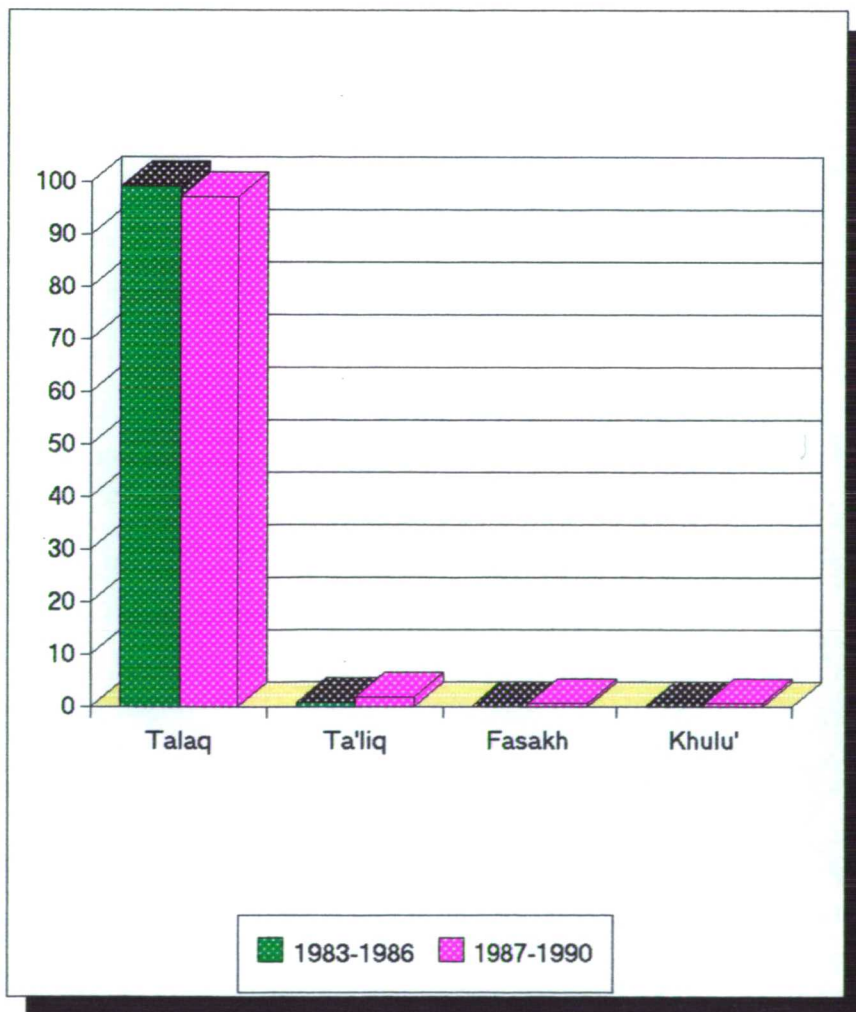
⁵⁰ Thornes, B and Collard, J., Who Divorces? London, Routledge and Kegan Paul, 1979, pp.72-80.

⁵¹ See Phillips, 1988, p.587.

TABLE 4.32

Percentage Distribution of Types of Muslim Divorces from 1983-1990

TYPES OF DIVORCE	1983-1986	1987-1990
Talaq	99.2	97.2
Ta'liq	00.8	01.8
Fasakh	00.0	00.5
Khulu'	00.0	00.5



4.7 TYPES OF MUSLIM DIVORCES

This study focuses on four types of Muslim divorces: talaq, (which is used exclusively by men) ta'liq, fasakh and khulu' which are considered the right of women who wish to release themselves from bad marriages. It is obviously of some interest to see to what extent these types of divorce have been used by women.

Talaq, or unilateral repudiation of the wife by a husband was found to be the most common type of divorce as shown in Table 4.32. From 1983-1986, 99.2 percent of divorces were by talaq, 0.8 by ta'liq but none under fasakh and khulu'. This pattern held when considering the data for 1987-1990. For this period, 97.2 percent of marriages were dissolved by talaq, 1.8 percent by ta'liq, and 0.5 percent each for fasakh and khulu'. The reason for the popularity of talaq is two fold; the first reason is due to the reaffirmation of the superior status of the husband over the wives. The other is its simplicity. A phrase such as "I divorce you" or "go home to your parents" may be binding and is easily uttered in the heat of a domestic quarrel. Also, it is a quick and convenient way to obtain a divorce and is sometimes requested by the wife in order that a divorce may be expedited.

TABLE 4.33

Percentage Distribution of Types of Muslim Divorce by Sex of

Petitioner from 1983-1990

TYPES OF DIVORCE	MALE		FEMALE	
	1983-1986	1987-1990	1983-1986	1987-1990
Talaq	100	100	0.0	0.0
Ta'liq	0	0	0.8	1.8
Fasakh	0	0	0.0	0.5
Khulu'	0	0	0.0	0.5

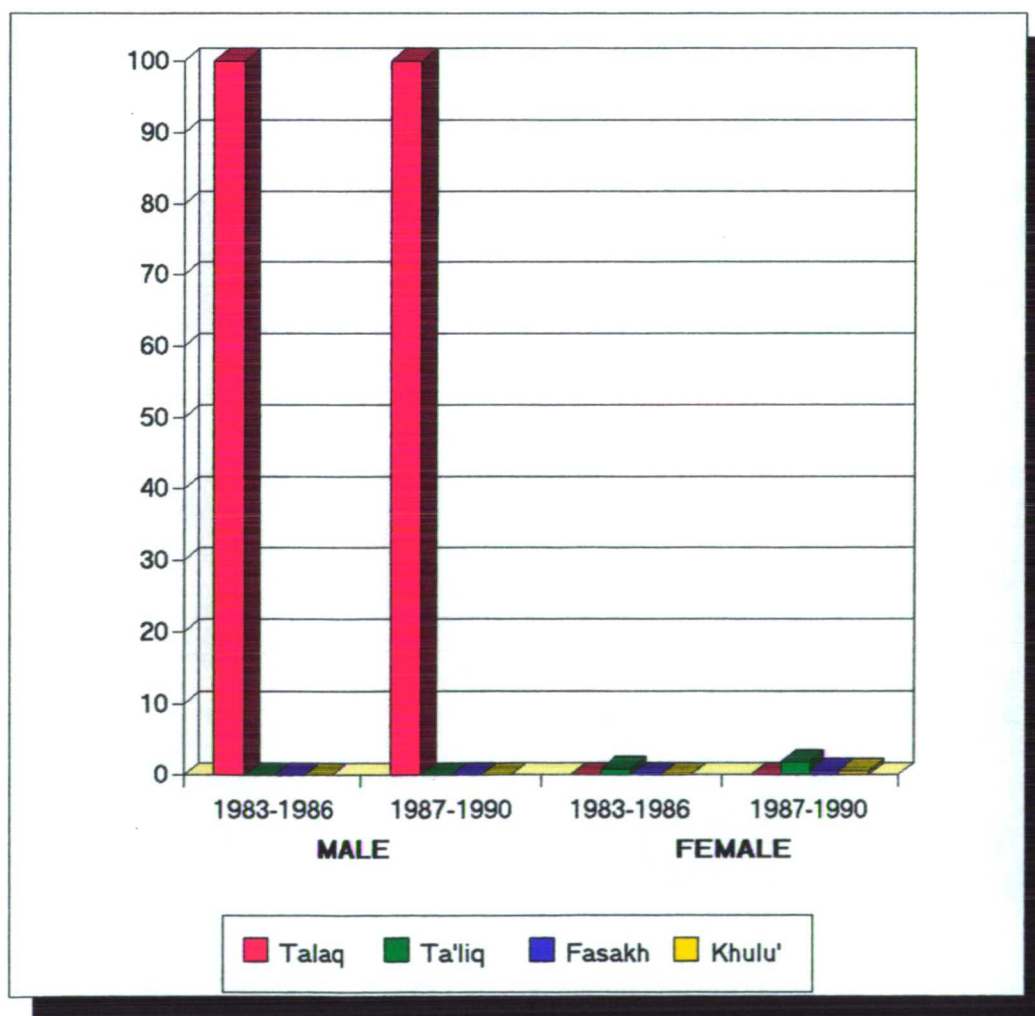
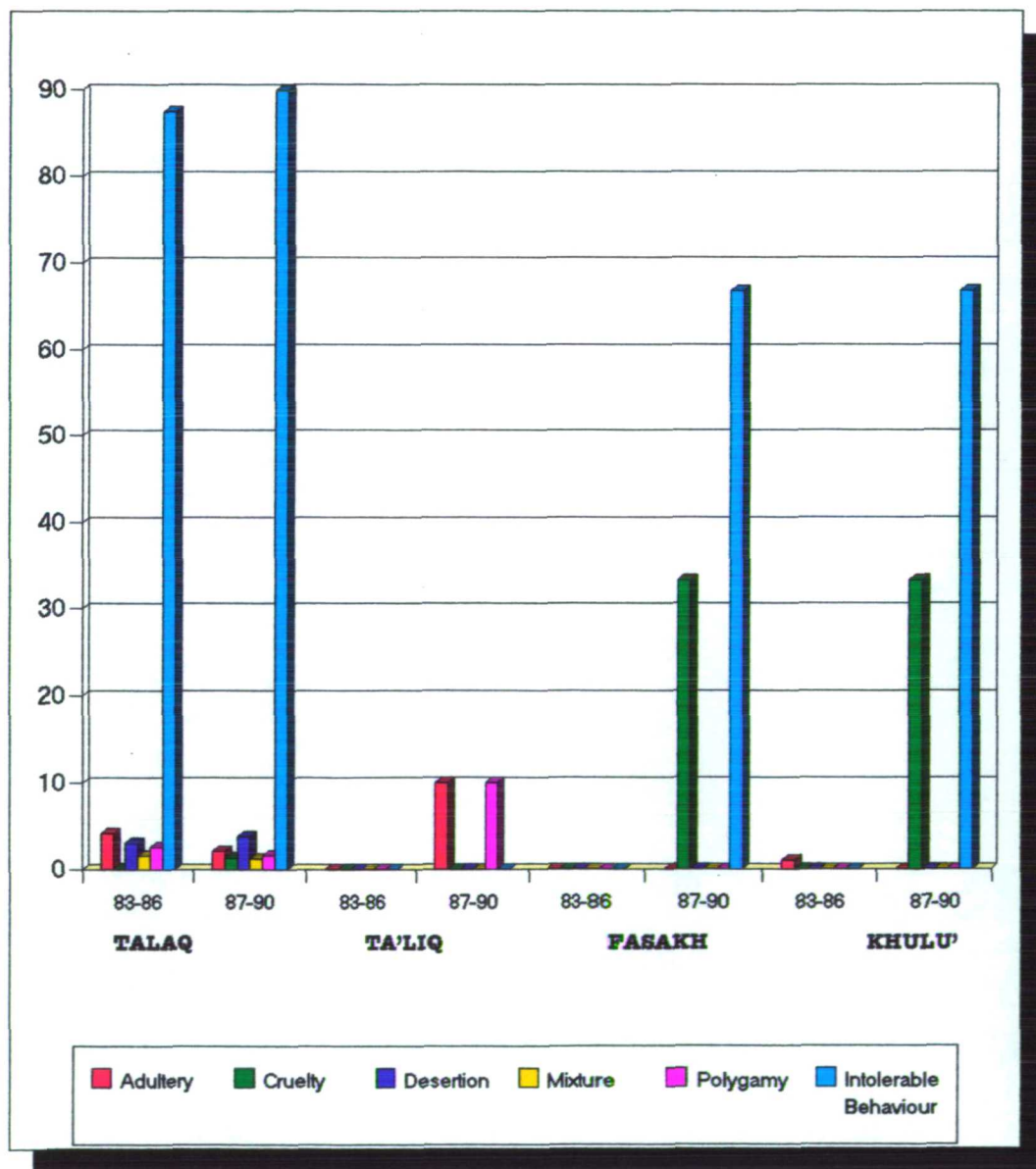


TABLE 4.34

Percentage Distribution of Grounds for Divorce by Types of
Muslim Divorce from 1983-1990

	TALAQ		TA'LIQ		FASAKH		KHULU'	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Adultery	04.2	02.1	0.0	10	0	00.0	1	00.0
Cruelty	00.2	01.4	0.0	0	0	33.3	0	33.3
Desertion	03.1	03.8	0.0	0	0	00.0	0	00.0
Mixture	01.6	01.2	0.0	0	0	00.0	0	00.0
Polygamy	02.6	01.6	0.0	0	0	00.0	0	00.0
Intolerable behaviour	87.5	89.9	0.0	0	0	66.7	0	66.7



A highly skewed distribution is obtained as shown in Table 4.33. From 1983-1986, the great majority of talaq divorces were carried out by the males.

Ta'liq, fasakh and khulu' were used exclusively by females. Females were under-represented at a frequency of 0.8 percent for ta'liq and none under fasakh and khulu' in the 1983-1986 time period. In the 1987-1990 period there was an increase in percentage in all types of divorce by females. Fasakh increased to 1.8 percent, fasakh and khulu' to 0.5 percent each.

As shown in Table 4.33, khulu' and fasakh are the types of divorce used less frequently in dissolving Muslim marriages. Table 4.34 shows that although there were no divorces under khulu' and fasakh on any grounds cited in 1983-1986, the pattern changed from 1987-1990. 66.7 percent of Khulu' and fasakh divorces were on the grounds of intolerable behaviour. Intolerable behaviour was also cited as the ground for ta'liq, which, in the 1987-1990 time period accounted for 10 percent of divorces. Ta'liq was used to dissolve 10 percent of marriages based on the ground of desertion and non-maintenance for more than four months. Fasakh and khulu' were also employed in 33.3 percent of cases citing cruelty as grounds for divorce. Talaq, due to its quick and preemptory nature was used in the majority of grounds. Talaq was used to dissolve marriages on the grounds of intolerable behaviour at 87.5 percent. This was followed by adultery at 4.2 percent. Talaq was least used for cruelty at 0.2 percent. There were decreases in percentages in all grounds for talaq except for cruelty which slightly increased to 1.4 percent. Desertion increased to 3.8 percent from 3.1 percent, and intolerable behaviour to 89.9 percent.

TABLE 35a

Percentage Distribution of Types of Divorce by Occupational Group of
Muslim Wives from 1983-1986

OCCUPATIONAL GROUP	Talaq	Ta'liq	Fasakh	Khulu'
Professional	00.6	00.0	00	0
Administrative	01.2	02.1	00	0
Clerical	10.3	08.8	00	0
Sales	03.6	04.3	00	0
Service	04.6	00.0	00	0
Agriculture	00.0	00.0	00	0
Labourer	18.4	21.3	50	0
Unclassified	00.6	00.0	00	0
Unemployed	60.7	63.8	50	0
Outside Labour	00.2	00.0	00	0

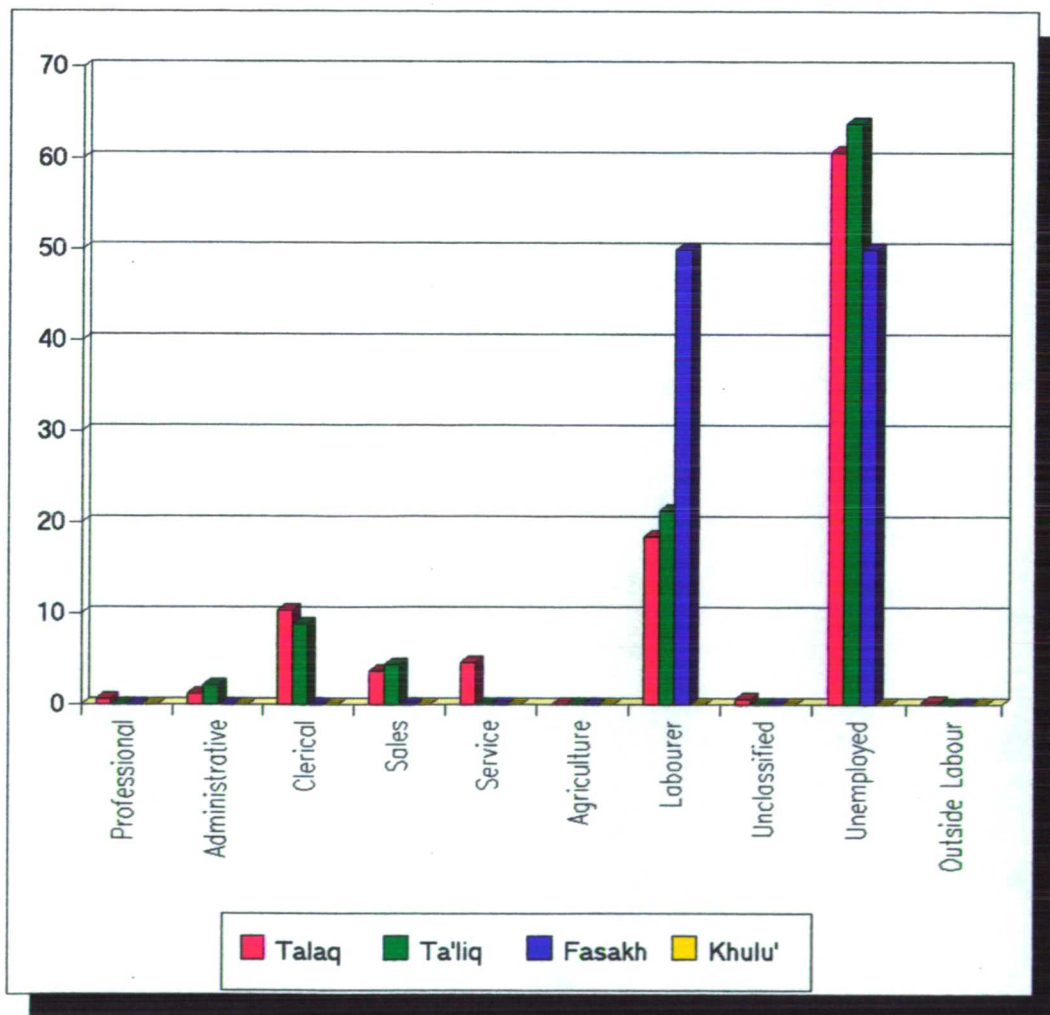


TABLE 35b

Percentage Distribution of Types of Divorce by Occupational Group of
Muslim Wives from 1987-1990

OCCUPATIONAL GROUP	Talaq	Ta'liq	Fasakh	Khulu'
Professional	00.7	00.0	00.0	00.0
Administrative	03.3	06.0	00.0	00.0
Clerical	13.3	31.1	33.3	00.0
Sales	05.2	06.3	33.3	00.0
Service	05.8	12.5	33.3	00.0
Agriculture	00.0	00.0	00.0	00.0
Labourer	23.8	12.5	00.0	00.0
Unclassified	00.4	00.0	00.0	00.0
Unemployed	47.1	07.5	00.0	66.7
Outside Labour	00.4	00.0	00.0	00.0

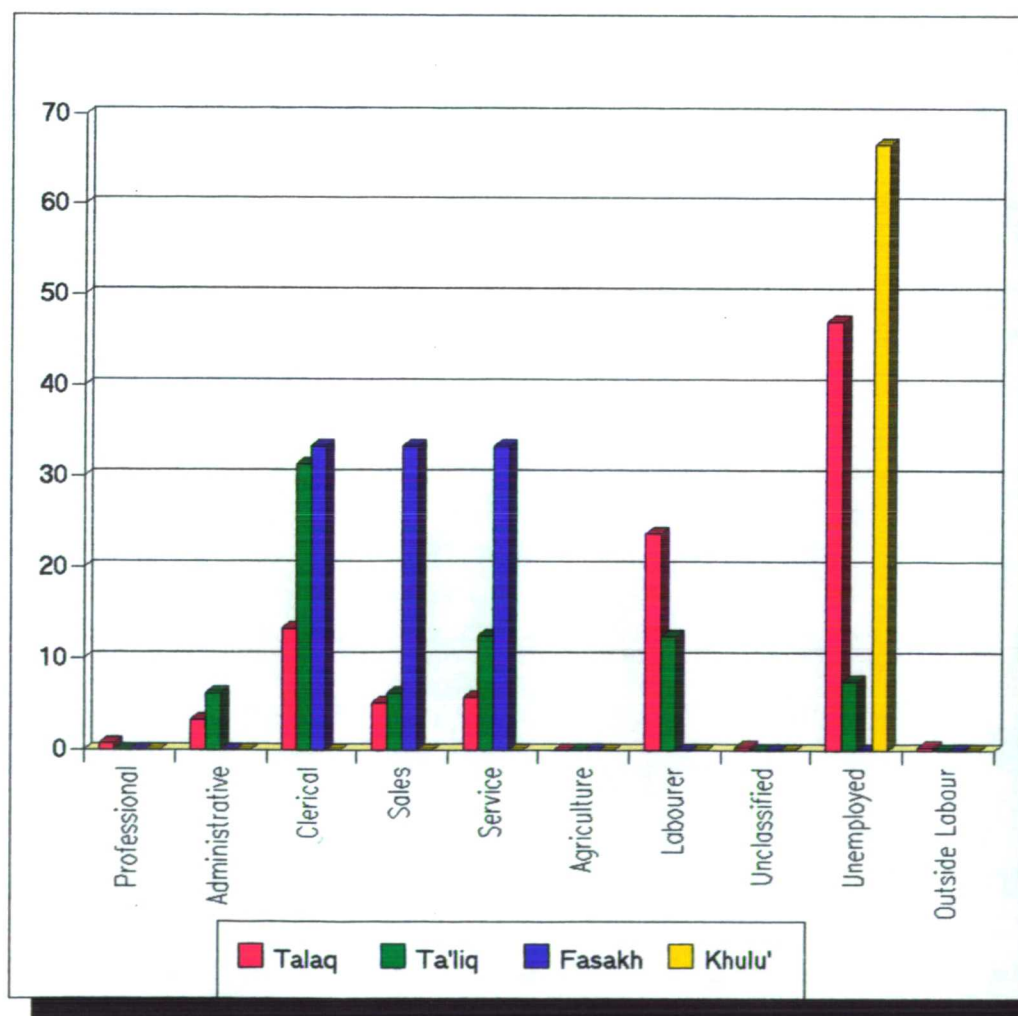


Table 4.35a shows that in 1983-1986, the unemployed were the majority group with 60.7 percent being divorced by their husband through talaq. Labourers, clerical, service and sales workers were next with 18.4 percent, 10.3 percent, 4.6 percent and 3.6 percent respectively. Administrative staff at 1.2 percent, professional and classified workers at 0.6 percent each and 0.2 percent for those outside the labour force make up the rest.

During the 1987-1990 period, it was observed that the percentage of the unemployed being divorced by their husbands through talaq fell to 47.1 percent which triggered off a corresponding rise in the frequencies of the other occupational group from 0.1 percent to 5.4 percent with the exception of those Outside the labour force which fell 0.2 percent to 0.4 percent of the total number of women being divorced by talaq

From 1983-1986, 63.8 percent of women using ta'liq for divorce were unemployed followed by a figure of 21.3 percent for labourers, 8.8 percent for clerical staff, 4.3 percent for sales and 2.1 percent for administrators. From 1987-1990, this pattern had changed with clerical staff at 31.3 percent being dominant followed by 12.5 percent for service workers and labourers. The unemployed only made up 7.5 percent with 6.3 percent each for sales and administrative workers.

During 1987-1990, fasakh was used as a means of divorce by clerical, sales and service workers in a three way split of 33.3 percent (Table 4.35b). Khulu' was used exclusively by the unemployed from 1983-1986 but fell to 66.7 percent from 1987-1990. The only other occupational group to use khulu' was administrative workers at 33.3 percent.

TABLE 4.36

Percentage Distribution of Types of Divorce by Occupational Group of
Muslim Husbands from 1983-1990

Occupational Group	1983-1986	1987-1990
Professional	01.6	03.3
Administrative	08.1	08.5
Clerical	09.0	09.8
Sales	11.3	13.0
Service	16.0	16.3
Agriculture	00.1	00.3
Labourer	45.6	38.0
Unclassified	00.6	00.3
Unemployed	06.7	00.0
Outside Labour	01.7	00.0

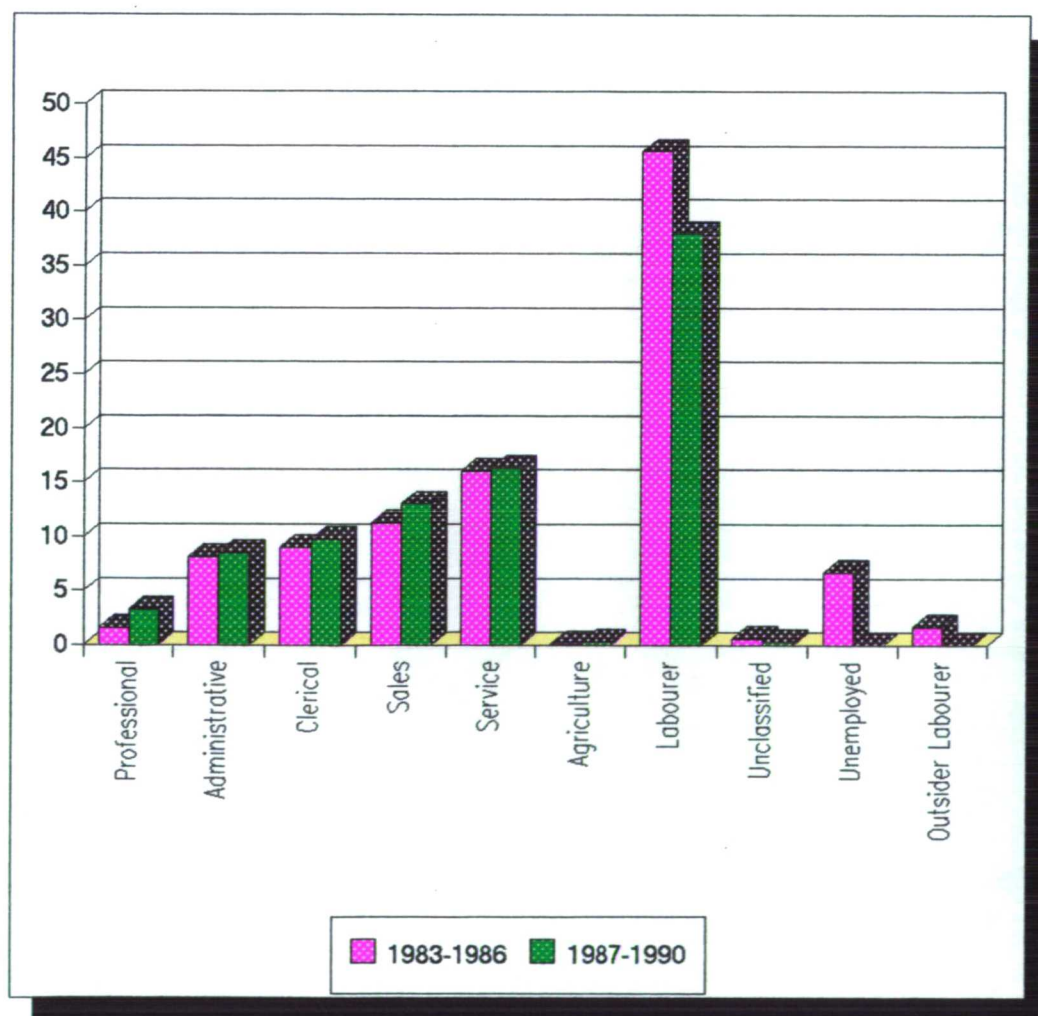


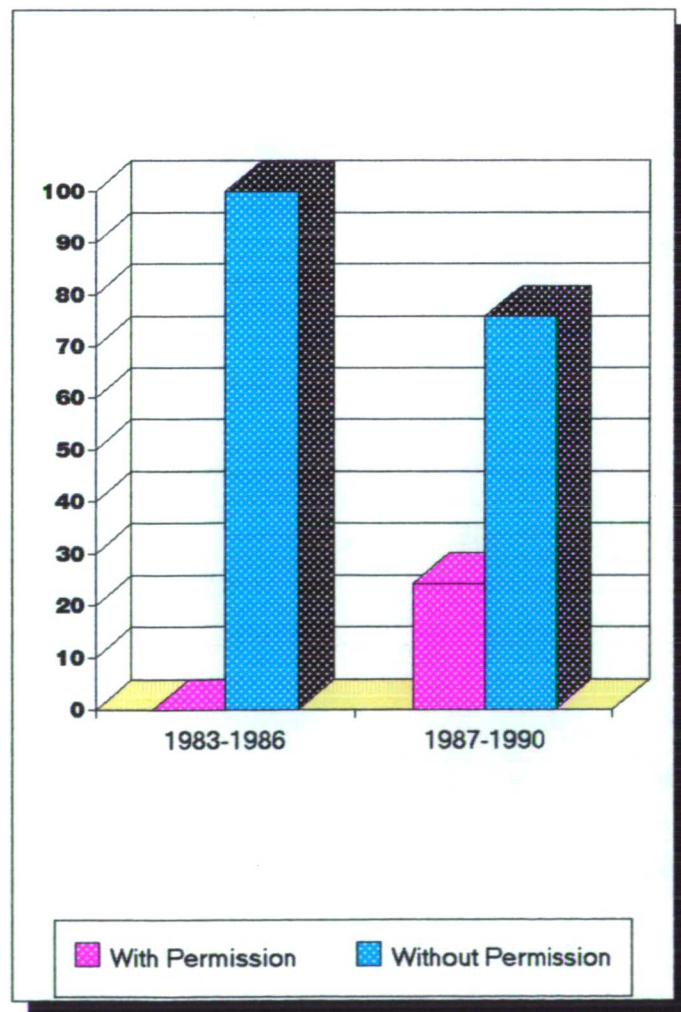
Table 4.36 shows at 45.6 percent, labourers make up the majority of talaq cases from 1983-1986. They were followed by service workers at 16 percent and sales workers at 11.3 percent. Then, there was a reduction in proportion from 9 percent for clerical staff to 8.1 percent for administrative workers to 6.7 percent for the unemployed. 1.7 percent and 1.6 percent were recorded for those outside the labour force and professionals respectively.

In 1987-1990, it was observed that the proportion of labourers who used talaq for divorce had been reduced to 38 percent. This brought a corresponding increase from 0.1 percent to 2.7 percent across the board with the only exception being unclassified workers which were reduced to 0.3 percent.

TABLE 4.37

Percentage Distribution of Methods of Divorce for Muslims from 1983-1990

METHOD OF DIVORCE	1983-1986	1987-1990
With permission	0	24.2
Without permission	100	75.8



4.8 METHODS OF MUSLIM DIVORCES

In traditional Islamic law, the husband is granted absolute and exclusive right to initiate divorce by pronouncing a talaq. He is authorised to divorce his wife without assigning any cause and he is not required to resort to any court proceedings in order to effect the talaq.⁵² The rampant use of this unilateral right to divorce caused hardship to women, raised the divorce rate and generally gave a bad name to Muslim family law. Controls over the exercise of this right became imperative. The state is not debarred from regulating divorce in the interests of all its citizens and for their general welfare.⁵³ Section 47 of IFLA requires an application for divorce to be submitted to the Sharia Court which will inquire into the facts of the case. The parties will be subjected to reconciliation procedures and only when these fail will the divorce be permitted.

It is obviously of some interest to see to what extent this requirement has been adhered to after its enforcement. Table 4.37 shows that from 1983-1986, an overwhelming majority of 100 percent of talaqs took place outside the Sharia Court. This is due to the fact that there were no requirements to do so. There was only a slight change however from 1987-1990. The frequency of divorce without permission dropped to 75.8 percent and divorce with permission rose to 24.2 percent. It could be hypothesized that these divorces were now pre-meditated and some may have been at the request of the wife so as to bring about a quick divorce. The interference of the court in the so-called unequivocal right of the husband is to regulate the divorce so that it is not being abused, and to protect the women.

⁵² Personal conversation with Ustaz Abdullah Abu Bakar, Associate Professor, Kuliyah of Laws, International Islamic University, in March 1992

⁵³ Ibrahim, 1965, p. 106.

A case study of Muslim divorce in 1989 by Haji Wan Mohammad shows that although divorce without the permission of the Sharia Court is considered as an offence, 68 percent of all divorces that were registered in 1989 were pronounced without the permission of the court. Though Jabatan Agama Islam Wilayah Persekutuan (JAWI) had taken legal action towards them, cases under section 124 is still considered the highest so far taken by the Unit Penguatkuasa dan Pendakwa (Enforcement and Litigation Unit).⁵⁴

In Kelantan in 1984, the very first year of the implementation of the Enactment, divorce rates dramatically dropped by half. This is evidence of the efficacy of the controls introduced by the Enactment. However, the rate has begun to increase and it could be because the men have learnt that even if they do not comply with the enactment, their pronouncement of talaq will still be effective for the purpose of dissolving the marriage. They are charged with committing an offence but may gladly pay the fine because after that the divorce is registered.⁵⁵

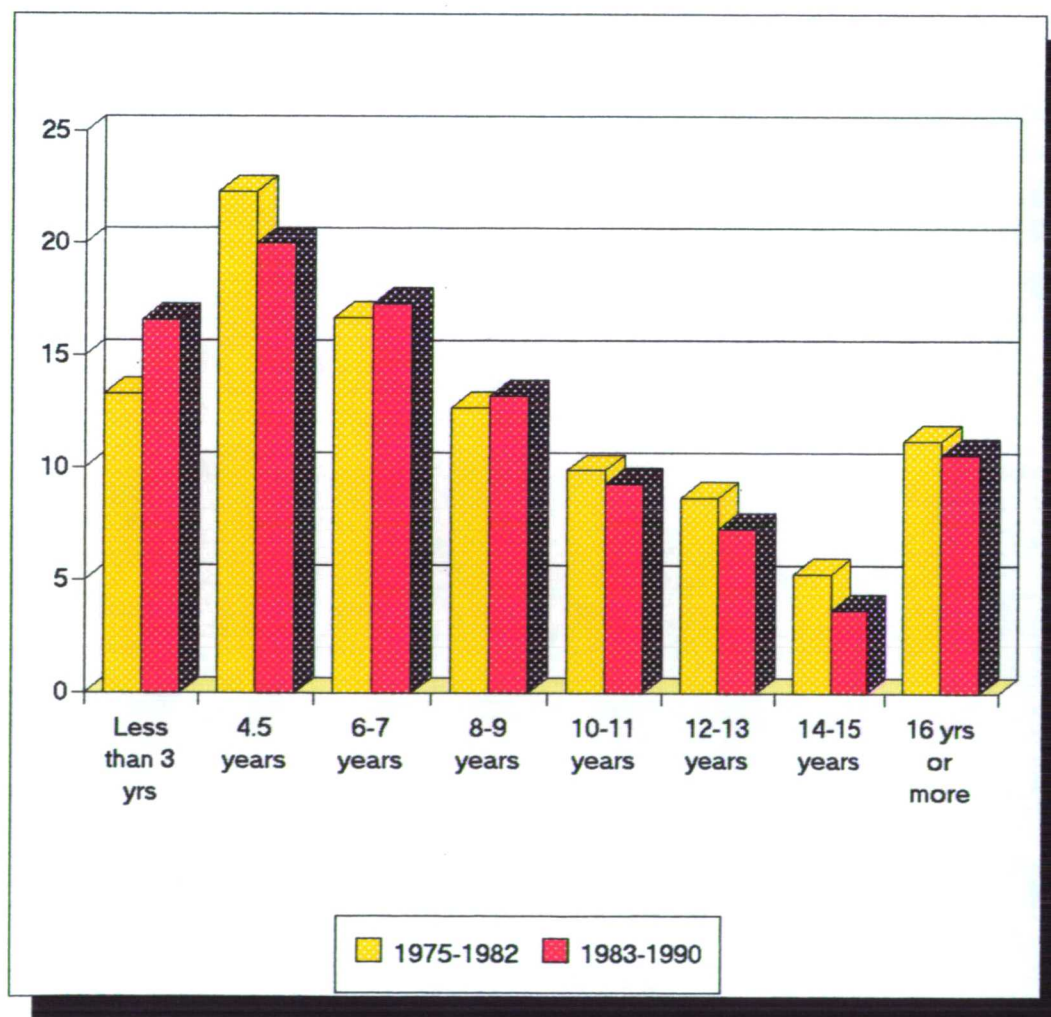
⁵⁴ Haji Abdul Aziz, Hj. Wan Mohammad bin, Suatu Pengamatan Umum Terhadap Isu Kekeluargaan, Kajian Kes di Kuala Lumpur, Seminar Tatacara Kekeluargaan, Institut Sains Komputer, Universiti Teknologi Malaysia, September 1990.

⁵⁵ Siraj, Mehrun, Developments in Muslim Family Law, Seminar on Family Law, Faculty of Law, University of Malaya, January, 1987.

TABLE 4.38

Percentage Distribution of Duration of Non-Muslim Marriages from 1975-1990

DURATION	1975-1982	1983-1990
Less than 3 years	13.3	16.6
4-5 years	22.3	20.0
6-7 years	16.7	17.3
8-9 years	12.7	13.2
10-11 years	09.9	09.3
12-13 years	08.7	07.3
14-15 years	05.3	03.7
16 years or more	11.2	10.6



4.9 DURATION OF MARRIAGE

There are several ways of conceptualising duration of marriage, and Monahan (1962) has shown that very different pictures are created depending upon whether duration is measured from date of marriage to date of divorce or from date of marriage to date of actual separation.⁵⁶

Duration of marriage in the present study refers only to the interval between marriage and the date of its legal dissolution (de jure duration.) These statistics, whilst providing an accurate picture of one aspect of trends in divorce behaviour, will not reflect actual marital duration, because cohabitation will have ceased sometime prior to the granting of the decree absolute.

The divorce petitions used in the present survey came from marriages which had lasted between three years and sixteen years and beyond. This means that marriages of widely differing durations were being examined. Duration of the marriage is calculated from the date of the marriage until the date the decree was made absolute to the nearest year.

Table 4.38 shows that the general patterns of duration of marriages do not change overall before or after LRA. This means therefore that the LRA does not directly affect duration of marriage. Rather, it helps to facilitate divorce when the marriage ends. But on its own, it does nothing to reduce the duration of marriages.

From 1975-1982, it was observed that a peak was reached at 4-5 years where 22.3 percent of couples were married for this period before they

⁵⁶ Monahan, T.P. "When Married Couples Part: Statistical Trends and Relationships in American Divorce", American Sociological Review, 27, 1962, pp. 625-633.

divorced. Then, in descending order were 6-7 years at 16.1 percent, 3 years or less at 13.3 percent, 8-9 years at 12.7 percent, 16 years and more at 11.2 percent, 10-11 years at 9.9 percent, 12-13 years at 8.7 percent and 14-15 years at 5.3 percent.

A similar pattern can be observed for the period 1983-1990 where 4-5 years stand at 20 percent followed by 6-7 years at 17.3 percent and then 3 years or less at 16.6 percent. This was followed by 8-9 years at 13.2 percent and 16 years or more at 10.6 percent. Those who divorced after 10-11 years of marriage stand at 9.3 percent, 12-13 years at 7.3 percent and 14-15 years at 5.7 percent.

From the above figures, it can be seen that marriages last generally for 4-5 years before ending in divorce. This period seems to be the most critical period. Figures are also reasonably high just before and after this period. Therefore taken cumulatively over 50 percent of marriages last for up to 7 years irrespective of the time period in which this study was made.

It may also be observed that fewer and fewer couples dissolve their marriage as the life-span of the marriage increases. This is generally true except for the category 16 years and more which accounts for 10-11 percent of all divorces. This could be due to a number of reasons. Firstly, it could be due to the artificially constructed category of 16 years or more. This category might be too big and so bring about an artificially induced high divorce rate. A solution would be to subdivide this category further. This would then give more accurate assessment.

Secondly, it may also be due to the fact that after 16 years or more of marriage, boredom sets in.

However, after the LRA, only 16.6 percent of the marriages ended before the duration of three years. This may be due to the legal bar

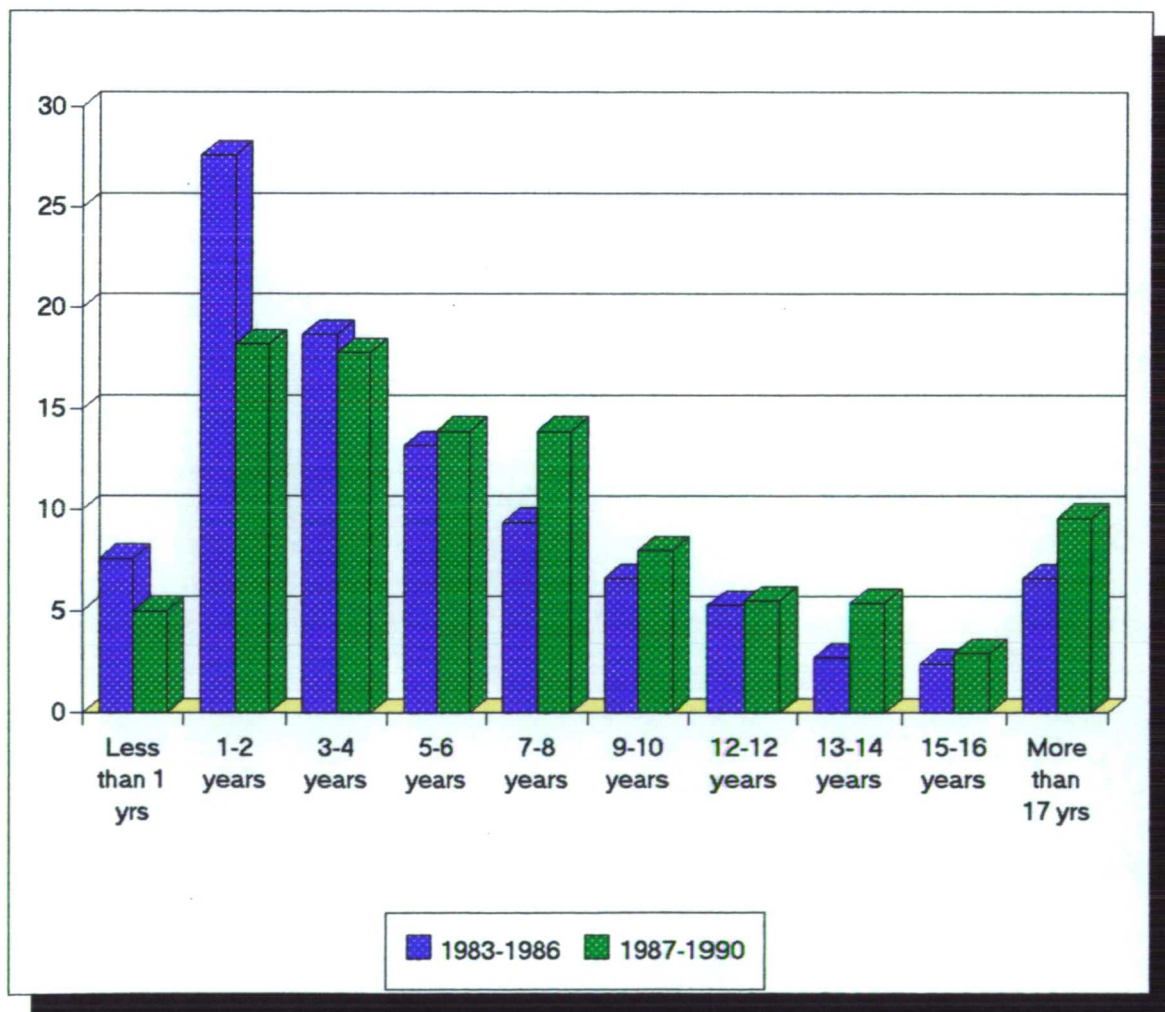
to divorce. If the marriage is less than three years under section 6(1) of Ordinance, 1952, and two years under the present law.⁵⁷ For the same reason, the period of 4-5 years after the marriage has the highest number of divorces. Couples wishing to divorce earlier must have waited for the expiry of the time-bar to divorce before commencing divorce proceedings.

⁵⁷ LRA, section 50, 51(3).

TABLE 4.39

Percentage Distribution of Duration of Muslim Marriages from 1983-1990

DURATION	1983-1986	1987-1990
Less than 1 years	07.6	05.0
1-2 years	27.6	18.2
3-4 years	18.7	17.8
5-6 years	13.2	13.9
7-8 years	09.4	13.9
9-10 years	06.6	08.0
11-12 years	05.3	05.5
13-14 years	02.7	05.4
15-16 years	02.4	02.9
More than 17 years	06.6	09.6



From Table 4.39, it can be observed that 7.6 percent and 5.0 percent of all marriages were dissolved during the first year from 1983-1986 and 1987-1990 respectively. The divorce rate reached a peak at 1-2 years after marriage where 27.6 percent of divorces took place at this time from 1983-1986. For this period as well, 18.7 percent and 13.2 percent of all divorces were carried out after 3-4 and 5-6 years of marriage. Together, 53.9 percent of all divorces happened within six years of marriage.

A similar picture also emerges from 1987-1990, where divorces peaked after 2-3 years of marriage at 18.2 percent. 17.8 percent of all divorces happened after 3-4 years of marriage and 13.8 percent after 5-6 years of marriage.

In both time periods, there was a corresponding drop in the frequency of divorce with increasing duration of marriage. However, it was observed that there was still a significant percentage of couples who divorced after 16 years or more of marital life. From 1983-1986, there were 78 such cases bringing the percentage up to 6.6 percent. However between 1987-1990, there were 95 such cases increasing the percentage to 9.6 percent.

It is extremely difficult to estimate the critical stages of marriage on the basis of statistics, and the only thing can be said is that the first years are the most difficult.⁵⁸ In western societies, the first three years of marriages are considered to be the more dangerous period because this is the time of greatest adjustments. Monahan demonstrates this point by using American data and pointed out in 1957, 14.9 percent of divorces in Wisconsin were of couples who were married for one or less than one year and 30.3 percent of the divorces were of

⁵⁸ According to Dr. Parameswara Deva, the next crises peak is the 15th year when already stressful unions may wear out with either one partner deciding to end the marriage; New Straits Times, January 1, 1991.

couples who were married for three or less than three years.⁵⁹ This seems to be in line with Jacobson's study, in which he concluded that the divorce frequency is highest in the early period of married life. The rate for America was at a maximum in the third year of marriage (duration 2-3 years), dropped sharply through the seventh year, and thereafter declined less rapidly but almost steadily with each advance of matrimonial duration.⁶⁰

Bowman also related that approximately two-fifths of the divorces he studied were granted to couples married for less than five years. One-fourth were granted to couples married for five to nine years. Thus, about one-third of divorces occur during or after the tenth year of marriage. Only a small percentage occurs before the end of the first year. These figures also show that couples do not rush into divorce as soon as trouble starts. It usually takes time for a couple to discover that their marriage is a failure. After that, a considerable period elapses before they bring themselves to the point where divorce is sought as a remedy.⁶¹

Several matters concerning adjustment may be found in the early period of the marriage. These may, later on, determine the chances of stability or instability in marriage. Efforts for adjustment are very much required. It is because of these that some sociologists have held that in general, divorce frequency is highest in the early period of married life.⁶²

⁵⁹ Monahan, 1962, p. 633.

⁶⁰ Jacobson, Paul H., "Differentials in Divorce by Duration of Marriage and Size of Family", American Sociological Review, Vol. 15, 1950. p.239.

⁶¹ Bowman, Henry A., Marriage for Moderns, New York, Mc Graw Hill, 1954, p.505.

⁶² Winch, Robert, and Mc Gimmis, Robert, The Family, New York, Henry Holt and Company, New York, 1971, p.550.

The oft-repeated sociological reference to the third or fourth years of marriage as showing the highest percentage of divorce decrees and the implication given thereby that marriage crises grow until then, according to Monahan, is a spurious statistical assertion. The popular belief that "the first year is the hardest" is according to him is the view which has always been supported by the more complete and refined information. A true recognition of this social reality should bring us to a better understanding and appreciation of the special difficulties of the first year of marriage for American couples. Data on desertion and non-support cases confirm the finding that couples who have difficulty in married life mostly manifest their problem in the first year, with diminishing frequency thereafter.⁶³

In the present study of the Non-Muslims, 13.3 percent were couples who were married for three or less than three years. Whereas for the Muslims, 5-7 percent were couples who were married for a year or less and less than 20 percent of the Muslim divorces were of couples who were married for three years. Comparatively, this shows that Asian people still regard divorce as a social taboo and it only occurs under extreme circumstances.

This conclusion confirms the study made by Monahan which showed that duration of marriage varies from area to area, from time to time, and from one population class to another.⁶⁴ It has been found that couples have longer durations of marriage when they are in their first marriage, have children, are in higher socio-economic occupational groups, generally, and live in less metropolitan but middle-sized population areas. The grounds chosen for divorce and the legal structure are also related to duration. It is also likely that race,

⁶³ Monahan, 1962, p. 633.

⁶⁴ Ibid, p.625.

educational achievement, premarital pregnancy, and other elements also bear a relationship to this measure of marriage duration.⁶⁵

The study made by Collard in 1979 also pointed out that those marriages involving a teenage partner, a pre-marital pregnancy, early fertility or which were infertile also had relatively shorter periods of cohabitation. The findings of a study made by Collard have indicated that, in many ways, those who have divorced may have had both environmental disadvantages and have been more at risk to personal stresses. Divorce behaviour, however, is inevitably affected by the macro-social system. Whilst those who divorce do so because they are unhappily married, other factors will also influence the actual decision to divorce⁶⁶.

⁶⁵ Id.

⁶⁶ Thornes and Collard, 1979, pp.14-117.

TABLE 4.40a

Percentage Distribution of Duration of Non-Muslim Marriage by Numbers of
Children from 1975-1982

DURATION	One	Two	Three	Four	Five	Six or more
Less than 3 years	73.9	13.0	10.9	02.2	00.0	0.0
4-5 years	73.3	21.6	05.2	00.0	00.0	0.0
6-7 years	53.3	38.3	08.3	00.0	00.0	0.0
8-9 years	33.0	44.3	13.4	08.2	01.0	0.0
10-11 years	40.4	38.2	10.1	05.6	04.5	1.1
12-13 years	26.3	34.2	28.9	06.6	01.3	2.6
14-15 years	25.9	29.6	31.5	09.3	03.7	0.0
16 years or more	16.4	32.7	25.5	11.8	10.0	3.6

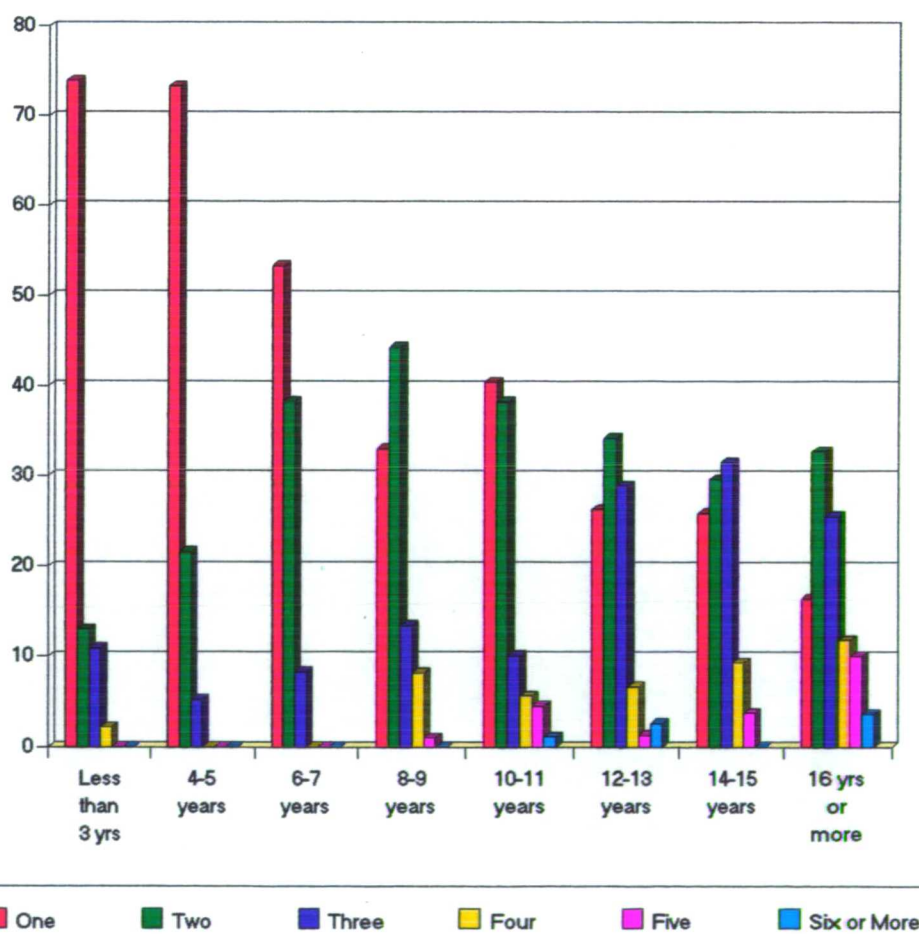
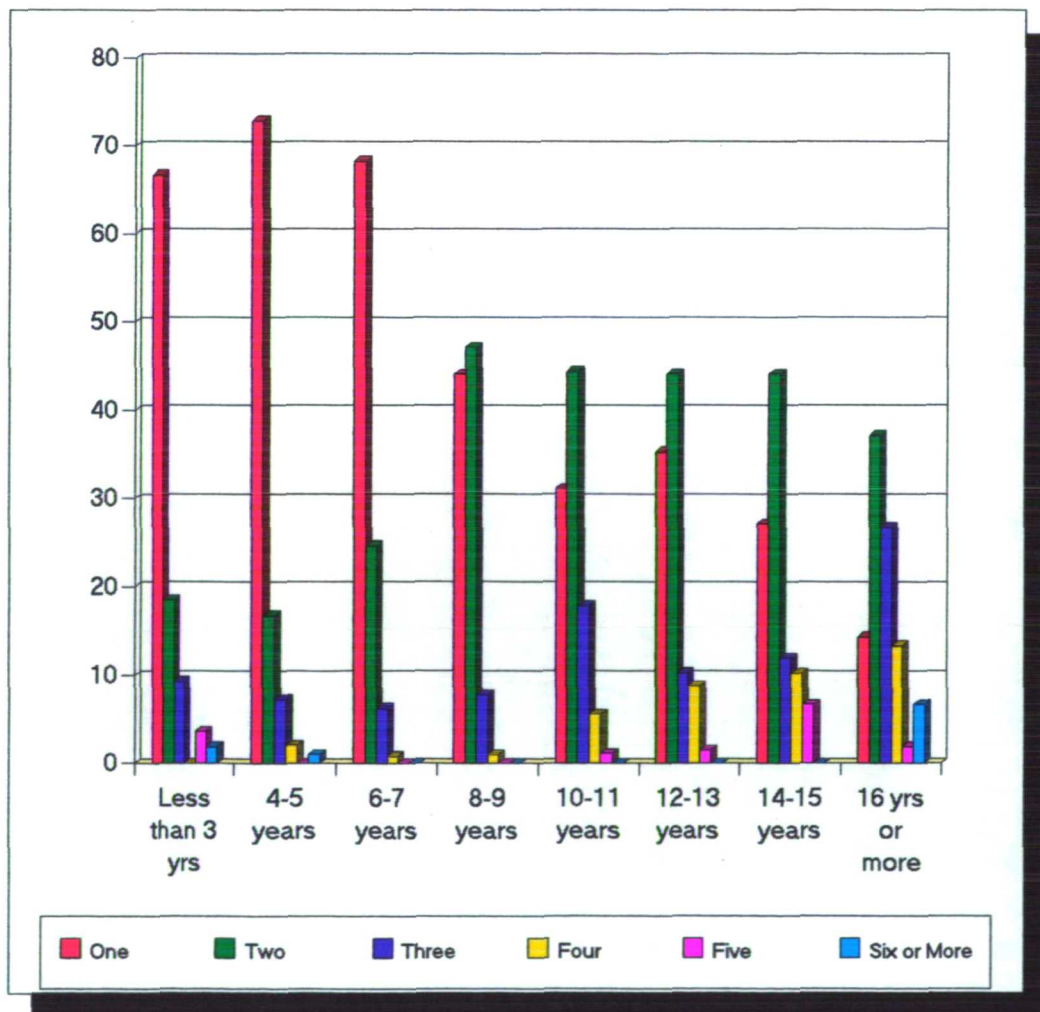


TABLE 4.40b

Percentage Distribution of Duration of Muslim Marriage by Numbers of
Children from 1983-1990

DURATION	One	Two	Three	Four	Five	Six or more
Less than 3 years	66.7	18.5	09.3	00.0	03.7	01.9
4-5 years	72.9	16.7	07.3	02.1	00.0	01.0
6-7 years	68.3	24.6	06.3	00.8	00.0	00.0
8-9 years	44.1	47.1	07.8	01.0	00.0	00.0
10-11 years	31.1	44.4	17.8	05.6	01.1	00.0
12-13 years	35.5	44.1	10.3	08.8	01.5	00.0
14-15 years	27.1	44.1	11.9	10.2	06.7	00.0
16 years or more	14.3	37.1	26.7	13.3	01.9	06.7



The duration of marriages by occupational group was studied by Tarver for five selected years in Wisconsin (1948-1952). He found that the manager-proprietor-official group showed the longest durations, and was followed by farmers and skilled workers. Professional and semi-professional occupations, rather oddly, along with the semi-skilled workers had the lowest median durations. While the figures on duration of marriage to divorce and percentage distributions of such data have a general usefulness, it is incorrect to use such information to conclude that divorces are occurring sooner, or that marriages are showing more fragility.⁶⁷

According to Monahan, in order to know precisely what proportion of marriage ends in divorce, one must know how long marriages last before their dissolution and this means that the probability of divorce should be calculated for each year of duration of marriage.⁶⁸ Unfortunately, because of the sorry state of marriage and divorce statistics in Kuala Lumpur, the basic data needed have not been available therefore only data from divorce records filed the High Court are used to measure de jure duration.

Table 4.40a shows that for those having one child, the duration of marriage of less than 3 years involved in divorce petitions is 73.9 percent followed by those in the 4-5 year period at 73.3 percent. As the years increased, the probability of divorce decreases to only 16.4 percent in the 16 years and more category (Table 4.40b).

The pattern does not change after LRA except instead the percentage at 4-5 years is top of the list compared to those in the less than 3 years category. For those with two children, the duration of marriage

⁶⁷ Ogburn, William F. and Nimkoff, Meyer F., Technology and the Changing Family, Boston, Houghton-Mifflin, 1955, pp.221-3.

⁶⁸ Monahan, 1962, pp.625-633.

is highest at 44.3 percent, in the 8-9 years category. There is no specific pattern in this category but the percentage increase to 47.1 percent after the LRA is still in the 8-9 years category.

For those with three children, the most common duration of marriage is 14-15 years at 31.5 percent followed by 12-13 years at 28.9 percent. After the LRA, the pattern changed, that is the highest percentage happens in couples falling under the 16 years and more category at only 26.7 percent. For those having four children, the highest percentage is only 11.8 percent at 16 years or more category and after the LRA, the pattern is still the same, that is only at 13.3 percent. And for those having 5 children, the highest percentage is only 10 percent in the 16 year and more category and after LRA, the pattern remains unchanged only it is reduced to 6.7 percent in the 14-15 year period whereas the 16 year period falls to only 1.9 percent.

As regards those having six and more children, the chances of divorce decreases wherein in this category the highest percentage belonging to the 16 and more years is only 3.6 percent but after LRA, there is slight increase to 6.7 percent.

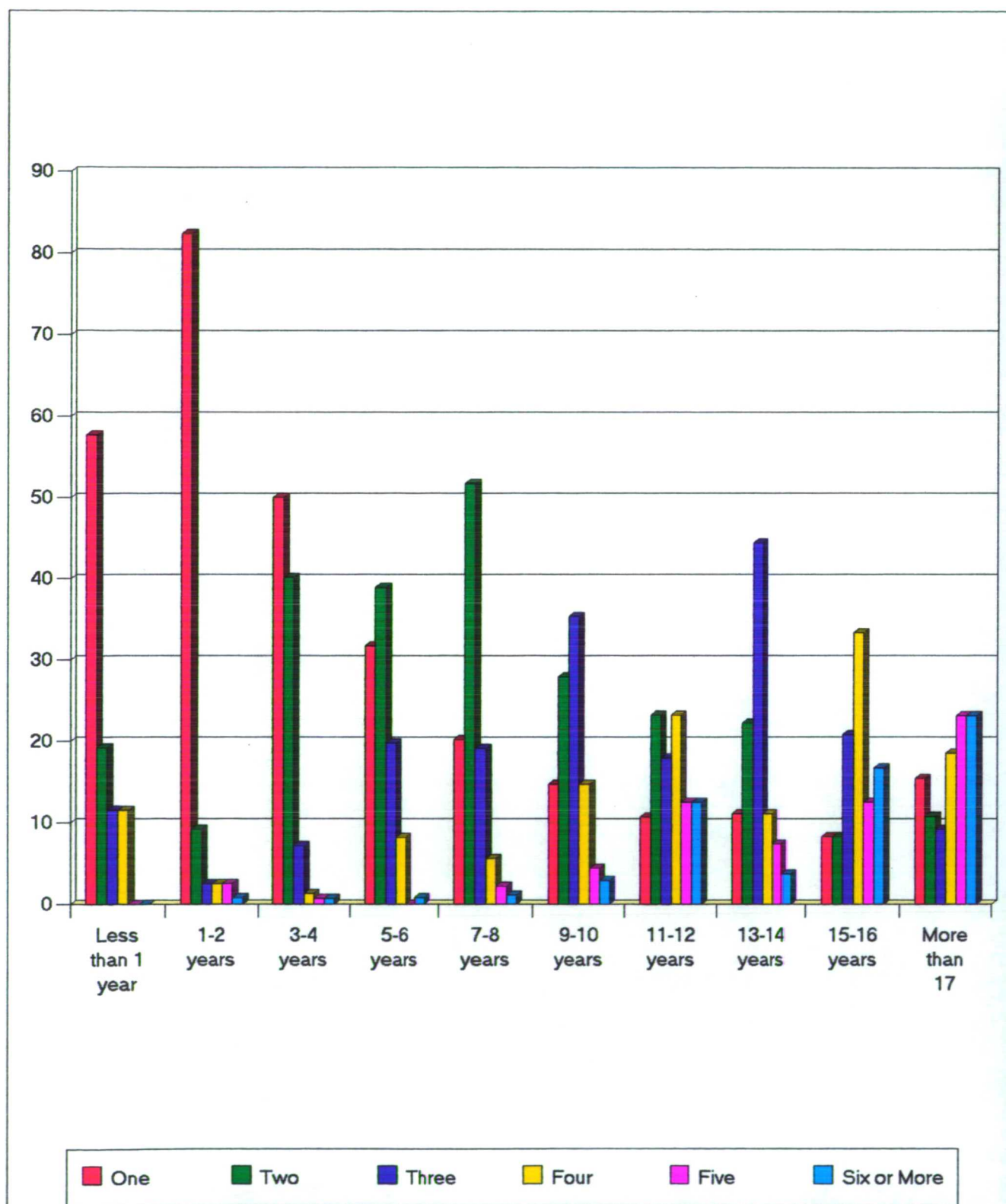
TABLE 4.41

Percentage of Distribution of Duration of Muslim Marriages by Numbers of

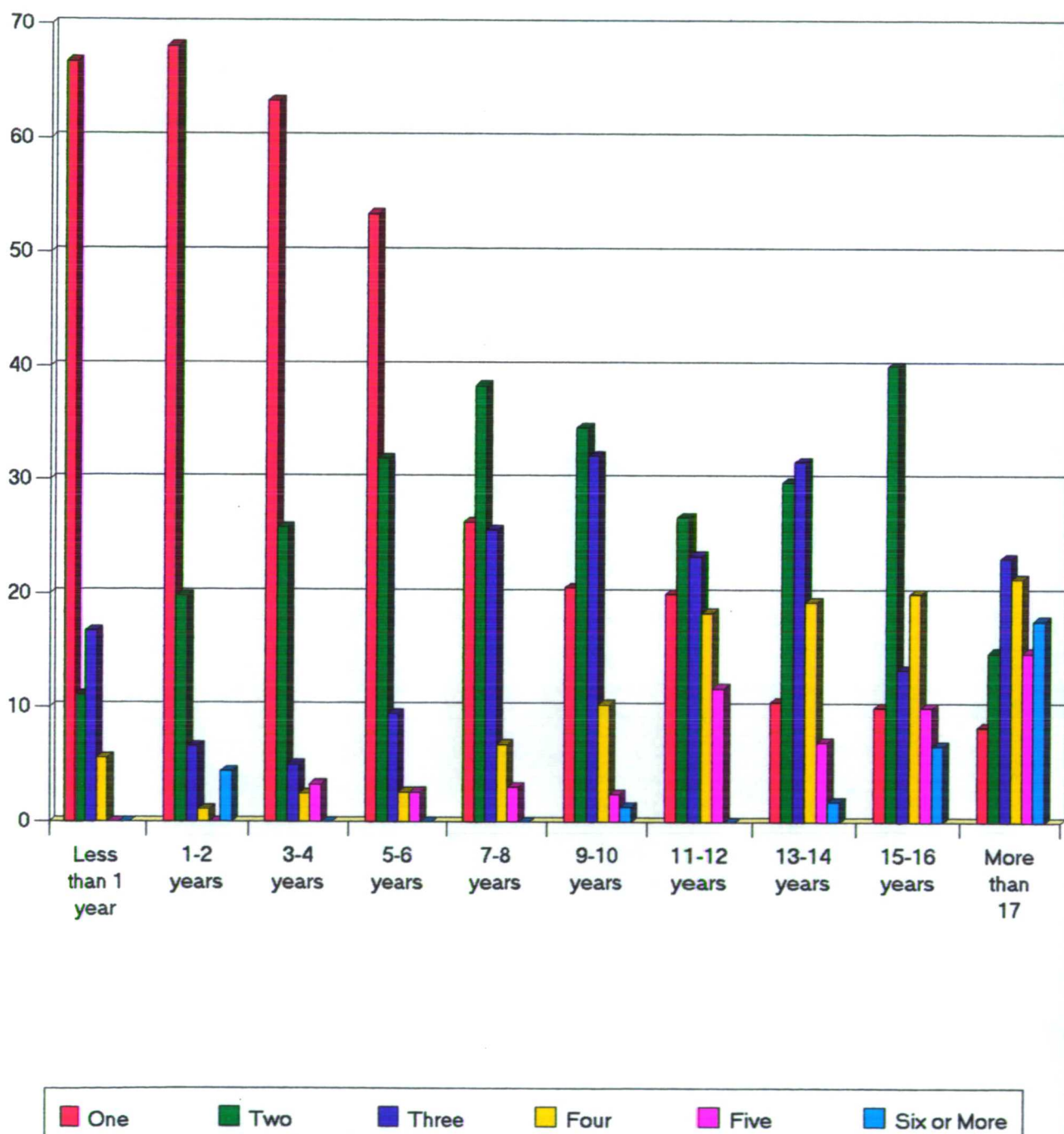
Children from 1983-1990

DURATION	ONE		TWO		THREE		FOUR		FIVE		More than 6	
	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90	83-86	87-90
Less than 1 year	57.7	66.7	19.2	11.1	11.5	16.7	11.5	05.6	00.0	00.0	00.0	00.0
1-2 years	82.4	68.1	09.2	19.8	02.5	06.6	02.5	01.1	02.5	00.0	00.8	04.4
3-4 years	50.0	63.3	40.1	25.8	07.2	05.0	01.3	02.5	00.7	03.3	00.7	00.0
5-6 years	31.7	53.4	38.9	31.9	19.8	09.5	08.2	02.6	00.0	02.6	00.8	00.0
7-8 years	20.2	26.3	51.7	38.3	19.1	25.6	05.6	06.8	02.2	03.0	01.1	00.0
9-10 years	14.7	20.5	27.9	34.6	35.3	32.1	14.7	10.3	04.4	02.4	02.9	01.3
11-12 years	10.7	20.0	23.2	26.7	17.9	23.3	23.2	18.3	12.5	11.7	12.5	00.0
13-14 years	11.1	10.5	22.2	29.8	44.4	31.6	11.1	19.3	07.4	07.0	03.7	01.8
15-16 years	08.3	10.0	08.3	40.0	20.8	13.3	33.3	20.0	12.5	10.0	16.7	06.7
More than 17 years	15.4	08.3	10.8	14.8	09.2	23.1	18.5	21.3	23.1	14.8	23.1	17.6

4.41a
Percentage Distribution of Duration of Muslim Marriages by Numbers of
Children from 1983-1986



4.41b
Percentage Distribution of Duration of Muslim Marriage by Numbers of
Children from 1987-1990



It was observed in Table 4.41 that there was an optimum peak number of children which corresponded to an increasing number of years of marriage. For couples which break up in less than one year, it was noted that for the time period 1983-1986, one child was the optimum peak at 57.7 percent, followed by two children at 19.2 percent, three and four children at 11.5 percent. This trend is generally repeated for 1987-1990 with a maximum of 66.7 percent at one child, decreasing to 11.1 percent with a slight rise to 16.7 percent for three children before falling to 0 (zero) percent for five, six and more children.

For marriages which lasted one to two years for 1983-1986, a maximum frequency of 82.4 percent was recorded for couples with one child, which was followed by a steady decline to 9.2 percent for two children, 2.5 percent for three to five children to low of 0.8 percent for six or more children. During 1987-1990, this trend was repeated with a peak of 68.1 percent for one child, 19.8 percent for two children, 6.6 percent for three children, 1.1 percent for four to a low of 0 (zero) percent for five children with a slight increase for six or more children at 4.4 percent.

For marriages which lasted 3-4 years for 1983-1986, 50 percent of the couples had one child, 40.1 percent had two children and the percentage decreased with the increasing number of children. This trend was also observed for the period 1987-1990 when 63.3 percent of divorced couples in that time-period had one child, followed by 25.8 percent with two children, decreasing to 0 percent for six or more children. A minimum of 2.5 percent was recorded for four children, which increased slightly, not in a significant manner, to 3.3 percent for five children.

There was a slight shift in emphasis for marriages which lasted 5-6 years during 1983-1986. 31.7 percent had one child but the maximum of 38.9 percent was recorded for couples with two children. Together,

they make up 70.6 percent of all couples who divorced after 5-6 years of marriage. A further 19.8 percent had three children and this frequency was reduced to 0.8 percent for six and more children. For 1987-1990, however, the trend was not evident with 53.4 percent of couples who divorced after this period together having three children coming to a low of 2.6 percent for four children. No cases were recorded for couples with five and more children.

After 7-8 years of marriage, however, the maximum moved to couples with two children with 51.7 percent for 1983-1986 and 38.3 percent for the 1987-1990 time period. Couples with one child had a frequency of 20.2 percent, followed by 19.8 percent for three children from 1983-1986. For 1987-1990, 26.3 percent of couples who divorced after 7-8 years of marriage had one child decreasing to only 3 percent for couples with five children.

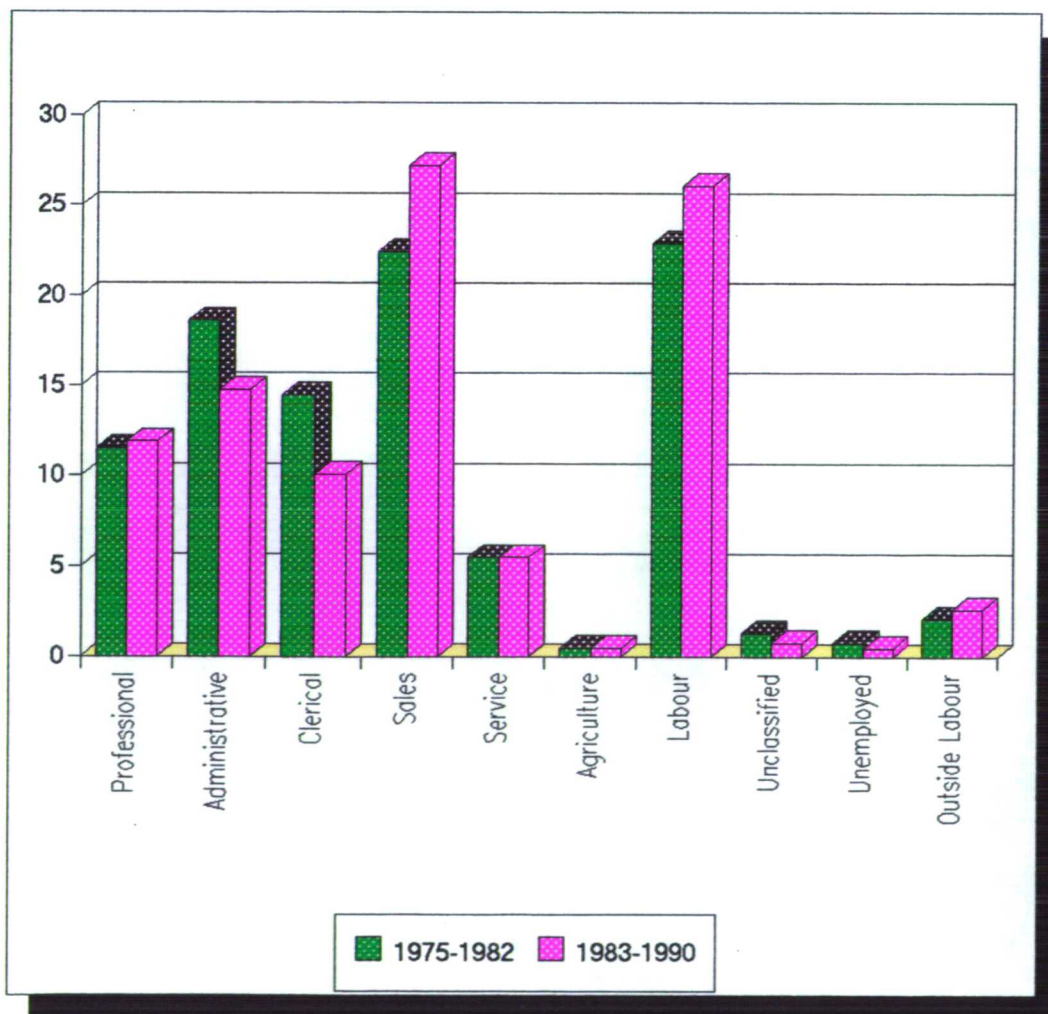
After 9-10 years of marriage, the maximum shifted again, in favour of those with three children for the time period 1983-1986. There was a steady decline by the couples that have more children. The data gets very sketchy for marriages which lasted over 10 years as they only made up 17 percent and 23.4 percent of all couples who divorced for 1983-1986 and 1987-1990 respectively.

However more data than expected was obtained for marriages which break up after 17 or more years of marriage, suggesting that a further subdivision might give more information. It appears that from 1983-1986, a plateau of 23.1 percent was achieved by couples with 4 or more children. A peak of 23.1 percent was also observed for couples with three children from 1987-1990. The percentage decreases with the increase number of children suggesting a damping down of the overall response rate with increasing duration of marriage.

TABLE 4.42

Percentage Distribution of Occupational Group of
Non-Muslim Husbands from 1975-1990

OCCUPATIONAL GROUP	1975-1982	1983-1990
Professional	11.5	11.9
Administrative	18.6	14.8
Clerical	14.5	10.1
Sales	22.4	27.2
Service	05.5	05.5
Agriculture	00.5	00.5
Labourer	22.9	26.1
Unclassified	01.3	00.8
Unemployed	00.8	00.5
Outside Labour	02.1	02.6



4.10 OCCUPATIONAL STATUS OF HUSBAND AND WIFE

The study is partly designed to investigate if there is a relationship between divorce propensity and the economic status of the couple, in other words whether divorce tends to occur more frequently among a certain socio-economic class. In this study, the socio-economic status of couple is indicated by the occupation of the husband or wife, since information on the income and educational level is lacking in the divorce files. Occupation is taken as the yard-stick not merely because it is a source of livelihood but it also determines the social status of persons in a complex society. There is a clear relationship between occupation and marital life. It not only determines one's economic status but also provides ample opportunities of social interaction, which ultimately affects his marital life.

Due to the large variety of occupations involved in this study, the various occupations are further classified under eight occupational groups. The classification method used is adopted from the one used by the Statistics Department.⁶⁹

The breakdown of the occupational group is given in Table 4.42. It is observed that the major occupational groups of divorced males are mainly in sales and labour, with a representation of 22.4 percent and 22.9 percent respectively. This is followed successively by administrative workers, that is 18.6 percent, clerical workers with a percentage of 14.5 percent, professionals at 11.5 percent and service oriented workers at only 5.5 percent of the total population. These was then followed by those outside the labour force who make up 2.1 percent, unclassified workers at 1.3 percent, the unemployed 0.3 percent and finally the agricultural workers at 0.5 percent.

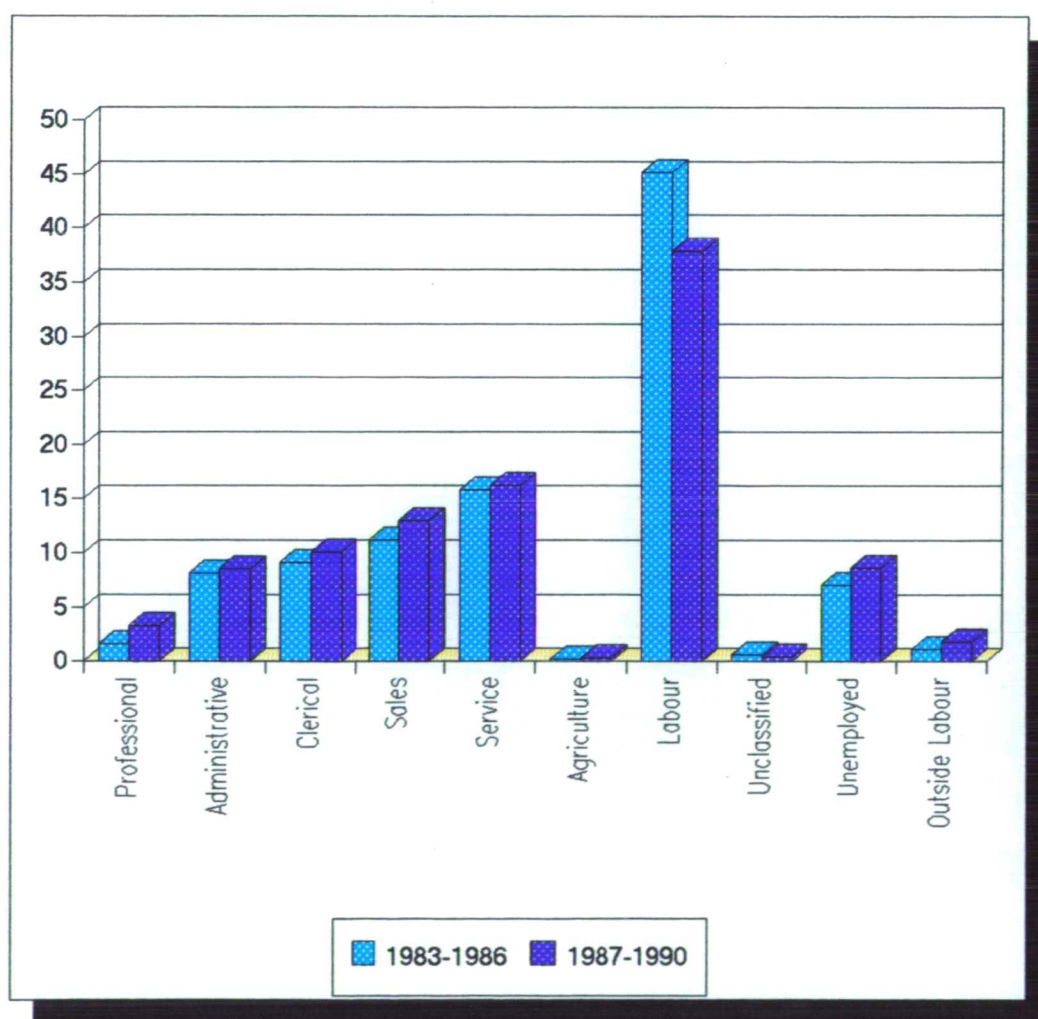
⁶⁹ See Malaysia, Population and Housing Census of Malaysia, 1980, Appendix 2, pp 652-667.

After the LRA, the distribution pattern has changed slightly in that men involved in sales divorce more frequently with a percentage of 27.3 percent followed by labourers with a percentage of 26.1 percent. These are then followed by those in administration with a representation of 14.8 percent, professionals at 11.9 percent, clerical workers at 10.1 percent and service oriented workers with a representation of 5.5 percent of the population. These were then followed by those outside the labour force who make up 2.6 percent of the population followed by unclassified Workers at 0.8 percent and the unemployed and agricultural at 0.5 percent each.

TABLE 4.43

Percentage Distribution of Occupational Group of
Muslim Husbands from 1983-1990

OCCUPATIONAL GROUP	1983-1986	1987-1990
Professional	01.6	03.3
Administrative	08.1	08.5
Clerical	09.1	10.1
Sales	11.2	13.0
Service	15.8	16.2
Agriculture	00.2	00.3
Labourer	45.2	37.9
Unclassified	00.6	00.4
Unemployed	00.7	08.6
Outside Labour	01.1	01.8



From Table 4.43, it may be observed that the majority of Muslim males divorced from 1983-1986 were labourers at 45.2 percent followed by those in service and sales workers at 15.8 and 11.2 percent respectively. The lowest percentage was that in agriculture who make up 0.2 percent of all the divorced men in this period. The situation was similar between 1987 to 1990 where the labourers were the majority at the level of 37.9 percent. There were also followed by service and sales workers at 16.2 percent and 13 percent respectively. Again at 0.3 percent the agricultural workers were the lowest percentage of men divorced during this period.

It may appear that the majority of divorcees are from the low income group who are represented as labourers. These work in jobs which are menial and repetitive requiring little skill and very poorly paid which puts great economic and psychological pressure on the families concerned. Hence, it could be that poverty is one reason why marriages break up.⁷⁰

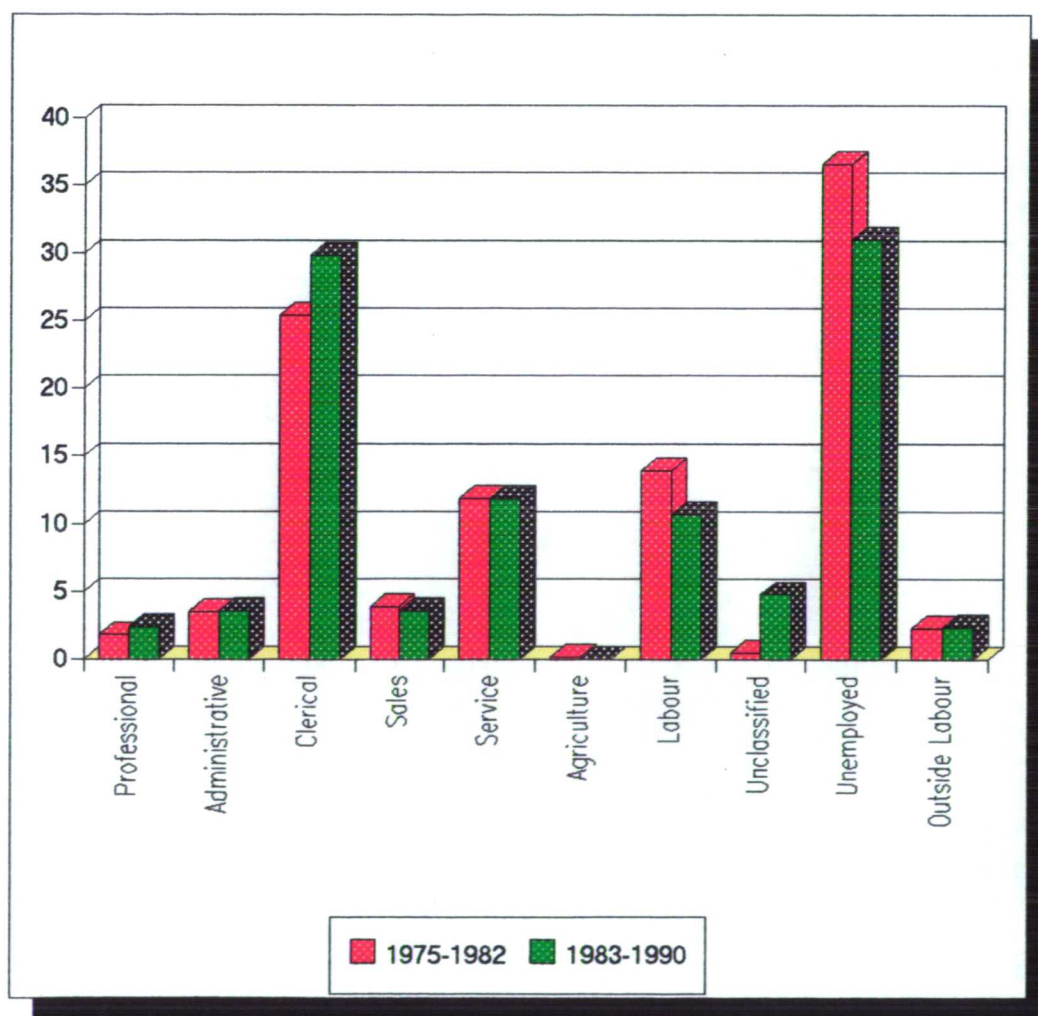
However, it must be noted that Kuala Lumpur is a major city and has more than its fair share of factories and building sites in which work can be easily obtained. Coupled with the fact that the Malays, although the majority in terms of population, are still economically backward, this might prove to be the reason as to why there is such a preponderance of labourers in divorce statistics. This may simply be due to their overwhelming numbers in these occupations. It is due to similar factors that there is such a low representation of agricultural workers who are divorced. As Kuala Lumpur is a major city, there is a very low number of people who rely on agriculture, fishing, hunting or forestry for their livelihood in Kuala Lumpur and thus they are under-represented in this survey.

⁷⁰ See Kassim, Azizah bt, *Women and Divorce among the Urban Malays in Women in Malaysia* edited by Hing Ai Yun, et.al., Kuala Lumpur, Pelanduk Publications, 1984, p.106.

TABLE 4.44

Percentage Distribution of Occupational Group of
Non-Muslim Wives from 1975-1990

OCCUPATIONAL GROUP	1975-1982	1983-1990
Professional	01.8	02.4
Administrative	03.5	03.6
Clerical	25.4	29.8
Sales	03.9	03.6
Service	11.9	11.9
Agriculture	02.0	00.0
Labourer	13.9	10.7
Unclassified	00.5	04.8
Unemployed	36.6	31.0
Outside Labour	02.3	02.4



The divorce pattern based upon occupational group of the wife was virtually unchanged before and after the LRA. From Table 4.44, it could be observed that in both cases, the main occupational group that was prone to divorce were the clerical workers and unemployed. Between 1975-1982, 36.6 percent of non-Muslim wives were unemployed followed by 25.4 percent who were clerical workers. Between 1983-1990 the figures were 31.0 and 29.8 percent respectively.

It may be gathered from the above data that incidence of divorce spreads fairly evenly across the employment categories. There is a marked social-class gradient in relation to sex of petitioner. The highest proportion of decrees were granted to unemployed wives, the lowest to those in the professional group. These occupational groups are not as prone to divorce as the statistics may have made them out to be. Rather, these occupational groups are over-represented in Kuala Lumpur. As the educational standard for clerical work is low and jobs are plentiful, clerical workers are over-represented in this survey. The other prominent group, the unemployed, are housewives, either due to pressure from husband and family, or due to the children or other circumstances such as low educational level. In addition to the above factors, being a housewife has always been viewed to be a traditional and hence, accepted role for women. On the other hand, it can also be supposed that the wife finds employment before divorce when she notes that the marriage is breaking up. Employment of the wife makes divorce possible and eases the process of decision-making. Phillips stated that to some extent, economic independence was a catalyst to divorce and the importance of employment to divorced women is shown by the fact that they were more likely to be employed than were married women.⁷¹

⁷¹ Phillips, 1988, p.615.

In recent years, increased educational opportunities and wider range of employment for women have made it possible for women to live independently and support themselves through a divorce. Not only has divorce forced millions of women into the role of sole bread-winner, but married women as well have found that a rapidly changing economic structure means that a middle class wage is now earned by two people.⁷²

Working life has also exposed women to more social contacts and the result of this may draw them away from their own marriage. Education and working status may also have broadened their horizons; consequently their attitudes towards marriage and divorce have become more liberal. Various research shows that an increase in wife's income and the ratio of her earnings to family income increases marital dissolution.⁷³

Peoples who are involved in sales are prone to divorce, probably due to a number of reasons. The nature of their work means that they are under a lot of pressure to outperform each other to achieve higher sales targets. These means longer hours away from the family and greater individual pressure which leads to marital instability. Burgess and Locke observed that various studies seem to show that divorce is relatively high among persons engaged in occupations necessitating frequent absence from home, involving intimate contacts with the opposite sex, and relatively little control by the community.⁷⁴

The study by Fonseca in Indian communities in Bombay also revealed that discord in the clerical and skilled, business, unskilled and

⁷² Mason, Mary Anne, The Equality Trap, New York, Simon and Schuster, 1988, p.108-118.

⁷³ Heather, Ross and Sawhill, Isabel, Time of Transition, Washington, D.C Urban Institute. 1975.

⁷⁴ Burgess, Earnest W. and Locke, Harvey J., The Family: From Institution to Companionship, New York, Prentice Hall, 1950, p. 634.

unemployed classes appear to outweigh discord in the professional class.⁷⁵

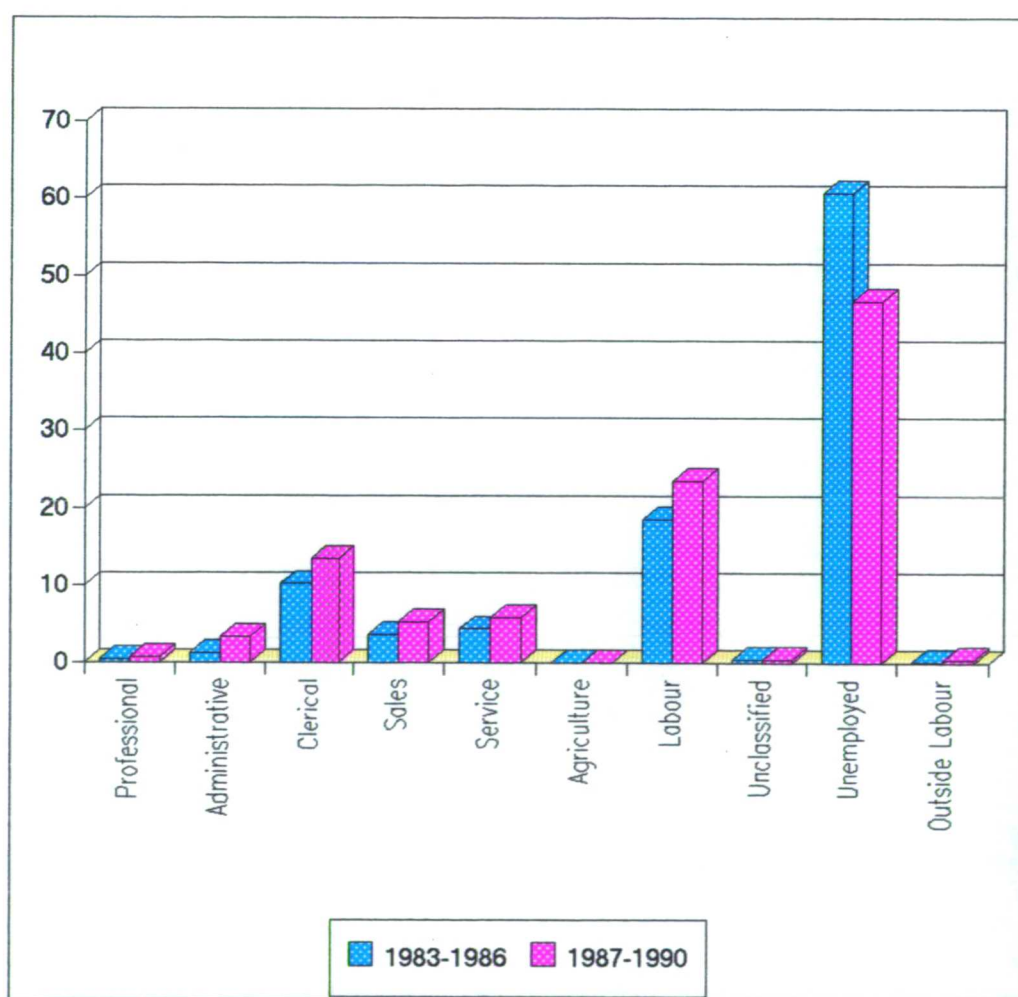
Another possible explanation for the high divorce rate amongst the people involved in sales is due to the location of the study. As Kuala Lumpur is a capital city of Malaysia and the focal point of many industries and corporations, it follows that there would be proportionately more sales personnel within Kuala Lumpur compared to other areas.

⁷⁵ Fonseca, Mabel, Counselling for Marital Happiness, Bombay, P.C Manaktala and Sons Ltd, 1966.

TABLE 4.45

Percentage Distribution of Occupational Group of
Muslim Wives from 1983-1990

OCCUPATIONAL GROUP	1983-1986	1987-1990
Professional	00.5	00.7
Administrative	01.3	03.4
Clerical	10.2	13.5
Sales	03.6	05.3
Service	04.4	05.9
Agriculture	n/a	n/a
Labourer	18.6	23.5
Unclassified	00.5	00.4
Unemployed	60.8	46.8
Outside Labour	00.2	00.4



It may be seen from Table 4.45 that the majority of Muslim women are unemployed. From 1983-1986, 58.1 percent of all women divorcees were unemployed. This was then followed by productive and transport workers, labourers at 18.6 percent and clerical and related workers at 10.2 percent. Overall, over 86.9 percent of female divorcees in this time period were represented by these three occupational groups. The lowest frequency at 0.2 percent was reported for women outside the labour force.

From 1987-1990, a similar pattern emerges, whereby 46.8 percent of divorced women were unemployed. Labourers were next at 23.5 percent, followed by clerical at 13.5 percent. Together, they made up 83.8 percent of the women in this time period. Unclassified workers and workers outside the labour force both had the lowest percentage of divorce at 0.4 percent each.

The reasons for such a high proportion of unemployed divorcees are societal. Due to the traditional belief that a woman's place in the home, many women are not encouraged to excel or extend their studies. Even those who do so tend to be housewives after they marry. Even if they do not, by a mixture of guilt and traditions, the wife tends to stay at home once the couple has a child or children. Therefore, it is believed that even in an urban environment like Kuala Lumpur, most women are housewives and so are over-represented in this study.

An interest in social class as a factor in divorce stemmed originally from United States Census reports, which have consistently shown an inverse relationship between divorce and social class. Within the United States, the lower the social class to which an individual belongs, the greater risk of divorce. This progressive increase in the probability of divorce has been explained by some in terms of variations in the life styles of the different social classes, which accordingly may make divorce more likely for individuals in

progressively lower social strata, a point of view held by Goode who postulated that the objective complexities and difficulties ensuing from divorce are greater for upper strata marriages, so that they are more likely to stay together.⁷⁶ According to Goode marriages from lower strata may be less constrained by economic barriers than would marriages from upper strata for two main reasons. First, he considers that more of the income in upper strata marriages is set aside for long term investment in houses, insurance schemes and the like, whereas relatively more income in lower strata marriages is spent on consumer goods. Consequently, it is far less easy for the husband in the upper strata to abandon such obligations. Second, the potential financial loss for the upper strata wife is perhaps greater than that for wives in lower strata, since in the event of her having to work and support herself after the divorce, the difference between the potential earnings of the lower class wife and her husband may well be smaller than between those of the wife and husband in the upper strata.⁷⁷

The census survey of married couples in the United States showed that although marriage instability exists at all socio-economic levels, the general trend is for marriage break up to be more profound at the lower status levels.⁷⁸

This inverse relationship between divorce and social class observed for the United States does not, however, appear to be the case within the United Kingdom. For instance, Rowntree and Carrier (1958) found that, within both a divorced and a continuing married population, there

⁷⁶ Goode, 1961, pp.416-9.

⁷⁷ Ibid, p.419.

⁷⁸ Kenkel, William, F. The Family in Perspective, 3rd. edn., New York, Appleton Century Crafts, 1973.

was an equal distribution of manual worker marriages.⁷⁹ Studies carried out by Gibson (1974) showed that not only was there no direct association between high divorce rates and low social class but conversely, even a slightly greater tendency for non-manual workers to divorce.⁸⁰

Research by Thornes and Collard showed that those from lower strata backgrounds experienced more environmental disadvantage than did others from other social classes. First, the environment in which they grew up was more likely to have been overcrowded, since they came from relatively large families of origin. Second, their job opportunities would have been fewer and less financially rewarding, since they were the least likely to have had a selective education or to have any further education.

The marital environment may also be regarded as potentially more economically disadvantaged. First, because they tend to marry at young ages, therefore, and have the least likelihood of accumulating any savings. Secondly, their early age at marriage also has implications with regard to their economic position which is likely to remain low, since their marital responsibilities probably neither encouraged nor permitted any participation in job-training schemes which might have led to improvements in their long-term economic position.⁸¹

Gibson also suggest that early marriage with its increased risk of later divorce predominantly associated with manually employed husband.⁸²

⁷⁹ Rowntree, G. and Carrier, N. "The Resort to Divorce in England and Wales 1858-1957", Population Studies, 11, 1958 p. 188.

⁸⁰ Gibson, C., "The Association between Divorce and Social Class in England", British Journal of Sociology, 25, 1974, pp. 81-92.

⁸¹ Thornes and Collard, 1979, pp.41-43.

⁸² Gibson, 1974, p.79.

The finding in this study that the unskilled manual group is the most divorce prone is in line with the American findings on divorce rates and social class. The above findings confirmed studies made by Chester and Streather and Haskey which found that amongst petitions based on the ground of cruelty, there was an over representation of couples where the husband worked in a partly skilled or unskilled occupation, and corresponding under representation of those who are professionals and administrators.

In the study of the cross-cultural analysis of divorce rates in various societies, William Goode demonstrated the relations between divorce rates and occupational groups in various societies. He, however, raised a word of warning that to date no conclusive findings have been obtained.⁸³

However, Tai Ching Ling in her study stated that in Singapore, there was a positive correlation between occupational status and proneness to divorce. She pointed out that in most cases in Singapore, those who were at higher occupational status were more prone to divorce. She suggested that such propensity to divorce may be due to the more active social life led by men in the administrative and managerial fields leading to the neglect of the wives at home. Among professional and technical workers, it is often a conflict of opinions and different sets of values that lead to the break-up of the marriages.⁸⁴ This trend contradicts most of the findings of studies on divorce in western

⁸³ Goode, 1962, pp.507-526.

⁸⁴ Tai Ching Ling, "A Sociological Analysis of Divorce in Singapore", Southeast Asian Journal of Social Science, Vol 3, No.1, 1975, p.76.

countries, where there were, in most cases, inverse correlations between occupational status and proneness to divorce.⁸⁵

However, as have been pointed out in the preceding chapter, the actual decision to divorce is influenced by many factors, among which the legal and financial consideration are most important in this study area. Most of the workers in the higher socio-economic class are well educated. The women, in particular are more aware of the laws and their legal rights and therefore, would prefer to dissolve their marriages legally and formally.

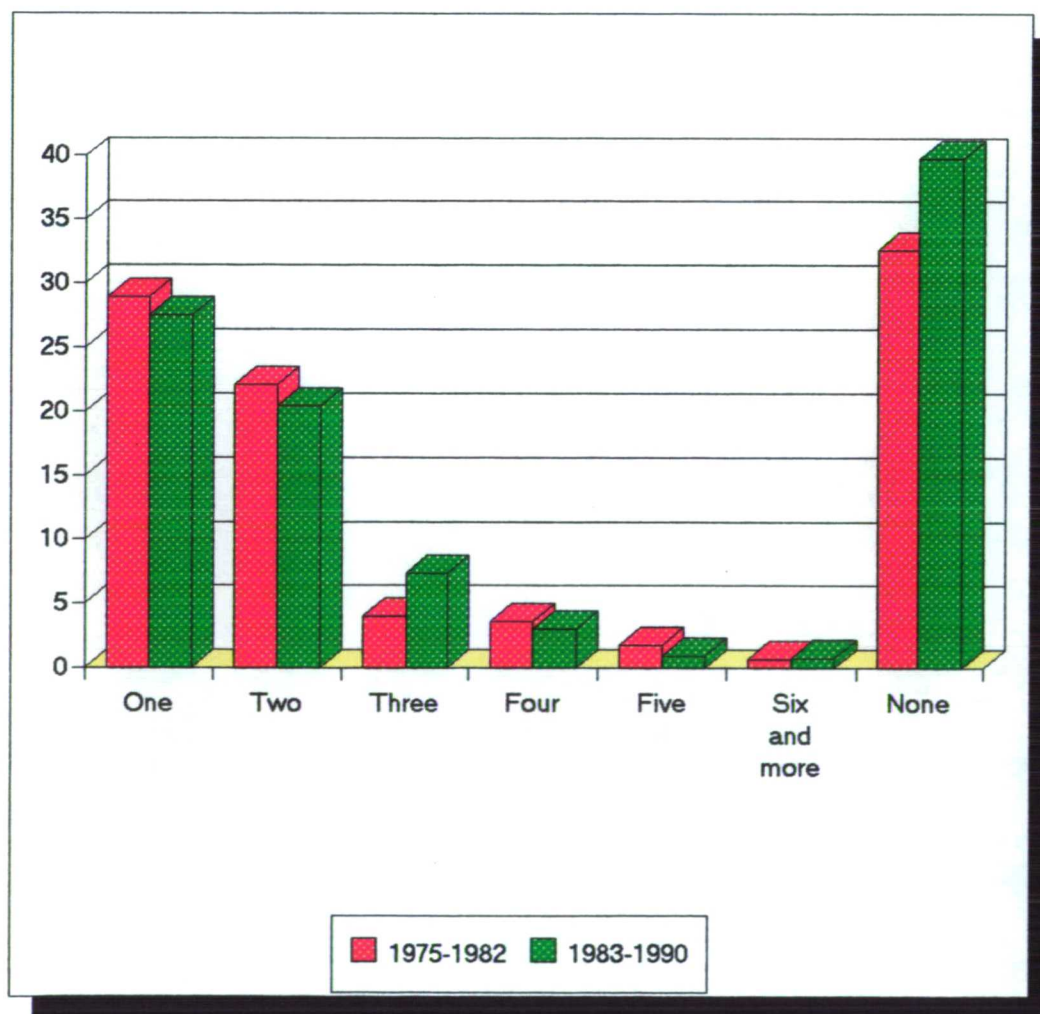
Therefore, although the indices of divorce proneness in Singapore indicate that the higher socio-economic groups are more prone to divorce, it may be that the only safe conclusion to draw from the figures is that they are more willing to seek the legal avenues formally to dissolve their marriages.

⁸⁵ See for example Kephart, William M. and Monahan, Thomas P. "Desertion and Divorce in Philadelphia", American Sociological Review, Vol. 17 (1952) pp. 710-727 and Goode, 1965, pp.44-8.

TABLE 4.46

Percentage Distribution of Number of Children of
Non-Muslims from 1975-1990

NUMBER OF CHILDREN	1975-1982	1983-1990
One	28.9	27.5
Two	22.1	20.7
Three	04.0	07.4
Four	03.6	03.0
Five	01.8	00.9
Six or more	00.7	00.8
None	32.6	39.8



4.11 NUMBER OF CHILDREN

It is widely held that divorce has a psychologically damaging effect upon children and that parents ought to stay together for the sake of the children.⁸⁶ It is said that the number of children is directly related to the happiness of the marriage. This may have been true in an agrarian society, where the child was important as a source of labour and as a factor in continuity. It may be that it still holds true, even though children signify, in today's world, a noticeable increase in consumption needs. Children place pressure on the family finances, and alter the parents' roles. This again, has led to the belief that children keep marriage together. As most divorces happen in the early years of marriage, both divorce and childlessness may be a result of more fundamental conflicts in marriage.

No doubt, some marriages are kept together because of the children, or the divorce is postponed or delayed. The children may thus be considered to have a stabilizing effect. But the strong increase in the number of children in divorce may also indicate that children in some marriages are a source of conflict and instability, especially among the young and lower class.

The number of children affected by divorce is of interest for several reasons. The well-being of children (often thought of as the innocent victims of divorce) has been and remains a principal concern of legislators and social commentators. In addition, it is frequently thought that childlessness makes divorce easier for married people, and that divorced couples are typically childless.

⁸⁶ See Wallerstein, Judith S, and Kelly, Surviving the Break-up: How Children and Parents Cope with Divorce, London, Grant Mc. Intyre, 1980.

Table 4.46 shows the distribution of the number of living (but not necessarily dependant) children in families affected by divorces from 1975-1990. It presents the number of the children only. The data give only the trend, without relating it to other variables. As one would expect, duration of marriage is related to the number of children in divorcing families.

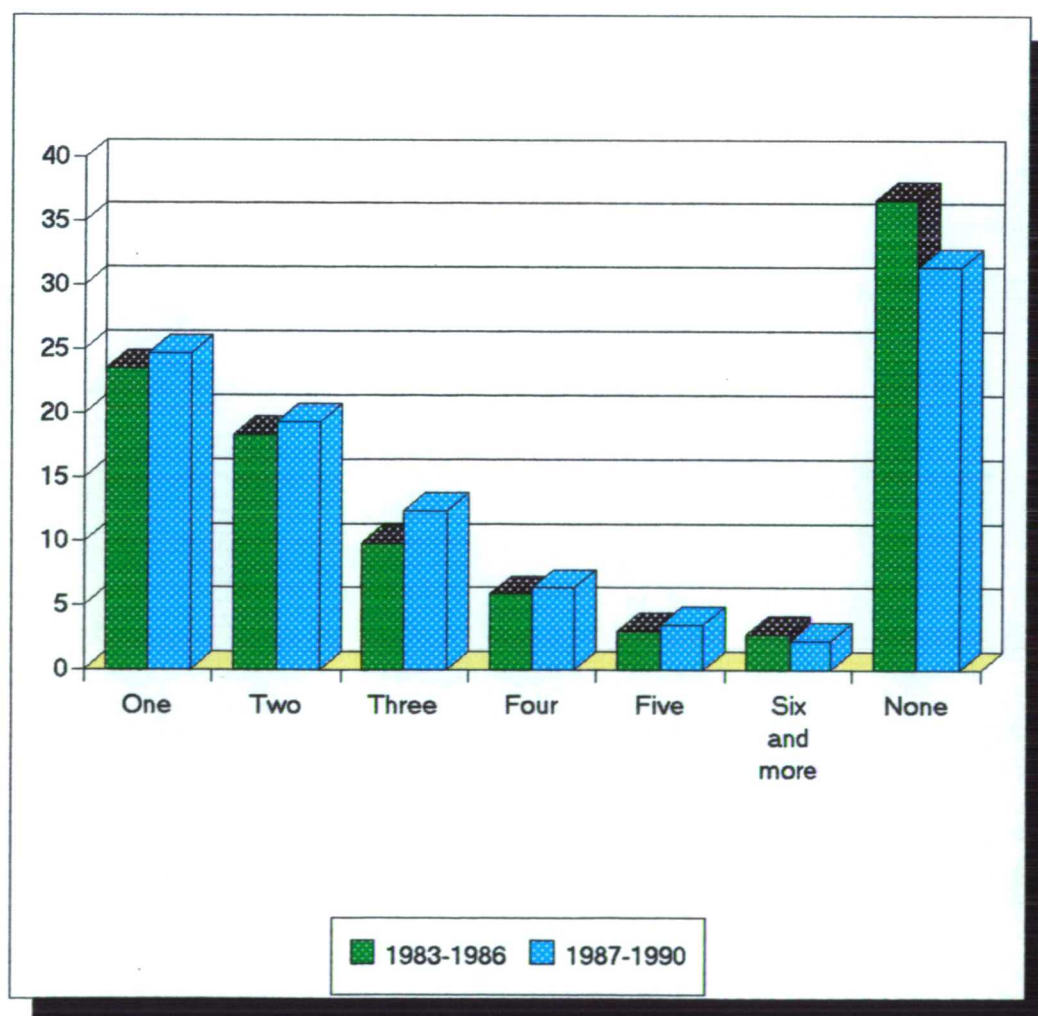
It may be observed that there is substantially no difference in the divorce pattern as far as number of children are concerned. Between 1975-1982, 32.0 percent of couples had no children. 28.9 percent had one child and 22.1 percent had two children. Collectively, they make up 82.6 percent of the total. The percentage of the number of children decreases with increasing number of children until a percentage of 0.7 percent for six or more children.

Between 1983-1990, the percentage of childless couples who divorced was 39.8 percent followed by those with one child at 27.5 percent and these with two children at 20.7 percent. Collectively, they make up 88.0 percent of the total. Again there was a steady increase in percentage with increasing number of children. These reveal that the frequency of divorce decreases with the number of children in the family.

TABLE 4.47

Percentage Distribution of Number of Children of
the Muslims from 1983-1990

NUMBER OF CHILDREN	1983-1986	1987-1990
One	23.5	24.7
Two	18.3	19.3
Three	09.9	12.4
Four	05.9	06.4
Five	03.0	03.5
Six or more	02.8	02.3
None	36.7	31.4



From Table 4.47, it may be observed that the majority, that is 36.5 percent of divorce cases from 1983-1986 were childless couples. The frequency of divorce decreased with increasing number of children from 23.5 percent for one child and 18.3 percent for two children to a low of 2.8 percent for couples with six or more children. A similar trend could be observed from 1987-1990, in that 31.4 percent of divorced couples were childless, 24.7 percent had one child and 19.3 percent had two children; decreasing steadily until a 2.3 percent for couples with six or more children is reached.

Do children make for more stable marriage? If stability is defined as not ending up in the divorce court, there may be some evidence to support this. For example in United Kingdom in 1979, the median duration of marriage in the case of divorcing couples with children under the age of 16 was just over 11 years as compared with cases not involving children. The child can represent unity in a marriage, but can equally represent disunity. It can be the product of a reasoned decision or a pawn in the conscious and unconscious power struggle of a relationship.⁸⁷

We were reminded by Clulow that, statistically speaking, the earlier one marries (and particularly there is a child already on the way) the more one runs the risk of a breakdown of a breakdown in the marital relationship. It is widely believed that the presence of children in a family acts as a powerful deterrent to divorce. This view probably had its origin in the high proportion of divorces to couples without children.

From United States statistics, Jacobson concluded that close to three-fifths of the divorced couples had no children. And it is evident by his

⁸⁷ Clulow, Christopher, Children, For Better, for Worse? in Change in Marriage, Rugby, National Marriage Guidance Council, 1982, p.34.

study that among families with children, the average number of children increases with the duration of marriage prior to dissolution.⁸⁸

Merton and Nisbet believe that childless couples are more likely to divorce. But at the same time they hold that couples in great marital conflict are less likely to have children.⁸⁹

In Pothen's study divorce is more common among childless couples. In the absence of children, the motivation to stay together under stress is considerably lessened.⁹⁰ Whereas Fonseca's study in Bombay disclosed that "the failure to have children induces divorce and family instability, especially where there are other disruptive factors."⁹¹

Tan, using Muslim samples, found that childlessness increased the probability of divorce and the probability of divorce for a woman with a son was lower than one without a son. She found out that the inability to have children also seems to have some effect on marital instability. A relatively large proportion (about 40 percent) reported they did not have any children in their first marriage. In some cases, divorce may occur soon after marriage, making it impossible to have children. While the majority of the respondents in Tan's study seem to indicate that the absence or presence of children would not make much difference to a marriage, they have at the same time indicated that a couple without children would not have a happy marriage. Thus it would appear that infertility is not considered an important reason for a marriage to break up. Nevertheless the relationship between a

⁸⁸ Ibid., p. 239.

⁸⁹ Merton, R.K. and Nisbet, R. Contemporary Social Problems, New York, Harcourt Brace and World, 1966, p.548.

⁹⁰ Pothen, 1986, pp.202-4.

⁹¹ Fonseca, 1966, pp.55-6.

husband and wife seems to be affected to such an extent that divorce becomes inevitable.⁹²

Jacobson has shown that divorce proneness is evidently correlated with childlessness.⁹³ Therefore, the above figures do support the hypothesis that childless couples have a higher tendency to divorce. This reasoning seems to imply that if the couple is childless, the decision to divorce is an easier one to make. Also, the presence of children does deter the divorce proneness of the parents, especially when the couple has more than two children. This also shows that parents do consider the interests of the children and the effect of divorce on them. Hence, if there are more children in the family, the parents are more reluctant to divorce.

As is often the case with a correlate of divorce, this relatively higher degree of childlessness amongst divorced couples may be interpreted in opposite ways. It can be argued that the survey findings demonstrate the void which may be created in a marriage where there are no children, thus increasing the risk of marital breakdown. Conversely, it may be that children do indeed reinforce the stability of a marriage, although not by lessening any risk of marital unhappiness but rather by making unhappily married parents more reluctant to divorce because of an overriding sense of obligation to remain together for the sake of their children.

Thornes and Collard's study has shown that there are strong pressures towards parenthood, but there is also consistent evidence to suggest that children probably do not enhance the marital relationship, since couples with children living at home appear to have lower marital

⁹² Lee Kok Huat, et.al., 1985, p.187-9.

⁹³ Jacobson, 1950, pp.239-243.

happiness levels than those living alone, they also have greater financial burdens and more interpersonal stress.⁹⁴

In England and Wales in 1980, 60 percent of all divorcing couples had children under the age of 16, and a further 10 percent having children over this age. So the proportion of divorces involving couples without children is very low, at three in ten. This proportion is obviously much higher in cases of earlier divorce. 71 percent of divorces which occurred within the first two years involved childless couples, as did 66 percent of divorces occurring after three years of marriage. But, in case of divorce after 10-14 years of marriage, only 15 percent one in six of divorcing couples have, or have had, no children. In cases of divorce after 15-19 years, this figure falls to just 9 percent.⁹⁵

The relationship between childlessness and divorce has been explained in terms of the stresses on marriage caused by infertility. Involuntary childlessness might make the spouses doubt their sexuality and thwart expectations of having a family. Alternatively, childless marriages might be dissolved more frequently because divorces without custody issues are less complicated. Against this, one persuasive article suggests that the correlation of childlessness and divorce rests on the complete misunderstanding of the data.⁹⁶

Perhaps the most distressing, and least understood aspect, was the effect of divorce on children. As more couples divorced, more children were separated from one parent or the other. During the late twentieth century, social workers, psychologists, and other experts who studied the effect of divorce on children reached disparate conclusions. Some

⁹⁴ Thornes and Collard, 1979, pp.88-96.

⁹⁵ Rimmer, 1982, p.103.

⁹⁶ Chester, R "Is there a Relationship between Childlessness and Marriage Breakdown"? in Journal of Biosocial Science, 4 (1972), 343.

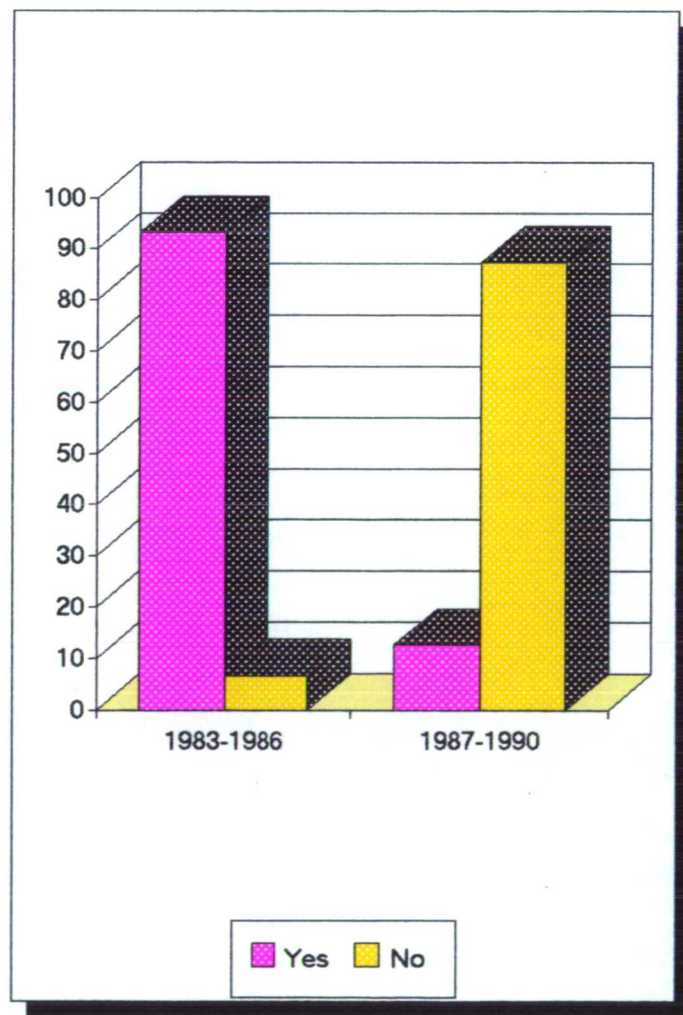
maintained that children fared better in divorce than in a conflict-ridden marriage, while others presented evidence that divorce exacted its own heavy tolls of children. The results of a long-range study published in 1989 indicated that the negative impact of divorce on children was far greater than anyone had previously suspected.⁹⁷

⁹⁷ See Wallerstein Judith S., and Blakeslee, Sandra, Second Chances : Men, Women, and Children a Decade after Divorce, London, Bantam, 1989, see also Wallerstein, 1980.

TABLE 4.48

Percentage Distribution of Reconciliation in Muslim Divorces from 1983-1990

Ruju'	1983-1986	1987-1990
Yes	93.3	12.6
No	06.7	87.4



It may be concluded that children are a stabilizing influence on a marriage and this has been borne out by this study which shows that the more children a couple has, the less likely they are to divorce. Therefore, it was predicted and indeed observed that the couples with no children were the most prone to divorce.

4.12 RECONCILIATION IN MUSLIM DIVORCES

Table 4.48 shows the frequency of reconciliation of the estranged couples within the two time periods. It appears that from 1983-1986, 93.3 percent of parties had a reconciliation and only 6.7 percent were irrevocably divorced. However, the figures are estimated as no information was available for the 98.8 percent of the divorce cases. Therefore, the effective level of reconciliation in this light was only 1.2 percent. This data however is not significant and so, should not be treated as proof that reconciliation occurs more readily than non-reconciliation.

With respect to the period of 1987-1990, it was observed that information on 51.4 percent of the estranged couples was available. Of this total 87.2 percent were the majority who had no reconciliation and only 12.6 percent of the divorced couples were reconciled.

4.13 CONCLUSION.

It emerges from this study that the divorce rate in Kuala Lumpur has been increasing and more so, after the introduction of the LRA. The change from a strict to more liberal law has also affected divorce patterns. The Act has opened the door to justice for couples who could not have obtained a divorce under the previous law, thus increasing the number of divorce petitions. More couples are resorting to the court to settle their marital breakdown. It should be noted that many couples

who were married according to their custom could not obtain a statutory divorce until the new law came into force.⁹⁸

Also, due to the change in the philosophy of the law with its emphasis on no-fault, husbands are more ready to petition for divorce. Divorce by mutual consent is and will continue to be very popular, especially among childless couples or couples with very few children.⁹⁹

The present study has also shown that couples contemplating divorce do consider the interests of their children and if they have more than two children, are most reluctant to contemplate divorce, unless they have very strong and compelling reasons to do so. The steep rise in early divorces may indicate a move towards the dissolution of unsuccessful marriages, before the decision is made to have children.¹⁰⁰ Furthermore, married people do not generally rush into a divorce on the discovery of the shortcomings of the other spouse. They are generally tolerant and patient, at least as compared to western couples in so far as duration of marriage is considered as an indicator of tolerance.¹⁰¹

It is also worth noting that both the LRA and IFLA discourage marriage between parties, either one or both of whom are below the age of 18.¹⁰² The policy of the law in discouraging teenage marriages will in effect reduce the number of divorces which are brought by young people who do not understand the heavy commitments a

⁹⁸ See LRA, section 4.

⁹⁹ See Table 4.11.

¹⁰⁰ See Table 4.41; see also Eekelaar, 1991 p. 57.

¹⁰¹ See Table 4.38.

¹⁰² See LRA, section 12; see also IFLA, section 8.

marriage entails. Coupled with their immaturity, these young couples may be ill-prepared to overcome their marital tensions with the result that they turn, precipitately, to divorce. Some studies have suggested that marriages by the young are more often motivated by a desire to escape personal problems and to find a substitute relationship for security, than by exclusive attraction to the other partner and commitment to the marriage ideal.¹⁰³

The above studies also point out the changes in the values and perceptions of the spouses in relation to the institution of marriage owing to a variety of social, cultural, political, and economic factors. The increasing enthusiasm for higher education, particularly professional education, and the employment of women played a vital role in influencing the values of men and women and changing the attitude towards marriage and divorce.¹⁰⁴ These changes have not only contributed considerably to the breaking of traditional structure of Malaysian marriage but also to the increase in the rate of divorce in Malaysian society.

Marriage has changed from being institutional to companionate. Freeman describes it as a union consisting:

*“two individuals rather than two lineages, on the child-centred household, on the quasi emancipation of women; and on the structural isolation of the nuclear family from the kinship system and the community.”*¹⁰⁵

¹⁰³ See for example Dominian, J., Marital Breakdown, Harmondsworth, Penguin Books, 1974 pp.131-2; see also Furstenberg, Frank F., Jr. Premarital Pregnancy and Marital Instability, Journal of Social Issues, Volume 32, Number 1, 1976, pp.67-85; see also Furstenberg Jr., Frank F. and Spanier, Graham B., Recycling the Family: Remarriage After Divorce, Sage Publication, California, 1984, p.57.

¹⁰⁴ Ibid.; see also Weiss, Robert S., Marital Separation, Basic Books Inc, New York, 1975, pp 5-13.

¹⁰⁵ Freeman, M.D.A, Questioning the De-legalization Movement in Family Law: Do We Really Want a Family Court?" in The Resolution of Family Conflict - Comparative Legal Perspectives, edited by John M.Eekelaar and Sanford N. Katz, Toronto, Butterworth and Co, 1984, p.9.

If the essence of marriage is seen as a personal relationship, and if it is no longer necessary to preserve the bond for economic reasons, fulfilment may legitimately be sought in a second union.¹⁰⁶ Evidence from a study shows that marital breakdown and divorce are more prevalent in urban, especially metropolitan areas, than in rural areas.¹⁰⁷ Within Durkheim's analysis, it may be postulated that the development of urban living has led to uprooting and greater social isolation.¹⁰⁸ This may be seen to contribute to the stresses within marriage and make it easier to leave the marriage.

Phillips suggests that the city must have facilitated divorce by providing a labour market and other facilities for increased independence for women not available in the rural areas. The effective decrease in the cost of divorce proceedings and the development of social welfare provisions make the process of filing for a divorce easier.¹⁰⁹

This research has shown that persons of lower socio-economic status prefer to end their marriages formally and legally.¹¹⁰ Furthermore, persons holding certain occupations are more prone to divorce, largely due to the nature of their work.¹¹¹ The risk of divorce within marriage is higher at some periods than at others. Although figures relating to the actual time of divorce are affected by the law governing divorce, and also do not reflect the true duration of marriage, there are some interesting differences by duration of marriage. The highest

¹⁰⁶ See Weiss, 1975, pp. 8-10.

¹⁰⁷ Rheinstein, 1972, p. 307; see also Norton, Arthur J. and Glick, Paul C., " Marital Instability: Past, Present, and Future" in Journal of Social Issues, Volume 32, Number 1, 1976, p. 17.

¹⁰⁸ See Giddens, Anthony, Durkheim, London, Fontana, 1978, pp. 31-32.

¹⁰⁹ Phillips, 1988, pp.582-634.

¹¹⁰ See Table 4.42.

¹¹¹ See Table 4.42.

rate of divorce currently occurs three years after marriage. After a period of three years divorce rates fall to about two thirds which is half the rate of divorce before a period of three years has elapsed. After three years have passed the divorce rate decreases with each subsequent year of marriage.¹¹²

Duration of divorce figures, even when statistically correct, are open to the sound criticism that divorced couples may have parted ways or separated long before the granting of the decree. Even the legal processing of divorce takes time. Administration in divorce proceedings, such as court backlogs and scheduling of cases sometimes delay to the time for the legal divorce. Recently, the growth of compulsory conciliation procedures,¹¹³ has meant that an additional extension of the period of litigation might be anticipated. However, adequate measurement of the over-all effects of these various legal practices in delaying (or preventing) divorce has not been made, so it is difficult to say whether the laws have slowed up the divorce process or affected it at all.

This study also shows the attitude of some Muslim husbands who lay more emphasis on divorce as the only way out of their marital instability. Although Islam shows fundamental dislike of divorce in the Qur'an and the Sunnah, these have not been emphasised in the daily life of the divorcees resulting in the abuse of the power of talaq. This study shows that a number of husbands would ruju'(reconcile) soon after that.¹¹⁴

¹¹² See Table 4.38; see also Goode, 1965, pp. 109-110.

¹¹³ See LRA, section 106, and also IFLA, sections 47 and 48.

¹¹⁴ See Table 4.48.

A study by Chiriboga et. al. showed that marital separation and divorce, in the long run, is not the solution to problems. They stated that;

“For many it was a relief from the chronic duress of an unhappy marriage, for some it was also a crisis, but for all it posed a challenge; to forge themselves a new life. The process initiated by the decision to divorce in essence is the beginning of a transition that is successfully concluded only with the construction of a new and more satisfying life.”¹¹⁵

The total number of divorces recorded is fairly accurate, but unfortunately, the records do not provide a very deep insight into the underlying causes of divorce. Legal causes for divorce are decided by legislative enactment. The petitioner must fit his or her grievances to whatever grounds the statutes permit. The differences in the divorce laws in Kuala Lumpur offer slight explanation of the wide variations in divorce grounds between the Muslims and the non-Muslims.

Variations in the use of the different legal grounds illustrate not only changes in the legislation, but also changes in the norms of the society. This transition underlines the fact that cited grounds may be a poor guide to the causes of marital disruption. The distribution of grounds thus reflects legal rather than marital behaviour, and divorce by consent, because of its advantage, may possibly come to dominate the scene in due course.

The enumeration of factors that correlate with divorce and that might therefore be called causes of divorce and the elaboration of linking hypotheses are of limited use. Couples of low socio-economic status

¹¹⁵ Chiriboga, David, Catron, Linda S. and Assoc., Divorce, Crisis, Challenge or Relief?, New York, New York University Press, 1991, p.292.

have been found to be at a high risk of divorce.¹¹⁶ Such causes of divorce are the perceptions of the spouses involved and spouses frequently give divergent accounts of the same marriage.¹¹⁷ Social scientists generally consider such causes of divorce, as perceived by the couples, to be secondary, and to represent symptoms of more fundamental causes. The manifestations of marital instability such as violence, adultery, incompatibility, emotional indifference which are said to constitute marriage breakdown, emerge from the interplay of the personal and social characteristics of the spouses and the context of their marriage.¹¹⁸

Other variables that have been correlated with divorce in many countries are premarital pregnancy, differences between husband and wife in social or educational background, marriages without children, employment by the wife or unemployment by the husband, and also the family histories of divorce.¹¹⁹ Several small-scale studies in Malaysia have listed incompatibility as one of the main reasons for divorce.¹²⁰ This study confirms research made by Haron which listed lack of maintenance, polygamy, and incompatibility as causes of divorce.¹²¹ Another interesting finding is that children do not deter couples from

¹¹⁶ See Table 4.42; see also Haskey J., *Social Class and Socio-Economic Differentials in Divorce in England and Wales*, (1984), 38, *Population Studies*, p.430; see also Goode, 1965, pp 43-55.

¹¹⁷ See Bernard, J., *The Future of Marriage*, Bantam, New York, 1973 p. 52. Bernard has referred to "his" and "her" marriage in order to suggest the idea that there are two marriages in every marital union and that these do not always coincide.

¹¹⁸ Phillips, 1988, p. 585.

¹¹⁹ Thornes and Collard, 1979, pp.130-2, see also Furstenberg Jr., Frank. F., 1984, pp 67-85.

¹²⁰ Tan Poo Chang, 1987, p. 83; Haji Haron, 1975, p.65; see also Lee, Kok Huat, et. al, *Family Events and Marital Stability in Peninsular*, Discussion Paper No.6, Population Studies Unit, Faculty of Economics and Administration, University of Malaya, Kuala Lumpur, 1985, p. 52.

¹²¹ See Table 4.17.

divorce and infertility is not given as reason for divorce, as a man could practise polygamy if the first wife is barren.¹²²

The Malay Muslims still have higher divorce rates than the other two ethnic groups. This study shows that the higher number of divorces may have resulted from the fact that a Muslim husband can divorce his wife by talaq at his own will without the intervention of the court. With the implementation of the IFLA, the abuses of talaq have dramatically dropped.¹²³

In many countries, studies have indicated that the wife is more likely to petition for divorce than the husband. The working status of women has also made them more willing to petition for a divorce. This reflects changes in the position and attitudes of women. The sex differences which have been outlined in this study strongly suggest that the choice of grounds for divorce is determined by social mores and legal convention. The grounds of mutual consent which were introduced in the LRA have decreased the percentage of petitioners using adultery as the grounds for divorce. As for Muslims, after the stringency of the law relating to polygamy, the grounds of divorce based on polygamy have proportionately decreased.¹²⁴

Unfortunately, due to the lack of information, this research could not be concluded on certain points. It was not possible to conclude positively as to whether inter-ethnic marriages are more prone to end in divorce.

¹²² See Tan 1987, p. 48.

¹²³ See Table 4.37.

¹²⁴ See Table 4.15.

Divorced women generally have a higher labour force employment rate, but we do not always know whether they were employed while married or whether they entered the labour force after divorce. The distinction is vital if we are to theorize as to whether employment by married women predisposes their marriages to breakdown. Similarly, most divorced women are located in the lower socioeconomic groups, but this distribution could well be not so much a factor in the probability of divorce as a result of divorce; divorced women and their children generally suffer economic decline after the separation, whereas the economic position of divorced men usually improves after a separation.¹²⁵

In the past there may have been very little overlap between those who were unhappily married and those who divorced. This may nowadays be less so and it seems likely that those who divorced and those who are unhappily married will, in the future, tend to become a more homogeneous group. This is because the number of barriers to divorce is diminishing and the viable alternatives to remaining in an unhappy marriage are expanding. Also, changes in the law governing divorce have led to its widespread availability, and these factors suggest that divorce is increasingly regarded as an acceptable solution to marital unhappiness and is therefore more normatively available within society than it once was.

¹²⁵ Weitzman, Lenore J., The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America, New York, The Free Press, 1985, p. 323.

PART THREE

CONCLUSION

INTRODUCTION

I have explained the historical background to the various developments in both the Muslim and non-Muslim divorce laws in Malaysia.¹ A knowledge of that background helps to explain why the law is as it is, but it does not necessarily provide a justification for it to remain unchanged in those areas where reforms may be considered desirable.²

This study shows that in almost every respect, divorce in Kuala Lumpur has undergone marked changes. Analysis of the LRA shows that changes in the divorce law constitute a substantial cause of the increasing rate of divorce. The law of divorce of non-Muslims has been progressively liberalised and the procedure simplified so that divorce becomes financially and legally feasible for an increasing proportion of married people. The greater incidence of divorces and social familiarity with divorce erodes negative attitudes and facilitates further legal reform. While negative social sanctions mitigate, so too the legal and economic constraints involved in obtaining divorces have become less stringent.³

¹ See Part 1.

² for more comprehensive discussions on the loopholes of the LRA and IFLA see Chapters 3 and 4.

³ See Chapter 4.

This study also shows that the present law and practice is very confusing. There is a significant gap between theory and practice, which leads to confusion and lack of respect for the law. The law can only be effective as an instrument of change if it is authoritative and commands respect from the public.

Criticisms of the LRA are not only directed at its main principles, but also at the legal rules and processes on which the grounds for divorce is based. First, the law states that the only ground for divorce is irretrievable breakdown of marriage, which does not involve fault. On the other hand, it provides that this can only be shown by proving one of the five facts, three of which apparently do involve fault. Despite having irretrievable breakdown of marriage as the sole ground for divorce,⁴ there are also two additional grounds, namely, divorce by mutual consent⁵ and conversion to Islam.⁶

The present empirical study confirms that sex, class and other differences in the use of the facts make it quite clear that they are chosen for a variety of reasons which are not connected to the reality of the case.⁷ The fact that is claimed by the petitioner in order to prove the breakdown of the marriage therefore, does not have any correlation with the real reason behind it.

In practice, defending a case on fault-based grounds is time consuming, money wasting and an emotional drain which is beyond the resources of most respondents. Even though parties are usually prepared to go all the way in defending their cases, the outcome leaves them worse off as it consumes limited resources. Legal aid is inadequate since the

⁴ See LRA, section 54(1).

⁵ See LRA, section 52.

⁶ See LRA, section 51.

⁷ See Chapter 4.

legal officers are overburdened with handling cases both from Muslim and non-Muslim jurisdictions. Furthermore, legal aid is only available in the capital of the state.⁸ Due to these factors, lawyers often advise their clients not to defend their case. In practice, an undefended divorce suit can be obtained faster and easier.⁹ Therefore, it is a misconception to assume that undefended divorce is a result of consensual decision.

When a marriage breaks down there are many practical questions to be decided. The policy of the law is to assist the couples to try and settle these conflicts through lawyers but negotiations can also be abused by a party who is in a stronger position in relation to the divorce itself. This open process of negotiation puts one party at an unfair advantage.

It is a good feature of the present law that couples who do not want to put the blame on each other can go through divorce by mutual consent. However, the present law is unjust as it does not take into consideration the unequal bargaining power which generally arises in a patriarchal Malaysian society.

The present practice also does not completely fulfil its initial goals. These are, first, the support of marriages which have a possibility of survival, and secondly, the “to enable the empty shell to be destroyed with maximum fairness and the minimum of bitterness, distress and humiliation” of those that are involved.¹⁰ The LRA does little to rescue these marriages. Although there is a provision relating to mandatory reconciliation, the present system of trying to reconcile the

⁸ Personal conversation with Puan Norsiah Baharin, Assistant Director, Legal Aid Bureau, Federal Territory of Kuala Lumpur, in December, 1992.

⁹ Personal conversations with lawyers in Kuala Lumpur in December, 1992; see Appendix IV.

¹⁰ See report of The Royal Commission on Non-Muslim Marriage and Divorce Laws, 1971, p. 13.

estranged parties is a total failure and does not help the law's objectives of supporting those marriages which have the likelihood of survival. The law cannot deter people from separating, although it could make it hard for people to get a divorce. There is no proper conciliatory body which helps to explain the reality of divorce, that is the emotional and the economic consequences of it. Thus, people go into divorce without realising the adverse consequences.

The LRA has brought fundamental changes to the existing law of matrimonial causes. The abolition of the "fault" concept as a factor in the determination of matrimonial disputes, and the reduction of the grounds of divorce to only one, namely irretrievable breakdown of marriage, are undoubtedly changes of great magnitude. Reforms in divorce law however, have been confined to the substantive aspects of the law without any consideration as regards the judicial institutions which would administer the law. Reform should not stop at the law itself but should extend to the system of courts in which it is administered and their procedures. In order to realise the full benefits of reform in the substantive law on matrimonial matters, a corresponding reform of court procedures is imperative.

As for IFLA, although it has improved greatly compared to the previous law in Kuala Lumpur, and law in other states, it fails to translate theory into practice and thus invites criticisms from the public, especially women. The law may be good in theory but fails to achieve its objective in practice. The enforcement agents fail to demonstrate their commitment to the new norms due to lack of manpower and ignorance of the public. There was no proper explanation given regarding the new law, thus the enforcement agents were left to interpret the Act themselves.¹¹

¹¹ Personal conversation with Ustaz Ismail Ahmad, Senior Officer, (Damansara), JAWI in December, 1992.

To complicate matters further, IFLA arrived without much publicity since it is only applicable in a more restricted jurisdiction.¹² It differs greatly with the divorce legislation for the non-Muslims. LRA has a nationwide application, therefore reform proposals are intensely discussed in the national press. The debate achieves a degree of sustained public attention. Furthermore, any important changes in family law for non-Muslims is preceded by extensive studies of behaviour and opinion of the rakyat.¹³

This study also points to the fact that although there is a provision under the IFLA that talaq must be pronounced in court, the conditions are often not adhered to by Muslim men. In theory, this condition is very commendable since it acts as a deterrent to the husband's misuse of the power of talaq. However, due to inadherence to the condition, IFLA fails to achieve its objective in protecting women against the abuse of the power of talaq. Either the law fails to gain respect from the public, or the law itself fails to answer the socio-historical needs of the people.¹⁴

Above all, the present law on divorce fails to acknowledge that divorce is not a final outcome but a part of a substantial change for the couples and their children. In other words, divorce is not a separate event but a social, psychological and only incidentally a legal process, which takes place over a period of time.

All these defects present a formidable case for reform. In recent years there has been a spate of new family legislation especially relating to divorce in England, Australia, and some Muslim countries. In Pakistan,

¹² The Malaysian Constitution, Schedule 9, List II.

¹³ In the Malaysian context, "rakyat" is normally use to indicate the citizens of Malaysia. Views of the rakyat could be found in the Report of the Royal Commission, 1974, Appendix I.

¹⁴ Personal conversation with Ustaz Abdullah Abu Bakar, Lecturer in Islamic Family Law, International Islamic University, in December 1992.

as in Egypt, Muslim reform was due to internal processes within the Muslim community and to external motivation from western presence and criticism.¹⁵ Reinterpretation and reform have occurred in the areas of both substantive law and jurisprudence in the name of social progress.¹⁶ Reform legislation has been enacted to meet more equitably the changing social and economic needs of modern society.¹⁷

In the seventeen years since the enactment of the LRA in 1976 and ten years in the enactment of the IFLA in 1984, there have been remarkable changes in the society and the climate of public opinion in Malaysia. When we consider that the LRA did not set out to do much more than achieve a uniform law for the non-Muslims in Malaysia,¹⁸ it could easily be argued that what is needed now is a more radical reappraisal of community needs and attitudes, and a thorough reconsideration both of the legal and the institutional responses of Malaysian society to the problems of divorce. However, the true effectiveness of reform will depend upon the acceptance of the Act not simply by those who legislate but by the entire Malaysian community.

The history of divorce as traced in this study points to several areas that demand increased attention from legislators, jurists and policy makers. Two major problems are identified as requiring solution:

¹⁵ See Chapters 2 and 3; see also Esposito, 1982, pp.94-101.

¹⁶ The flexibility of Islamic legal system, due to its plurality and divergence of juristic opinion within its broad framework, has resulted in the reformation of traditional family law, without parting with its fundamental principles, see Mahmood, Tahir, Family Law Reform in the Muslim World, New Delhi, The Indian Law Institute, 1972, pp. 267-8.

¹⁷ "Two alternative courses of action - to end or to mend were available to the countries which realised this need. However, only a few countries opted for a complete abandonment of the traditional Islamic family law and its replacement by entirely secular systems; and even among these countries, some have so far taken such a step only in the limited field of Islamic matrimonial law", Mahmood, 1972, pp.263-4.

¹⁸ See LRA, section 2, see also Chapter 3.

- i. The need to protect and support the family especially women and children.
- ii. The mechanism of divorce itself. This needs, at the very least, attention and refinement or perhaps more fundamental reform.

These two major areas will be discussed separately in two concluding chapters, although they are very much inter-related. Chapter 5 includes discussion on several measures other than law which should be considered towards the development of supportive systems for working mothers or a general family support system.

Chapter 6 of Part III will end with a discussion of the reform of divorce laws. Among the areas that will be touched are legal reforms to protect women, grounds for divorce under Islamic law and civil law, and also the setting up of family courts and systems of conciliation.

CHAPTER 5

PROTECTION AND SUPPORT OF FAMILY INSTITUTION

5.1 INTRODUCTION

My purpose has not been to make detailed proposals but rather to indicate a new direction in which the government could help support and protect the family. The Prime Minister of Malaysia, Dr. Mahathir Mohammad has emphasized in his Vision 2020¹⁹ that society has a sound and reasonable interest in actively promoting the nuclear family as the chosen shelter for bringing up children who will take charge of the future.²⁰ It is therefore submitted that, to achieve these objectives, proposed reforms should be targeted with a view to relieve any problems relating to women and children.²¹ This proposal arises from the fact that, under the present divorce laws, the terms of exit from marriage are disadvantageous for almost all women in traditional or quasi-traditional marriages in Malaysia.

Practically, women have a share in promoting the nuclear family, since they bear a disproportional share of the hardship of its failure. Economically and socially, women everywhere are made vulnerable, by the historical correlation of female responsibility for bringing up children with female subordination and dependence.

¹⁹ Within the context of Vision 2020, where family development is the vital agent of Human Resource Development of the nation, it is imperative that greater efforts should be taken to improve the available skills and knowledge which the members of society already possess about the linkage between "family development" and "a nation's progress."

²⁰ Utusan Malaysia, November 30, 1992.

²¹ For proposed reform in this area see Appendix I.

The current practices of marriage itself contribute to economic inequalities between women and men. Okin suggested that the arrival of a child is most often the point where the wife becomes economically dependent.²² Although this economically subordinate situation of women frequently remains concealed during marriage, it becomes instantly obvious on marriage breakdown, at which point the poverty of women develops into a public problem.²³

Women carry far greater responsibility for domestic duties and children, whether or not they work outside the home. Constraints built into society limits women in their efforts to be successful providers for their families. Low level jobs and low-level wages typically paid to women employees keeps them from earning incomes that would adequately support them and their children.²⁴ The combination of domestic duties and unrewarding employment act as a strong deterrent to women working outside the home and so actually discourage them from doing so. Therefore, a women's weak position in the labour market, which is itself a consequence of women's domestic role, in turn reinforces their subordination in the home.

So far, Malaysian women regardless of religion and race share a common background. They have been dominated and relegated to a minor and subservient role in society.²⁵ In the olden days, women were deemed inferior to men.²⁶ A woman's life centred around the men in her life. For the Chinese, girls are subjected to a lifelong

²² See Okin, Susan Moller, Justice, Gender, and the Family, New York, Basic Books, 1989, pp.138-9.

²³ Ibid, p.139.

²⁴ Arendell, T. Mothers and Divorce - Legal, Economic, and Social Dilemmas, Berkeley, Los Angeles, University of California Press, 1986, pp.80-101.

²⁵ Hong, Evelyn, Rural Women in Development in Malaysian Women: Problems and Issues, edited by Evelyn Hong, Consumers Association of Penang, 1983, pp 24-7.

²⁶ Traditionally, "proper" Malay girls are kept under strict surveillance from puberty onwards; Heyzer, Noeleen Working Women in South-East Asia. Development, Subordination and Emancipation. England, Open University Press, 1986, p.113.

discrimination, well described by the popular code of feminine ethics, the three obediences, viz to obey her father at home, her husband after marriage, and her eldest son after the death of her husband.²⁷ Women themselves have internalised and accepted certain social conceptions about their position in society. Such was, and still is to a great extent, Malaysian society. Even when the process of achieving equality is generated, this may occur unevenly at different levels and for different social groups.²⁸

Studies on divorce show that the inequality of women in marriage and their continuing fight to change that condition.²⁹ In common law, it was well-established that the two partners became one entity at marriage, with a single domicile - that of the husband.³⁰ When she got married, the wife lost her status as feme sole, and her independent legal rights were quite limited.³¹

This is due to the fact that the traditional notion of “sex-differentiated marital responsibility”, with the husband as provider and wife in the domestic roles, continues to be a solid influence on what men and women think and the way they behave. In fact, both the division of these responsibilities between the spouses resulting in women’s economic dependence on men and the related responsibility of husbands to support their wives compromise the choice of occupation of both sexes.

²⁷ See Wong, 1978, p.252, see also Salim, Rafiah bt, The Legal Status of Women in a Multi-Racial Malaysian Society in Hing Yun, et.al. (eds) Women in Malaysia, Kuala Lumpur Pelanduk Publications, 1984, p.187.

²⁸ See Heyzer, 1986, p.113.

²⁹ See Heyzer, 1986; see also Nicholas, Susan C., Rights and Wrongs : Women’s Struggle for Legal Equality, New York, pp. 22-9.

³⁰ See LRA, section 49.

³¹ See Chapter 3, see also Snell, James G., In the Shadow of the Law, Divorce in Canada, 1900-1939, Toronto, University of Toronto Press, 1991, p. 9.

As is generally known, most married men give priority to their careers. However, the present divorce rules do not grant women their share of investment in men's career. Divorce rules expect her to enter the labour market as his equal, even though she has fewer job skills, and is at the same time carrying major responsibilities for their children after divorce. Women by virtue of their limited education have been ill-equipped to compete with men for such positions. Apart from the lack of formal education, rural women in Malaysia usually marry young³² and are therefore deprived of many of the opportunities to enhance their skills and experiences.

In Malaysia, women workers in manufacturing industries, like women workers in other sectors of the economy, lack skills and training, and are concentrated in certain industries. This, in combination with their lack of independent unions or any affiliation with trade union organizations, leaves them open to exploitation.³³

Therefore, the prospects of a divorcing woman, particularly if she is a custodial parent, are in many ways much bleaker than the prospects of a divorcing man. Divorce usually pushes women down the class ladder. Regardless of the consensus that existed about the division of family labour, these women will lose most of the income that has supported them and the social status that was attached to them because of their husband's income and employment, often for the first time in many years. This combination of prospects would seem to be enough to put most traditional wives off the idea of divorcing even if they have good cause to do so.

³² Lee, Kok Huat, Tan Poo Chang, and Siti Rohani Yahaya, Family Events and Marital Stability in Peninsular Malaysia, Discussion Paper No.6, Population Studies Unit, Faculty of Economics and Administration, University of Malaya, Kuala Lumpur, 1985.

³³ See Tan, Pek Leng, Women Factory Workers and the law in Malaysia women: Problems and Issues edited by Evelyn Hong, Penang, Consumer's Association of Penang, 1983, pp.64-74.

This is true in the Malaysian context as is shown in a study made at Kampung Perupuk, Kelantan. Due to poverty of the family, the men release their despair and frustration by beating their wives but the wives do not seek divorce. Application for divorce will only be made if their husbands are reluctant to work or court other women. However, this occurred only when the women were young, and were economically independent.³⁴

Research in a number of states in America has shown that the economic consequences of divorce are a greater blow to women than men and it falls more heavily on women with dependent children. Together with these is the huge social and psychological distress, as a result of economic loss. Unlike men, both women and children experience economic loss as the worst dimension of divorce.³⁵ In the average case, the standard of living of divorced women and the children who live with them plunges after divorce, whereas the economic situation of divorced men tends to be better than when they were married.³⁶

Arendell's study also showed that for women, the main blow of divorce is basically economic.³⁷ And due to that factor, divorced women with

³⁴ See Narendran, Vasantha Malliha, *The Women of Perupuk; An Economic Study*, M.Soc Sc. Theses, University of Science, Malaysia, 1975.

³⁵ Weitzman reports that "what women say they miss most about marriage is the husband's income. What men report missing is having a sexual partner and a partner in life"; Weitzman, L., The Divorce Revolution, The Unexpected Social and Economic Consequences for women and Children in America, New York, The Free Press, 1985 pp.348-354. On emotional deprivation and the diminished opportunities of middle-class children of divorce; see Wallerstein, Judith S. and Kelly, Surviving the Break-up: How Children and Parents Cope with Divorce, London, Grant McIntyre, 1980, No such research being done in Malaysia yet.

³⁶ See Funder, Kathleen Australia: A Proposal for Reform, Lenore Weitzman and Mavis Maclean (eds), Economic Consequences of Divorce: The International Perspectives, Oxford, Clarendon Press, 1991.

³⁷ Arendall, 1986, p.153.

young children had to take up employment.³⁸ Single parent families headed by women are among the poorest groups in contemporary society. It is extremely difficult for such families to lift themselves out of poverty without the help of an extra income in the household.³⁹ In many cases, full-time work or the minimum income, is insufficient for these families as the women have insufficient job-training and experience. As Bianchi and Spain state,

*“women’s labour market adjustments to accommodate children, which are often made within a two-parent family context and seem economically rational at the time, cause difficulty later when these same women find themselves divorced and in great need of supporting themselves and their children.”*⁴⁰

Although there is no research done in this area as yet in Malaysia, it is a well known fact that these women suffer badly after divorce by the number of maintenance cases filed at the Sharia and Civil Courts and matters taken up by the Legal Aid Bureau. These also include cases of wives being deserted by their husbands and left in limbo; what is commonly termed as “gantung tak bertali” (literally; being hang without a rope). Under the Malay custom, although it is embarrassing to turun naik mahkamah, (literally; up and down the court)⁴¹ the women have no other choice as their present income is insufficient to pull them out of poverty. The only advantage of Malaysian women compared to their western counterparts is that of having an extended

³⁸ Eekelaar citing Gordon and Kammeyer 1980, Eekelaar, J., Family Law and the Social Policy, 2nd. edn., London, Weidenfeld and Nicolson, 1984, p.206.

³⁹ On the chronicity of poverty in female headed households see Youssef, Nadia and Hetler, C.B, Establishing the Economic Condition of Women-headed Households in the Third World: A New Approach in Women and Poverty in Third World, edited by Mayra Buvinic, et.al, Johns Hopkins University Press, London, p.216. See also Eekelaar, J., and Maclean, M., Maintenance After Divorce, Oxford, Oxford University Press, 1986, pp.68-84.

⁴⁰ Okin quoting Bianchi and Spain in American Women, p.163.

⁴¹ A term widely used to connote the frequency of going to the Sharia court.

family to help them to cope with the divorce trauma. Even then, the financial burden is still shouldered by the women themselves.

Another reason why divorced women are likely to have to rely on their own, often inadequate earnings is that they are much less likely than their ex-husbands to remarry.⁴² In divorce, remarriage is considered a solution offered at individual level.⁴³ Although remarriage is widely practised by Kelantanese women,⁴⁴ it is not a general phenomenon elsewhere in Malaysia. The reasons for this are almost all socially created and therefore alterable.⁴⁵ In the vast majority of cases, a divorced mother continues to take primary responsibility for the children, but she has lost a very large portion the financial resources she had within marriage, making her a less attractive marital partner than the typical divorced man.

Custody of children is known to be a cause that discourages remarriage. Research has shown that divorced men who are in their thirties and forties are usually non-custodial parents. Most often they are at the height of their careers, which is a factor in attracting a subsequent wife. Whereas increasing age is not much of an obstacle for a man seeking to remarry, Okin suggests that it seriously affects a woman's chances, which decrease from 56 percent in her thirties to less than 12 percent if she is in her fifties or older when divorced. This is also due to the fact that emphasis is placed on youth and good looks.

⁴² Arendall, 1986, p.157.

⁴³ Smart, C. The Ties That Bind: Law Marriage and the Reproduction of Patriarchal relations, London, Routledge and Kegan Paul, 1984, p.23.

⁴⁴ In Kelantan, a "janda" (divorcee) readily remarries without any stigma; Karim, Wazir Jahan, (ed), Emotions of Culture: A Malay Perspective. Singapore, Oxford University Press, 1990, p.21. See also Laderman, Carol, Putting Malay Women in their place in Women in Southeast Asia, Van Esterik, Penny (ed), Northern Illinois University, Centre for Southeast Asian Studies, Monograph Series of Southeast Asian, 1982, p.87.

⁴⁵ The ability of a large proportion of Kelantanese women to sustain themselves economically enhanced their readiness to divorce and remarry; Jones, 1981.

And ironically, success at work, highly correlated with remarriage for men, is inversely correlated for women.⁴⁶ Although no such study has been carried out in Malaysia, it could be inferred that the trend would be the same.

Such are the different structural opportunities that men and women face at divorce. It is this structural economic inequality in marriage that the law has failed to address. Recent research as well as the present study show that any equality women have gained within divorce law is largely symbolic.⁴⁷ Although husbands and wives apparently have equal access to obtaining legal divorce, in practice that equality is not real. The present situation has made women and children victims of the legal process. By attempting to treat men and women as equals at the end of marriage, current divorce law ignores the obvious fact that women are not socio-economic equals of men in the Malaysian society. Not only that, it also fails to recognise the fact that the experience of “gendered marriage” and primary parenting largely aggravates the inequality that women already bring with them into the marriage.⁴⁸

5.2 REFORMS TO PROTECT WOMEN AND CHILDREN

The present problems in the light of development strategies should also work towards a redefinition of these roles so that there can be a more meaningful role for women in Malaysian society. It makes it imperative for the government to begin considering of special social and

⁴⁶ On women's work success in America, see Blumstein and Schwartz, American Couples, New York, Morrow, 1983, pp 32-33.

⁴⁷ See Chapters 2-3, see also Arendell 1986, p.153.

⁴⁸ For further details on gendered marriage, see Okin, 1991, p.166.

educational programmes to achieve this.⁴⁹ This implies that social reform could significantly alter the negative impact of divorce on those who suffer most from it. It is reported that the Women Affairs Secretariat (HAWA) in the National Unity and Social Development Ministry will intensify its programmes to make women aware of their legal rights. Its Minister, Datuk Napsiah Omar, also suggested that strong family institutions be built in the Malaysian community and divorce should only be the last resort.⁵⁰ It is really hoped that this suggestion is followed by serious action as well.

Although there have been important legal changes that have improved the status of married women in relation to their husbands, many of these reforms have benefited women only indirectly, through their role as guardian of the children. The law has attempted to improve the lot of children and has done so by extending protection to their primary carer.⁵¹

These legal reforms have not touched upon the principal structure of marriage and the family which is based upon women's economic dependency on men. The law's failure to realise that these women face a "gender-structured" society puts them at a disadvantage as single-parent providers which contributed directly to the extent of the hardship they encounter.⁵² It is therefore crucial that the rules of divorce be redrawn so as to reflect the gendered or non-gendered

⁴⁹ On the development of Malaysian women in economics see Lim, Teck Gee, *Women, Economics and the Environment in Malaysian Women*, edited by Evelyn Hong, Penang, Consumers Association of Penang, 1983, pp.31-5.

⁵⁰ Malay Mail, December 9, 1992.

⁵¹ On legal reform in this area in England see Brophy, J and Smart, C *Women-in-Law: Explorations in Law, Family and Sexuality* (eds) London, Routledge and Kegan Paul, 1985.

⁵² See Weitzman, 1985, pp.357-401 see also Glendon, M., *Abortion and Divorce in Western Law*, Cambridge, Harvard University Press, 1987, Chap 2.

character of the marriage that is ending, to a far greater extent than they do now.

Gender-structured⁵³ marriage needs to be considered as a necessary institution but one that is socially difficult. The legal system of a society that allows couples to divide the labour of families in a traditional or quasi-traditional way must accept the responsibility for the vulnerable position in which divorce has placed the woman who has completely or partially lost the capacity to be economically independent especially when there are children.⁵⁴ When marriage does come to an end, the law should try to ensure continuing family stability for the children as far as possible by insisting that their lifestyle should remain as it is.⁵⁵

Therefore when marriage ceases, it is reasonable to demand that the husband whose career has been largely unburdened by domestic responsibilities support financially the wife who undertook these responsibilities. This support, in the form of combined alimony and child support, should be far more substantial than that which is often ordered by the courts now. Both post divorce households should enjoy the same standard of living.

There is also a need for the legal procedure relating to marriage to be considered from a completely new viewpoint. One of the incentives for the deregulation of divorce was the recognition that not all marriages are the same. No single legal procedure is suitable for every single case. The government should pay more attention in marriage to the quality and stability of the environment in which children are brought

⁵³ Okin defines gender as "the deeply entrenched institutionalization of sexual difference", Okin, 1991, p.6.

⁵⁴ Glendon has set out a "children first" approach to divorce in England; see Glendon, 1987 p.94.

⁵⁵ See Chapter 6 note 13; see also Mason, 1988, p. 69; see also Okin, 1991, p. 183.

up.⁵⁶ As we move to implement these goals, however, we must keep in mind the laws governing marriage. If we have learned anything from the work of Weitzman and others,⁵⁷ it is that we cannot expect to remedy the defects of marriage at the point of divorce.

And this brings us to the crux of the matter. In trying to fight divorce, Rheinstein rightly suggests that we are attacking the symptom, not the malady. He stated that;

“Not divorce but the factual breakup of a marriage constitutes the social evil which has been decried so often and so passionately. It is this situation which turns the children into ‘orphans’, which is likely to throw them and perhaps the wife too as a charge on the tax payers, which creates the psychological problems of loneliness, and which injects a general element of instability into the fabric of social life. But none of these effects is produced by divorce, which is an event occurring not in the world of social living but in the universe of formal law.”⁵⁸

5.3 RECONCILIATION

A long standing official policy with respect to divorce procedures has been the encouragement of attempts at reconciliation between the parties. This policy is reflected in the provision in the LRA.⁵⁹ Under the LRA, the court has the power to adjourn divorce proceedings at any time if it appears that there is a reasonable prospect of the parties becoming reconciled, for such a period as it thinks fit to enable attempts to be made to effect such reconciliation.⁶⁰ However, it seems

⁵⁶ See Mason, 1988, pp.71-2.

⁵⁷ See Weitzman, 1985, p. 321; see also Goode 1956, p 121; see also Rheinstein, 1972, p.78.

⁵⁸ Rheinstein, 1972, p.266.

⁵⁹ See LRA, section 106.

⁶⁰ See LRA, section 55.

unlikely that either of these provisions is particularly effective, since they only apply once one of the parties has filed for divorce, by which time reconciliation seems a remote prospect.⁶¹

Studies in England showed that reconciliation procedures started after the filing of the petition achieve little success and have tended to become fruitless.⁶² The Law Society in England took a similar view,⁶³ as the couples would have sought it before then from family, friends or marriage guidance counsellors.

Various schemes which have been tried in foreign countries, requiring compulsory attendance of parties to a divorce suit before some form of conciliation agency or tribunal, have proved in the end to be a routine and useless formality. It is ironic that despite various schemes which showed that mandatory reconciliation is a failure, Malaysia is still pressing on with it. Malaysian reformers should have looked into all these before including the provision on compulsory reconciliation.⁶⁴ Section 106 of the LRA should therefore be repealed.⁶⁵ There must also be complete assurance of secrecy⁶⁶ as the present members of the reconciliation tribunal are not given any

⁶¹ See Chapter 3 pp.45-47.

⁶² The Law Commission, The Denning Committee on Procedure in Matrimonial Causes 1947, The Royal Committee on Marriage and Divorce 1956, The Law Commission in the Field of Choice 1966, and the Finer Committee on One-Parent Families 1974 all concluded that mandatory reconciliation attempts within the court process were unlikely to succeed.

⁶³ The Law Society, A Better Way Out, A discussion paper prepared by the Family Law Subcommittee of the Law Society, London, Law Society, 1979.

⁶⁴ Sheikh Ghazali Abdul Rahman, Chief Qadhi of Sharia Court, also agreed that there must be a positive impulse on one side at least; see also Riley, 1991, p. 186.

⁶⁵ See Ibrahim, (1979) on the proposal for rules relating to reconciliation; see also proposal in Appendix I.

⁶⁶ Under the Australian Matrimonial Causes Act 1959, Section 12, provides that a marriage guidance counsellor is not competent or compellable to disclose any communication made in his capacity as a marriage guidance counsellor and to guarantee complete secrecy, it is provided under section 12(2) of the same act that he has to take an oath before embarking upon his work of counselling.

guidelines as to how they should consider these cases, and also they are not bound to confidentiality.⁶⁷

While in principle all reformers approved of reconciliation facilities as an appropriate approach to stabilise marriage, not all of them regarded mandatory counselling or court-based services as the answer to the problem. The dominant view, held by legal practitioners and the judiciary, would appear to be that there is little prospect of reconciliation once divorce proceedings have begun.⁶⁸

Academicians have been rejecting reconciliation provisions introduced into divorce legislation.⁶⁹ However, according to research carried out by Davis and Murch, the potential exists for reconciliation in a significant number of divorce cases. The possibilities of reconciliation, even when legal proceeding have begun, may be greater than is sometimes supposed. However, for most petitioners the decision to seek a divorce is only taken after careful consideration.⁷⁰

Studies in England show that prospects of reconciliation are much more favourable in the early stages of marital disharmony. Prolonged conflict will leave the couples with no desire to restore the marriage, and by the time steps have been taken to institute divorce proceedings the prospects of bringing the couples together is bleak.⁷¹ Therefore, it is important that the general public should be brought to realise the

⁶⁷ Samuel, Charlotte, *Abused Women*, paper presented at the Seminar on Law, Justice and the Consumer, Consumers' Association of Penang, Penang, 19-23 November, 1982; for further discussions in this area see Chapter 2.

⁶⁸ See Chapter 2 pp. 56-57; see also *The Field of Choice*, see also Law Society, 1979 para 51 A *Better Way Out*; see also *A Better Way Out Reviewed*, 1982, para 27.

⁶⁹ Further discussions see Chapter 3 pp.34-35; see also Eckelaar, 1971, pp.182-3.

⁷⁰ Davis, G., and Murch M. Grounds for Divorce, Clarendon Press, Oxford, 1988, p.53.

⁷¹ Royal Commission on Marriage and Divorce, Morton Commission of 1956. Cmd. 9678, London, H.M.S.O.

importance of seeking competent advice before it is too late and to sort out as early as possible problems of a serious nature.

In Singapore, the registration of divorce, revocation of divorces and conciliation regarding marital disputes (functions formerly carried out by Assistant Qadhi) were taken over by the Sharia Court. These duties were then performed by the Qadhi and the Social Worker in the Sharia Court. Since then, whenever there are marital disputes between the spouse, the qadhi or assistant qadhi will initially see the husband and wife separately. After several interviews with the couple separately, the social worker or the qadhi will see the couple together where the situation will be assessed and salient points brought before the couples for further discussion so as to improve their relationship. The counselling service has played a significant role in reducing the number of divorces among Muslims in Singapore⁷² and there is no reason why the same service cannot be done in Malaysia.

The present marital agencies backed by the Government in Kuala Lumpur such as Unit Perunding dan Pembangunan Keluarga in JAWI are consulted only by a small proportion of people. Many seek help elsewhere; some do not look for help at all especially those in the higher income bracket.⁷³ This shows that the existing scheme is operating on a limited scale, but the measure of success already attained supports the view that in quite a number of cases, the estranged spouse have been able, with the help of skilled counselors, to overcome their difficulties and to achieve reconciliation. However, further expansion of these facilities is required, and new methods need to be formulated to cover all sorts of people from various walks of life. If the present structure is to be continued, only certain groups of

⁷² Tai, Ching Ling, 1975, p.70.

⁷³ Utusan Malaysia, January 14, 1993.

people will approach it, the rest will endure in silence and when the strain is too much to carry, it will disrupt in divorce.

The conclusion that appears to emerge from the foregoing is that the stress that has been placed on the role of counselling and reconciling estranged couples probably raise unreal expectations in the community as to what can be achieved by counselling. The government has thus an interest in furthering reconciliation wherever possible. The government's role should rather be to give every encouragement to the existing agencies, statutory or voluntary, engaged in works relating to marriage, as well as to other agencies which may be approved in future.⁷⁴ Voluntary agencies which have proved their worth should receive financial assistance from public funds.⁷⁵ Their activities should be widely publicised and be made widely available throughout the country. In extending the existing facilities, experiment and diversity of method and technique should continue to be encouraged and a system be formulated which provides agencies tailored to different religious, cultural and ethnic needs.

Malaysia should also follow the example of China, where in Beijing, a Chinese court, faced with a rising number of broken marriages, has established a school for divorcing couples to help them part amicably or be reconciled. The one month course set up by Jinan district court in Shandong province provides systematic education on law, policies, morals and ethics so that couples will take a correct attitude toward divorce. So far in the six months of its operation, it has managed to reconcile 37 percent while another 45 percent divorced amicably.⁷⁶

⁷⁴ A statutory agency would not be able to cater to such a broad cross-section of the Malaysian community.

⁷⁵ See proposal in Appendix I.

⁷⁶ New Straits Times, December 12, 1992.

This seems to be in line with the Islamic principles proposed by the Qur'an, that is,

*"the parties should either be together on equitable terms or separate with kindness."*⁷⁷

I believe this is the best solution as further animosity would have bad effects on the children of the already failed marriage.

5.4 OTHER MEASURES

It is worth emphasising that measures other than the rules on divorce offer much better prospects for strengthening marriages. A wide scope of problems arise in societies where an increasing proportion of both spouses with children work outside the home to maintain financial stability. Even when both the husband and wife have jobs, the wife is expected by society to be primarily responsible for the reproduction and child rearing. The emphasis placed on women's domestic roles has therefore set limits to potential manipulation of family living.⁷⁸

Most women in Malaysia now hold jobs, either by choice or necessity⁷⁹ and they are entering fields that are already female-dominated or are fast becoming so. At the top end are the traditional female professions of teaching, nursing, and social work, at the bottom end, unskilled and semi-skilled manufacturing jobs but the great middle bulge, where most of the new jobs appear, is the service sector, which

⁷⁷ Al Qur'an, Surah Al Baqarah : 229.

⁷⁸ See Eekelaar, 1984 p.189; see also Rhode, Deborah L. and Minow, Martha, Reforming the Questions, Questioning the Reforms in Divorce Reform at the Crossroads edited by Stephen D. Sugarman and Herma Hill Kay, Yale University Press, 1990.

⁷⁹ Eekelaar quoted study made by Gordon and Kammeyer (1980) that women with young children take employment because of financial necessity; Eekelaar, 1984, p.207.

is made up of many jobs with secretarial and clerical areas as the largest components.⁸⁰

Overall the gender stereotyping of occupational roles in Malaysia is remarkably similar to the West. This, according to O'Brien, is attributed to a number of reasons, prominent amongst them being the colonial heritage and the effect of capitalism.⁸¹ In addition, due to socially propagated values as to what is suitable and right for women and men, the effects of female occupational segregation is further reinforced by their assignment to jobs with minimal possibilities of advancement.⁸²

The division of labour based on sex is more than a mere technical division. It helps to enforce domination and create more discrimination. For women, it has both domestic and external effects which are interrelated. The interest placed by society on women's reproductive function has an effect on women entering the labour force on an equal footing with men. So when women do work in the wage sector, the majority are distributed among the most poorly paid and static jobs.⁸³

Due to changes in traditional economic systems and labour relationships, women in Malaysia today especially those in the rural area have been reduced to a position of dependency on men. With their total exclusion from the cash economy in terms of relationships

⁸⁰ See Chapter 4; see also O'Brien, Leslie, *Four Paces Behind: Women's Work in Peninsular Malaysia* in Lenore Manderson, (ed) Women's Work and Women's Role in Economics and Everyday Life in Indonesia, Malaysia and Singapore, Monograph Australian National University, Developments Studies Centre, Canberra, 1980, p.194.

⁸¹ Ibid., p.217.

⁸² See Heyzer, 1986, p.7.

⁸³ Hing Ai Yun, *Women and Work in West Malaysia*, in Women in Malaysia, edited by Hing Ai Yun, et. al. Kuala Lumpur, Pelanduk Publications, 1984, pp.5-17.

with the larger society and with their further isolation in the domestic sphere, women's status has fallen. This has never happened before in traditional economies where women contribute to their share of the economy and participate on equal terms in decision making processes in agriculture and affairs which affect them and the lives of their families.⁸⁴

Ione Fett in her analysis of changes in land tenure in Negeri Sembilan showed that, whilst women collectively own more land today than at any other time this century, individual shares have declined. As a result, women's economic independence is being whittled away and their position within the economy has thus become marginal.⁸⁵

O'Brien's study points out that occupational opportunities are predicated upon several factors such as the type of education received, the gender, and the ethnic status of the recipient. With increasing industrialisation and urbanisation, employment opportunities require specialised skills; education has become the principal means of recruitment to better pay and higher status positions in the labour force.⁸⁶ Even educated women will eventually marry and for this reason sublimate their career aspirations to their marital obligations and motherhood. This results in employment difficulties even for educated women in the modern labour force.

⁸⁴ The colonial administration is blamed for these changes which disrupted the traditional system; Further discussions in this area, see Sundaram, J.K., "Class Formation in Malaya: Capital, The State and Urban Development" Ph.D Thesis, Harvard University, 1977.

⁸⁵ Fett, Ione, Land Ownership in Negeri Sembilan, 1900-1977, Women's Work and Women's Role - Economics and Everyday Life in Indonesia, Malaysia and Singapore, in Lenore Manderson (ed) Women's Work and Women's Role in the Economics And Everyday Life in Indonesia, Malaysia and Singapore, Monograph Australian National University, Development Studies Centre, Canberra, 1980, p.73.

⁸⁶ O'Brien, 1981, p.194.

As expectations regarding standards of living rise and as decent living conditions come to require two incomes, more and more mothers of young children work because of economic pressures. As a consequence, working women in Malaysia, as in all other industrialised countries, have the problem of juggling home and family roles with work outside the home. Research indicates that in poverty groups, women tend to work longer hours and have less leisure than men. Even with the long hours spent in production, the extent of women's role in reproduction does not decrease, resulting in a double burden for them. Unlike women in the better-off classes, women in poverty groups tend not to trade off between child care and income generating work. They cannot afford to resign because their income helps to cover the family expenses. This is especially so in urban centres with high cost of living such as Kuala Lumpur. If these women resign and want to resume employment later, they face another setback as they will lose out in terms of seniority. In addition, the condition of women in the poverty group according to Buvinic is different from the condition of men in the sense that the increasing household burden and pressures for income tend to change women's and children's but not necessarily men's use of time, and their work burden.⁸⁷

Faced with the difficulties of trying to coordinate and balance home-life with work, the poor working class women tend to have more marital problems. Azizah Kassim's study showed that divorce rates are highest amongst the poor working class families, as contrasted with the more educated and wealthier Malay families in Petaling Jaya. There could be other variables influencing divorce trends. Nevertheless, the correlation between poor working class women and high divorce rates

⁸⁷ Buvinic Mayra (eds), et al., Women and Poverty in the Third World, Johns Hopkins University Press, London, 1983 pp.14-31.

is alarming as it would result in grave consequences for both women and children.⁸⁸

These potentially severe consequences for women themselves, for job performance, and for family life generally require public policy intervention. The purpose of such intervention is the development of a social infrastructure supporting these dual responsibilities. The infrastructure would, in fact, make work and parenting responsibilities more possible. Such a support system would be needed even when occupational roles and familial responsibilities are more equitably shared by men⁸⁹ and women.

If there is a real concern about young children, the government should focus on the implementation of policies that would permit a parent the option of staying home and caring for very young children. However, there is no explicit or single public policy regarding the family in Malaysia yet. Since marital disharmony is a major social problem, the government should exercise more responsibility - shared with caring individuals, by promoting independent initiatives for relieving private misery and exercising social concern by the provision of services through statutory and other public agencies to help with marital problems. Family education in schools, beginning with pre-adolescents, should include positive training on the role of nuclear families and the responsibilities of parenthood.

The development of supportive systems for working mothers or a general family support system involves change, reform, and innovation in policy and in programme development. Measures should be taken to

⁸⁸ Kassim, 1984, pp.94-111.

⁸⁹ A psychologist, Dr. Mat Saad Baki believes that a husband should share the many responsibilities of child rearing. As the leader of a family, he can be a figure of authority to the child; New Straits Times, July 1989.

ensure that it is supportive of family living. The government concern at divorce should focus on the internal aspects of family life, with the need to protect individuals.

The responsibility for child rearing should be made a social responsibility shared not only with other members of the family but also with the rest of society. As it is generally known, from time immemorial responsibility for running the home and rearing the children have fallen heavily on the shoulders of women alone. It is only shared whenever convenient with other members of society. This fundamental function of society should not be shouldered by the women but be made a truly social responsibility.⁹⁰

Expansion of child care programmes is high on the list of unmet needs. Malaysians need legislation providing extensive child care programmes. Private and public agencies must also assist to reduce the stress on contemporary marriage by providing quality child care which includes infants, preschool and school-aged children. The growth of child care centres well monitored by the government designed to supplement this familial role would help low-income households, where the earnings of the wife form a significant part of the family income. The problem of child-care for employed women therefore plays an important part in determining the totality of the family income.

In addition, large scale employers should be required to provide high-quality on-site day care for children from infancy to school age.⁹¹ In order to ensure day-care of equal quality for all children, government subsidies should to be used to make up the difference between the cost

⁹⁰ For further details see Abu Bakar, Noor Laily bt, Hashim, Rita Raj, Child Care for Working Women in Women in Malaysia, edited by Hing Ai Yun, et.al, Kuala Lumpur, Pelanduh Publications, 1984 pp.78-93.

⁹¹ Menara Bank Pembangunan has taken the first step towards fulfilling the needs of those working in that building; Sunday Mail, 14th August, 1988.

of high-quality day-care and the amount that parents on lower incomes could be expected to pay.⁹² The availability of day care for children within the workplace would enable mothers to continue to nurse, if they chose, beyond the time of their parental leave.⁹³ Flexibility of working and child-care conditions can allow wage-earning mothers both to breast-feed their infants and to care for the child.⁹⁴ Institutions which have already taken this step are the National University of Malaysia, Institute for Medical Research and the National Population and Family Development Board.⁹⁵

More specifically, a social infrastructure supporting family and employment responsibilities of married women with children should include a variety of different economic measures such as tax benefits, social welfare benefits to child-care, social security benefits (for example special maternity benefits and child-care benefits), improved technology for household tasks, expanded provision of services facilitating housework and household management (workshops, recreational facilities), and housing policies in order to help families with children.⁹⁶

Other possibilities of reducing these problems include alternating the number of working hours for both parents. It should support changes in traditional gender roles by including legislation setting a shorter

⁹² See Okin, 1989, p.176.

⁹³ See Shreve, A. Remaking Motherhood: How Working Mothers Are Shaping Our Children's Future, New York, Fawcett Columbia, 1987, p. 237.

⁹⁴ Fuchs carefully analyses the potential economic and social effects of alternative policies to improve women's economic status, and concludes that "child-centred policies" such as parental leave and subsidized day care are likely to have more positive impact on women's economic position than "labour market policies"; Fuchs Victor, Women's Quest for Economic Equality, Cambridge, Harvard University Press, 1988.

⁹⁵ Malay Mail, August 17, 1988.

⁹⁶ Much of what I suggest here is not new. It has been widely practised in America and Britain.

work day for parents of young children, programme development for pre-schools and child health and also youth programmes.⁹⁷

It must, however, be acknowledged that some of these issues are probably controversial. Although these programmes involve substantial amounts of money, the government should consider their long-term benefits, which would outweigh the cost spent on such programmes. In many cases in America, the cycle of poverty has been broken and children have been able to escape from, or to avoid falling into it through a much better early start in life.⁹⁸

Moreover, the deficiency in the quantity and quality of the existing programmes will result in negative consequences for women and children. The society in general will be affected because of the loss of productive female employment and the potential problems of poorly cared children.⁹⁹

The Government attempts through KEMAS (Community Development Division of the Ministry of National and Rural Development)¹⁰⁰ recognised that the family needs all the support that society, through the Government, can give. However, the programmes should go beyond women's domestic and reproductive roles. Programmes should be designed to reflect the proper functioning of the family in which it could make important contributions to social stability by preventing

⁹⁷ See Kamerman, S.B " Public Policy and the Family - A New Strategy for Women as Wives and Mothers in Women into Wives : The Legal and Economic Impact of Marriage, edited by Chapman, J.R and Gates, M (eds), Beverly Hills, Sage Publications, 1977, pp.195-212.

⁹⁸ Schoor has discussed the ways in which the cycle of disadvantage can be effectively broken, even for those in the poorest circumstances; Schoor, Lisbeth B., Within Our Reach - Breaking the Cycle of Disadvantage. New York, Anchor Press, Double Day, 1988. Chap. 8.

⁹⁹ For a discussion of child care in Malaysia - Issues, Policies, and Programmes, see Abu Bakar, 1984.

¹⁰⁰ KEMAS has concentrated on classes in literacy, handicrafts, pre-school centres and family development classes, *ibid*, p.78.

juvenile delinquency and crime and producing adults who would be well-adjusted to the values of the current social system.

If the government is really concerned about the effects of divorce on women and children, they should not confine their concern to the time period of the actual divorce proceedings. The curative process has to start from pre-divorce period and continue into the post-divorce stage. Many proposals have been suggested and attempted to lessen the rising tide of divorces from sex education to pre-marital counselling services, especially for teenagers whose marriages are notoriously vulnerable.

The Government should also encourage the establishment of adequate pre-marital counselling services and it should be part of a comprehensive programme of family life education. In the pluralistic society where life within marriage is increasingly varied and uncertain, many children are growing up in homes with inadequate parental guidance, or where parental figures change. It is a recognised fact that learning about growing up should not be done by a few sessions with outsiders but within the framework of regular relationships with adults. School programmes which involve teachers would be the best means in educating the young with social education.

Educators and counsellors can support the ideal of marriage and assist people to avoid divorce by expanding programmes which are designed to educate people before and during marriage.¹⁰¹ There should be compulsory courses in every state in Malaysia relating to marriage, family and parenthood as part of the requirement before marriage.¹⁰²

¹⁰¹ Rheinstein, 1972, p.435.

¹⁰² The National Population and Family Development Board and other agencies involved in family development have been urged by Datuk Dr.Zaharah Sulaman, Deputy Minister in the Prime Minister's Department to enhance their roles in helping to resolve family crises; Berita Minggu, July 9, 1989.

The importance of this sort of preparation has been emphasized recently by JAWI by preparing courses for the public.¹⁰³ The courses held by JAWI have made a noticeable impression on the divorce rate in Kuala Lumpur where it is estimated that about a 30 percent decrease has taken place since the courses were made compulsory. The Deputy Minister in the Prime Minister Department, Dato' Dr. Abdul Hamid Othman's statement that more courses regarding family matters will be introduced in future¹⁰⁴ sounds promising, but the implementation of it would mean overcoming the crucial lack of manpower which is normally the case in the Sharia jurisdiction.¹⁰⁵

In an era of experiment, various independent agencies also pioneered courses of preparation for marriage. These have been in response to their experience of meeting in counselling rooms and clinics and interviews of many couples whose difficulties seem to spring from ignorance about aspects of marriage. However, preparation and support are seriously inadequate in the field of education about marriage. Although there are some projects which have been done by churches, voluntary organisations and religious bodies, the approaches to such education are uncoordinated. The best way forward is to expand and improve the present services. The government should set up counselling units similar to those of the State Islamic Affairs Department.¹⁰⁶ Not only is it essential that a marriage counselling service should be provided, it is vitally important that people in the community should know that it exists and that they should be given every opportunity, at

¹⁰³ The courses are part of the requirement before marriage in the Federal Territory of Kuala Lumpur. see Koleksi Persidangan Kursus Perkahwinan dan Kekeluargaan dalam Islam JAWI (Wilayah Persekutuan) 1989.

¹⁰⁴ Utusan Malaysia, September 23, 1992.

¹⁰⁵ See Abdul Rahman, Sheikh Ghazali, Perlaksanaan, Amalan dan Permasalahan Undang-Undang Keluarga Islam - Pengalaman Wilayah Persekutuan, Kursus Perkahwinan dan Kekeluargaan dalam Islam. Kuala Lumpur, JAWI (Wilayah Persekutuan) 1989.

¹⁰⁶ Star, August 19, 1991.

the earliest stage, to seek counselling help on an entirely voluntary basis.¹⁰⁷

The provision of pre-marital counselling should not be the responsibility of the court. The location and detailed organization of such services must primarily be determined by local conditions. There should be a higher standard of training and skill in marriage counselling. This will depend a great deal on financial backing from the government.

The system in Britain, under which the service operates under the control of a voluntary organization which receives financial support from the government, has been found to work well. At the same time, the operation of private organizations using paid workers and supported by community funds, as the United States, Australia and in Canada, has also been shown to be effective.¹⁰⁸

It is a widely held belief that a tightening up of the divorce laws is the best way to counteract disintegration of family life. This view is based on two assumptions: first, that the incidence of divorce can be reduced by making divorce more difficult; secondly, that the incidence of divorce is a reliable indication of the stability or instability of family life. Both assumptions are extremely doubtful. The contention that "easy divorce breeds marriage breakdown" is entirely unproven. All the evidence collected by experts show that there is no simple correlation between the divorce laws and the incidence of marriage breakdown.¹⁰⁹ Rheinstein was absolutely correct when he suggested that restrictive

¹⁰⁷ Sanctuary, G. Marriage under Stress- A Comparative Study of Marriage Conciliation, London, George Allen and Unwin Ltd., 1968, pp.71-89.

¹⁰⁸ Finlay, 1989, p.590.

¹⁰⁹ Rheinstein, 1972, p. 94.

divorce law was an inappropriate method of controlling the upswing of divorce.¹¹⁰

The divorce rate is not a reliable indication of the stability or instability of family life. This is shown by the experience of those countries that do not permit divorce. There were still many broken marriages, deserted wives and children, kept mistresses, desertion and illegitimacy. In America, when the colonial and state governments denied or restricted divorce, serious problems became apparent. Adultery, abuse, separation and desertion were frequent occurrences among the distraught spouses. They sought annulments for spurious reasons, obtained divorces in more permissive jurisdictions, and subverted the intent of restrained divorce laws by fabricating grounds that fell within legal limitation.¹¹¹

On the other hand in England, the Morton Commission feared that facilities for easier divorce would threaten the stability of marriage. They thought that there is a tendency to take the duties and responsibilities of marriage less seriously than formerly and an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to go wrong, even that marital disharmony is really due to the acceptance of false standards of value and behaviour in marriage.¹¹²

While it is doubtful whether “easy divorce breeds marriage breakdown”, it is certain that difficult divorce breeds immorality. In the words of Henry H. Foster, Jr:

¹¹⁰ Ibid.

¹¹¹ See Phillips, 1988, pp 528-533.

¹¹² Para 47, p 329.

*"It seems relatively certain that a repressive law of divorce engenders a higher incidence of prostitution, concubinage, the mistress system, and illegitimacy."*¹¹³

Restrictive marriage law in Malaysia has also brought an adverse effect. The present regulation in Kuala Lumpur makes marriage more difficult by insisting both parties to the marriage to go through compulsory interviews to ascertain their knowledge on the rights and responsibilities of marriage.¹¹⁴ Although this is commendable, there are several negative side effects if it is not properly administered. First, there are many instances of solemnisation occurring outside jurisdiction, popularly known as "kahwin lari".¹¹⁵ This would result in more problems if it is done illegally by those who are not qualified to do so.¹¹⁶

Investigation done by several officials from Majlis Agama Kedah (Kedah Islamic Council) revealed that unauthorised people were involved in solemnising marriages of couples who sought their help. Due to several problems, including the family's rejection, many couples resorted to having their marriage solemnised in Thailand and Indonesia. Married men wishing to take another wife are also known

¹¹³ (1971-1972) 39 Chi. L.R. at 877.

¹¹⁴ See Siraj, 1989, p.5.

¹¹⁵ The number of "kahwin lari" (elopement) cases are mostly undetected. It surfaces in cases where the wali (guardian) makes a report to the Religious Department or the parties themselves applied to validate their marriage certificate or in khalwat (close proximity cases. in Kelantan, it is recorded that there are only 36 cases in 1984, and 112 cases in 1986. In Kedah, in 1984 only 4 cases, and 5 in 1985. However, according to the Deputy Chief Q di of Narathiwat (South Thailand), they have been processing 1000 application from Malaysian every year; Utusan Malaysia, January 12, 1985.

¹¹⁶ Most of the time, the women will be at the losing end. on effects of "kahwin lari" (elopement) see Yaakob, Md. Akhir bin, and Md.Nor, Siti Zalkhah bt., Beberapa Aspek Mengenai Enakmen Keluarga Islam di Malaysia, Petaling Jaya, Al Rahmaniah, 1989, pp.60-1.

to have gone to Thailand to get married to escape going through set procedures.¹¹⁷

To validate a marriage solemnised outside jurisdiction, the man need only pay a small fine.¹¹⁸ In the case of married man, although the permission of the first wife is needed, this will not pose a great problem as the wife will normally concede for the sake of the children. It is considered virtuous under Malay custom for her to be patient. If the law is really concerned about protecting women, the penalty for contravention of this condition should be more severe so as to act as deterrent for these men.

¹¹⁷ Utusan Malaysia, October 10, 1992.

¹¹⁸ See IFLA, section 124.

CHAPTER 6

TOWARDS REFORM OF DIVORCE LAW IN MALAYSIA

6.1 REFORM OF ISLAMIC LAW ON DIVORCE

In Malaysia, family law is one area of law where Muslims are subject to a set of rules that are different from those which govern the non-Muslims.¹ Muslim family law has always been something of a mystery to the average Muslim in Malaysia. Its primary sources, the Qur'an and the Sunnah, are only understood by those who study them. The religious education of the Muslim individual in Malaysia concentrates on the rituals and the basic principles relating to the faith.² In almost all cases, there is a great deal of ignorance on the part of the people as to how the law operates.³ Parties seeking redress in the Sharia Courts depended on the qadhi for the interpretation and the implementation of Muslim law. It is not surprising therefore to find that there were numerous complaints about maladministration particularly from women who felt that they were being discriminated against by the court officials.⁴ This complaint seems to be in line with what has been suggested by Muhammad Abduh, that the Muslims have

¹ Compared to other Muslim countries, the Shafi'i school of thought is prevalent as well as some ancient customs known as the 'adat' have survived and are adhered to along with the law of Islam. The system of family law incorporating a dominant Islamic and minor customary element, applied to Muslims by the courts in Malaysia is described by some authors as the Malayo-Islamic Law, see Gordon, S; Preface in Ibrahim, 1965, p.2. For further discussions on this point see Chapter 1 pp 10-3.

² Siraj, 1987.

³ Personal Conversation with Ustaz Abdul Aziz Mashuri, Judge of the Sharia Court in August, 1993.

⁴ Siraj, 1983.

erred in the education and training of women. Not teaching them about their rights has led to the failure of them understanding the true nature of the teachings of Islam.⁵

Generally speaking, it is possible to lay the blame on prevailing social conditions - culture, custom, attitudes and ignorance of legal rights and obligations. More specifically, it is clear that the weakness in the system lies in the administration machinery - the structure, personnel, powers and procedures of the Sharia Courts.⁶

Over the years, various efforts have been made to overcome these problems. Reform in this regard is more difficult, as the matter falls within the jurisdiction of the states and the prerogatives of the Sultans,⁷ but a Committee has been set up to study and examine the existing laws and study the feasibility of reforms, which, while keeping the Islamic law in line with the principles laid down in the Qur'an and Sunnah, will at the same time have regard for modern thinking and also the changes affected in other Muslim countries.⁸ The effort which began more than a decade ago is beginning to bear fruit. It has introduced some changes designed to meet current needs and to overcome pressing problems. The last few years have seen developments that augur well for the administration of Muslim family law in Malaysia.⁹

Some of the problems encountered in family law in Malaysia today lie in the constitutional division of the jurisdiction between the Civil

⁵ See Esposito, 1982, p.50.

⁶ See Sira , 1987.

⁷ See Chapter 3.

⁸ See Ibrahim, 1984, p.11.

⁹ Siraj, 1987.

Court and the Sharia Court. Recent changes to improve the administration of Islamic law has brought new impetus of Islamic reform in this multi racial country. The amendment of Article 121 of the Federal Constitution,¹⁰ in 1988 is a positive move towards elevating the position of the Sharia Courts. The new Article 121 (1A) provides that the courts referred to in Clause (1) of Article 121 (the High Courts of Malaya) should have no jurisdiction in respect of any matter within the jurisdiction of the Sharia Courts.

The important effect of the amendment is to avoid for the future any conflict between the decisions of the Sharia Courts and the Civil Courts which had occurred in a number of cases before.¹¹ It frees the Sharia Court from the Civil Court, thus lifting the standard of the Sharia Court after long neglect during the British rule.¹² Although this seems to be the result, Ahmad Ibrahim suggests that there is a need to amend or repeal other laws as well.¹³

Recently the Supreme Court decided in the case of *Muhd Habibullah v Faridah*,¹⁴ that the Civil Court cannot interfere with matters which fall under the jurisdiction of the Sharia Court. This important decision has brought into legal effect the long-standing assertion that Islam is the religion of the Federation.¹⁵

¹⁰ Constitution (Amendment) Act 1988.

¹¹ See *Myriam v Ariff* [1971] 1 M.L.J 265; see also *Roberts v Umi Kalthom* [1966] 1 M.L.J 163; see also *Commissioner for Religious Affairs, Trengganu v Tengku Mariam* [1970] 1 M.L.J 222; see also Ibrahim, Ahmad bin Mohamed, *The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law*, [1989] 2 M.L.J xvii-cxvi.

¹² Ibrahim, 1989, xvii.

¹³ See Ibrahim, Ahmad bin Mohamed, *The Sharia Court in Malaysia*, *Eighth Malaysian Law Conference*, Kuala Lumpur, November 14-16, 1985.

¹⁴ [1992] 2 M.L.J 264.

¹⁵ Ibrahim, Ahmad bin Mohamed, *Recent Developments of Islamic Family Law in Malaysia*, paper read at School of Oriental and African Studies (SOAS), London, January 1993.

It is also necessary to free the Sharia Courts from any control by the “Majlis Agama Islam” in each state. Recently in Kuala Lumpur, the Sharia Court has been administered directly by the Prime Minister’s Department.¹⁶ There is also a three tier court system in the Federal Territory - The Sharia Subordinate Court, the Sharia High Court and the Sharia Court of Appeal.¹⁷ Steps have also been taken to improve the professional competence of the judges in the Sharia Courts by the institution of a course for the Diploma in Sharia Law and Practice at the International Islamic University. There is a further proposal to expand the course to cater the need for more qualified and well-trained Sharia judges and practitioners.¹⁸

The amendment discussed is just one way of improving the administration of the law. Introducing legislation alone is not enough to improve the administration of Muslim family law. Far more important is the restructuring of the courts, the training of the personnel, the upgrading of the position and powers of the qadhi or Sharia court judge¹⁹ and the improvement of facilities.

Another matter that should be considered is the procedure of the Sharia Courts and the law of evidence to be followed. Not enough guidance was given to the judges of the Sharia Court and in most cases the judges of the Sharia Court in Kuala Lumpur referred to the Rules of the Subordinate Court and Rules of High Court under the civil

¹⁶ Personal conversation with Ustaz Mohamed bin Ibrahim, Registrar, Sharia Court, Federal Territory of Kuala Lumpur, in March 1992.

¹⁷ See Administration of Muslim Law legislation for the Federal Territory of Kuala Lumpur.

¹⁸ STAR, April 21, 1988.

¹⁹ Qadhi draws a salary which does not commensurate with their position and responsibilities; Utusan Malaysia, August 3, 1989.

system.²⁰ According to a Supreme Court judge, for the purpose of administering justice, procedure is very important, therefore it is imperative that the Technical Committee gives due emphasis in this area. He gave the example of Egypt, where the implementation of the Personal Status under the Egyptian law was followed by the institution of a Code of Procedure, with the exception of certain instances for which special rules may be found in the Plan for the Regulation of the Sharia Court of 1931.²¹

Kedah enacted the Islamic Civil Procedure Enactment of 1979 in 1984²² and Kelantan enacted the Sharia Civil Procedure Enactment in 1984.²³ Both these enactments appear to be based on the Subordinate Court Rules and the Enactments have been followed with amendments by the Committee set up in the Islamic Centre to draft a Sharia Civil Code. The draft was followed in Sarawak,²⁴ and in Selangor.²⁵ However, according to Ahmad Ibrahim, some defects have been found in the laws especially with regard to trials in the Sharia Courts and it is therefore necessary to have a new set of rules based on the Rules of the High Court, 1980.²⁶

²⁰ Personal Conversation with Tan Sri Azmi Kamaruddin and Ustaz Mohammad Ibrahim, Registrar of Sharia Court in August 1993.

²¹ Ibid.

²² No.2 of 1984.

²³ No.5 of 1984.

²⁴ Sharia Civil Procedure Ordinance, 1991; No.7 of 1991.

²⁵ No.7 of 1991.

²⁶ Ibrahim, Ahmad bin Mohamed, Islamic Law in Malaysia since 1972, in Developments in Malaysian law - Essays to Commemorate the Twentieth Anniversary of the Faculty of Law, University of Malaya, Kuala Lumpur, Pelanduk Publication, 1992, p.316.

These improvements are in the process of being carried out and it is hoped that it will be achieved in the near future.²⁷ But it should also be recognised many problems stemming from the apparent inadequacies and shortcomings are the consequence not of the fact that reforms have been effected, but of the fact that some have not yet gone far enough.²⁸

6.2 LEGAL REFORMS TO PROTECT WOMEN

The religious and social equality of women with men is a theme well-documented in the Qur'an. Although men and women are biologically different, they stand equal before Allah. They have the same rights and duties which come from the practice of religion. For example, like men, women are also expected to render service (*ibadat*) to Allah.²⁹

Equality is specifically affirmed in the area of divorce by the Qur'an and the Sunnah. According to the Qur'an,

*"... women shall have rights similar to the rights against them, according to what is equitable."*³⁰

While this verse recognizes equal rights of divorce for women, no Quranic verse supports the licence of divorce presently awarded to males.

In spite of changes in legislation in Kuala Lumpur to protect Muslim wives, there is a widespread recognition of the need to overhaul

²⁷ Siraj, 1989.

²⁸ Personal conversation with Professor Tan Sri Datuk Ahmad Ibrahim, Head of Technical Committee for Civil and Islamic law, January 1993.

²⁹ See Al Qur'an, Surah Al Imran: 194; see also Surah An Nisa': 7; see also Surah An Nahl: 97.

³⁰ Al Qur'an, Surah Al Baqarah :228.

further the legal machinery involved in the granting of divorce decrees. This study has shown that sex ratio of petitioners for divorce was dependent on the terms of legislation. Predominance of women initiating divorce in Kuala Lumpur reflects the fact that the LRA gave non-Muslim women equal access to divorce.³¹ By contrast, the IFLA by a more complicated process of divorce for Muslim women has effectively changed the sex ratio,³² although there are more women compared to men going to Unit Perunding dan Pembangunan Keluarga for marital complaints.³³

Variables other than legislation also come into play. Social pressure, reflecting prevalent attitudes toward divorce, must have played a role in encouraging or deterring men and women from filing for divorce. These different attitudes also result from the way divorce per se is perceived by Muslims.³⁴ Several studies have shown that lack of judicial supervision and ignorance of Muslim wives about their rights have also contributed to capricious divorce.³⁵

To counter Muslim men's abuse of their right of repudiation (talaq), reforms were introduced that restricted their exercise of talaq, based upon the Quran. A strong case can be made for establishing equal divorce rights by taking away the male's extra-judicial rights of repudiation, as well as equalizing the option to exercise divorce by

³¹ See Chapter 4, Table 4.01.

³² See Chapter 4, Table 4.02.

³³ Laporan Unit Perunding dan Pembangunan Keluarga, 1990-1992, Jabatan Agama Wilayah Persekutuan, 1992.

³⁴ Hassan, 1986, see also Mahmood Tahir, The Muslim Law of India, 2nd ed. Allahabad, The Law Book Co, 1982 p.95.

³⁵ See Menski, Werner F, The Reform of Islamic Family Law and a Uniform Civil Code for India in Mallat, Chibli and Connors, Jane (eds) in Islamic Family Law, London, Graham and Trotman, 1990 p.280. See also Othman, Junaidah bt. Talak Bain; Konsep dan Perlaksanaannya di Wilayah Persekutuan, Academic Exercise, Islamic Academy, University of Malaya, 1990, p. 134; see also Hassan, 1984, p. 238.

requiring that all divorces be subject to the courts as has been done in a number of Muslim countries.³⁶ The Qur'an and Sunnah, the twofold support of the traditionally acknowledged material sources of Islamic law, provide an Islamic rationale for legal reform in divorce. As Shaykh Mahmud Shaltout said:

*"Islam has not allowed divorce in order that a man may use the threat of divorce as a sword which he waves in the woman's life. On the contrary, Islam allows divorce as a bitter medicine to be used by a man to cure a situation or get rid of an association that defies remedy. Islam holds that if a man trespasses on a woman's rights by divorcing her without cause, he is abusing his power and is, therefore, liable to be held responsible for committing a breach of duty. Islamic courts are allowed to censure the man for misusing the right of divorce. The law of Islam permits the woman to ask the courts of law to look into her case...the court is authorised to order her to be divorced if she is justified in her contentions and her husband refuses to divorce her."*³⁷

Whereas traditional Islamic law gives a Muslim male the unilateral right of divorce, modern family law legislation subordinates his exercise of this right to the jurisdiction of the courts.³⁸ This has been a very contested area of reform. However, in all those jurisdictions, failure to comply to the law does not render the divorce invalid but simply illicit. The only exception to this process is Tunisia which declared an extra-judicial divorce invalid.³⁹ The Tunisian law puts the wife in the matter of divorce on an exactly equal footing, in theory with the husband.

³⁶ In other countries like Turkey (1951), Tunisia (1956), Syria (1953), Iran (1967), Pakistan (1961), Morocco (1958), and Iraq (1979), a husband desiring to divorce his wife has to apply to a court of law. The laws of these countries are, however, not uniform with regard to the circumstances in which the court can honour the husband's wish to dissolve his marriage.

³⁷ Shaltout, Mahmud, Islamic Beliefs and Code of Laws, in Islam -The Straight Path: Islam Interpreted by Muslims, edited by K.W Morgan, New York, Ronald Press, 1958, pp. 122-3.

³⁸ See Esposito, 1982, pp.93-4.

³⁹ See Tunisian Law of Personal Status, 1957, see also Esposito, 1982, p.94, see also Coulson, 1969, p. 48.

According to Coulson, for this revolutionary step, it is claimed that the Qur'an itself provided the necessary authority, particularly Surah Al Baqarah: 228.⁴⁰

In Iran, it is also required that divorce be sanctioned only by civil courts, with the aim of putting an end to the common practice of men easily divorcing their wives against their wishes.⁴¹ Shahla Sherkat, editor of Zanan (women) magazine said that men are often able to divorce their wives very easily. One of the reasons for this is that a man in the workplace is more likely to meet the Head of a divorce bureau, who is likely to be more sympathetic to the man than to the woman. With the present law, it would not be that easy as the new law states that officials who register a divorce without a civil court ruling will be dismissed.⁴²

In most Muslim countries, a husband may choose to ignore the reform laws and exercise his traditional unlimited right of divorce, at the risk of incurring imprisonment, a court fine or the payment of compensation to his ex-wife. Reform legislation, therefore, has not invalidated the traditional law but simply aimed to restrict it in certain areas.⁴³

The IFLA provisions on talaq and ruju' appear to have gone a step further than other measures in the Arab world with a few exceptions in certain countries such as Tunisia, Iran and Somalia which have provided for similar restrictive provisions with certain local variations.

⁴⁰ "And women have rights similar to those that the men have over them."

⁴¹ In Iran, under Article 8 of the Family Protection Law of 1967, a certificate of "impossibility of reconciliation" between the spouses must be obtained from the court, before a divorce is effected by a husband.

⁴² The Malay Mail, December 9, 1992.

⁴³ Esposito, 1982, p.94.

The effect of the said provisions is that the husband no longer has an arbitrary power to divorce his wife.⁴⁴ Section 124 of the Act furthermore provides that any man who divorces his wife by the pronouncement of talaq in any form outside the court and without the consent of the court commits an offence and shall be punished with fine or imprisonment.⁴⁵

Ustaz Abdullah Abu Bakar contended that the main question which has to be considered in determining an application to divorce is whether such divorce can be regarded as valid or otherwise by Hukum Shara' and in line with the existing law in this country. If the divorce is valid according to the Hukum Shara' and in line with the existing law, then there is no problem. But the question which usually arises in the case where an application for divorce is in line with Hukum Shara' but not in compliance with the existing law. He believes that if such non-compliance with the existing law does not concern the fundamental elements, the court should recognise the validity of the divorce. However, in any case, the court should declare a marriage or dissolution void if it took place not in compliance with existing law and in conflict with the Hukum Shara'.⁴⁶

It is still common practice amongst men in Kuala Lumpur despite having the said provision, to pronounce divorce without the permission of the court.⁴⁷ They tend to ignore the provision and prefer to do it privately without interference from third parties and are willing to pay

⁴⁴ IFLA, section 47.

⁴⁵ Datuk Abdul Hamid Othman, The Director General of the Islamic Religious Affairs Division, states that before the laws were tightened, many husbands who divorced their wives had refused to provide alimony and maintenance to their former wives; STAR, April 21, 1988.

⁴⁶ Personal Conversation with Ustaz Abdullah Abu Bakar, Associate Professor, International Islamic University, Petaling Jaya, in March, 1992.

⁴⁷ See Chapter 4 Table 4.37.

the fines for doing so. The Registrar of the Sharia Court stated that since the enforcement of the IFLA, an increase of 80 percent of the court's revenue came from men who have contravened the said provision.⁴⁸ The figure of 80 percent clearly shows that the provision has not been successful in controlling the abuse of divorce in the Muslim community in Kuala Lumpur. Ustaz Abdullah questions the practicality of the said provision in the Malay-Muslim⁴⁹ community and suggests that the rights to divorce remain with the husband but are controlled by other means, that is to provide men with more religious knowledge with emphasis on their responsibilities as head of the family.⁵⁰ According to a report by the Lembaga Perancang dan Pembangunan Keluarga Malaysia, besides transferring the right of divorce from the Muslim husband to the court, education has also been proven successful in decreasing capricious divorce in rural areas.⁵¹

The Technical Committee for Sharia and Civil law has suggested that a provision be made for the registration of such divorces but subject to a penalty.⁵² Mehrun Siraj stated that the fines for non-compliance were relatively light (this has been true in most Muslim countries), instead she suggested imprisonment to deter other men from committing the same offence.⁵³ However, this view has been rejected by the Registrar of the Sharia Court. He is of the opinion that imprisonment would not solve the problem, but it would aggravate the

⁴⁸ See note 16.

⁴⁹ The Malay Muslim connotes a society which is more influenced by adat (custom) than by religion.

⁵⁰ See note 49

⁵¹ AZIZ, Datin Norlaily bt., et. al, *Kajian Tentang Perceraian Dalam Masyarakat Islam di Semenanjung Malaysia*, (Trengganu, Kelantan, Kedah, Perlis, Negeri Sembilan dan Johor) Report by Lembaga Perancang Keluarga Negara Malaysia, 1978.

⁵² Personal conversation with Haji Idris and Sheikh Ghazali Abdul Rahman, members of the Technical Committee of Sharia and Civil law, January 1993.

⁵³ Siraj, 1987.

situation further as the men would not be able to maintain the family during imprisonment.⁵⁴

If a husband wishes to ruju' with his divorced wife the recohabitation must take place by mutual consent.⁵⁵ It cannot take place unless the fact of divorce has been disclosed by the husband to the wife.⁵⁶ Therefore, in cases where the divorce has been pronounced without the court's consent the husband cannot recohabit with his wife without disclosing the fact of the divorce to her. The wife in exercising her rights can refuse the ruju' on grounds allowed by the Hukum Shara'. In this circumstances, therefore it is incumbent on the court to appoint a reconciliatory committee to look over the case.⁵⁷ This section is entrenched by section 131(1) which provides that any man having lawfully divorced his wife, and resumes cohabitation with her without having pronounced a lawful ruju' commits an offence and shall be punishable under the Act. These sections on talaq and ruju' have categorically abolished traditional Shafi'i law and definitely deprived a husband of his absolute rights of unilateral repudiation and ruju'.

As the Qur'an's primary legislative concern was the improvement of women's status through the establishment and protection of her rights, the main motivation behind modern Malaysian family reform should be the uplifting of women's position. Malaysia could follow the example of Iran in protecting women's rights. Iran's clerical leaders have adopted a new divorce law granting unprecedented rights to women. It

⁵⁴ See note 16.

⁵⁵ IFLA, section 51 2).

⁵⁶ IFLA, section 51 7).

⁵⁷ IFLA, section 51 8).

allows a woman to seek compensation through the courts for housework her husband ordered her to do during the marriage.⁵⁸

In the Indian sub-continent, and all those countries which were formerly under British rule, the changes have been effected through judicial decisions.⁵⁹ It was by a series of judicial decisions that Muslim wives in Pakistan have been given the right to a judicial divorce on grounds which amount to incompatibility of temperament or breakdown of marriage. In the case of *Khurshid Bibi v Mohamed Amin*,⁶⁰ the Supreme Court, the highest judicial authority in Pakistan, declared that Khurshid Bibi was entitled to a divorce upon returning her dower to her husband. Thus, while the right of the man to repudiate his wife has remained unaltered, the granting of a unilateral khul' divorce to a woman in case of incompatibility represents significant headway in achieving a balance of rights.⁶¹

Unfortunately, reforms in this area have had little effect in Malaysia. According to the Shafi'i school of thought, it is not compulsory for her husband to accept the compensation offered by his wife and give her the divorce. His consent is, therefore, necessary and he cannot be forced to give a khulu' divorce.⁶² With the adoption of Maliki schools of thought on the grounds for divorce in the IFLA,⁶³ there is no

⁵⁸ The Malay Mail, December, 9, 1992.

⁵⁹ For further details on use of judicial decisions to reform the law, see Anderson, 1976, p.78.

⁶⁰ (1967) P.L.D, S.C 97.

⁶¹ For further details see Anderson, 1976, pp.80-2.

⁶² See Taylor, E.N., "Mohammedan Divorce by Khula" (1948) J.M.B.R.A.S., Vol 21. Part 2; see also Yaakob, Mohd. Akhir bin, Khulu' dan Perlaksanaannya di Malaysia, (1983) J.H., 131.

⁶³ See IFLA Section 52.

reason why the same process should not be used in cases of khulu' so as to give equal rights to women as elucidated in the Qur'an.⁶⁴

Nevertheless, despite the obvious concern of the IFLA for the position of the wife, the fact remained that the husband's established powers could not be curtailed without his free consent in khulu'. According to Coulson, reforms in the Middle East, by the use of administrative regulations had succeeded in controlling the abuse of women's rights; but the husband's basic rights of polygamy and repudiation remained secure. Whatever restrictions social and economic factors might impose upon their exercise, their mere existence under the law was sufficient to constitute a formidable obstacle to a woman's real emancipation.⁶⁵

It is obviously insufficient to attach blame to the judiciary for the distortions without suggesting means whereby Muslim wives would be better protected.⁶⁶ Since education has been proved to have a significant negative effect on divorce in Peninsular Malaysia,⁶⁷ the right way forward would be to further educate women giving emphasis on religious matters especially those in the rural areas. A legal literacy campaign must be launched to educate women on laws that affect their lives.

6.3 GROUNDS FOR DIVORCE UNDER ISLAMIC LAW

Legislation has been passed in several Muslim countries to correct abuses⁶⁸ in Muslim society by granting women the additional Maliki

⁶⁴ See note 42.

⁶⁵ See Coulson, A History of Islamic Law, Edinburgh, University Press, 1964, pp.208-217.

⁶⁶ See Menski, 1990, p.280.

⁶⁷ See, Lee, Kok Huat, et.al., 1985.

⁶⁸ For further details of these abuses see Anderson, 1976, p.39.

grounds for divorce.⁶⁹ The juristic basis for this change was a doctrine of takhayyur or selection suggested by Tahtawi as a reform method to suit the need of modern times. This principle is an accepted method of jurisprudence according to which a Muslim in a specific situation is permitted to go outside his own personal school of law and follow the interpretation from the remaining three Sunni schools.⁷⁰

The principle of takhayyur was adopted and used extensively by later modernists. This principle has been progressively expanded in its scope. In one country after another it has proved to be the major expedient in legislation introduced to effect reforms in family law.⁷¹ It has been adopted in the Ottoman Family Rights Act which is the law applicable to the Sunni Muslims of the Lebanon, followed by the laws of Syria, Morocco, Iraq, Jordan, and Algeria.⁷²

The legislators in enacting the IFLA besides adopting a collection of various legislative enactments of the Middle East and Pakistan, used this principle in departing from Shafi'i law⁷³ in adopting the more liberal and equitable teaching of the Maliki school in giving Muslim women extended grounds for divorce.⁷⁴

⁶⁹ "The Malikis (who were the most liberal in this regard) allowed a wife to ground a petition on the husband's cruelty, his refusal or inability to maintain her, his desertion, or his affliction with some serious ailment which made the continuous of the marriage harmful to the wife"; Coulson, N.J., A History of Islamic Law, Edinburgh University Press, 1964, p. 185.

⁷⁰ Ibid., p.185; see also Anderson, 1976, p.51-2 see also Esposito, 1980, p.58.

⁷¹ Anderson, 1976, pp.51-8.

⁷² See Nasir, 1990, p.81.

⁷³ Buang, Ahmad Hidayat bin, Islamic Family Law: Reform in Malaysia with Special Reference to the Islamic Family Law (Federal Territory) Act 1984, Paper read at LL.M Seminar, School of Oriental and African Studies, June 1989.

⁷⁴ IFLA, section 52.

There is also a provision to extend the interpretation to other schools of thought, as long as it is considered valid for the dissolution of marriage by fasakh in accordance with the Hukum Shara'.⁷⁵ It is noteworthy that the definition of Hukum Shara' as given in section 2, refers to the laws of Islam in any of its recognised sects or schools. The IFLA in this matter seems to have followed the original version of the draft Bill presented by the Federal Council for Islamic religion to the Council of Rulers.⁷⁶ Hukum Shara' in the draft Bill meant the laws accepted by the Hanafi, Maliki, Shafi'i, Hanbali and Shi'i (Zaidiyya and Ja'fariyya) schools.⁷⁷ The said provision could be considered radical as it gives the qadhi power to use his own ijtihad.⁷⁸

However, the provision in its actual practice has rarely been used by Muslim women in Kuala Lumpur because of its complexity.⁷⁹ In most cases, the man will initiate the divorce proceedings if the wife insists on a divorce.⁸⁰ And if the man refuses, the Unit Perunding dan Pembangunan Keluarga will try to overcome this complication by advising the husband to pronounce talaq. If the husband after being advised refuses to initiate the proceedings, only then will the wife petition for a divorce.⁸¹ A further device formulated by the law to safeguard the wife's position was that of ta'liq. This study also shows

⁷⁵ See IFLA, section 52(1).

⁷⁶ Buang, 1989, p.20.

⁷⁷ Ibrahim, Ahmad bin Mohamed, Islamic Law, Survey of Malaysian Law, 1985, p. 243.

⁷⁸ For further details on ijtihad, see Coulson, 1964, pp.60-129, see also Anderson, 1976, p.52.

⁷⁹ Personal conversations with Sharia' lawyers in the Federal Territory in December, 1992; see Appendix IV.

⁸⁰ Under the Malay custom, a man is considered less than a gentlemen if he does not divorce his wife if she insist on it.

⁸¹ Personal conversation with Ustaz Wan Sulaiman, Head of the Unit Perunding dan Pembangunan Keluarga, JAWI, April 1992.

that due to its less complicated process (as compared to fasakh), most of the wives will resort to it.⁸²

To protect the wife further, there is a provision in Egyptian and Iraqi family law, that the wife must be informed if her husband takes another wife, and she has the right to sue for divorce if she disapproves of the marriage.⁸³ Furthermore, if a husband conceals from his new wife that he is already married, this too will constitute grounds for divorce by the new wife.⁸⁴ Under the Moroccan law, a woman has the right to stipulate in the contract of marriage that her husband should not take another wife, and if the husband does not comply with this obligation, the wife retains the right to seek dissolution of the marriage.⁸⁵ The Iranian Family Protection Act of 1967, which was then consolidated into the Family law of 1975 (now abolished by the new regime since 1979) provided another approach to protect the rights of a wife in a polygamous marriage. In addition to requiring that a husband obtain judicial permission based upon proof of financial competence and equal treatment, Article 2 required that all marriage contracts include an irrevocable power of attorney to enable a wife to divorce her husband if he should take another wife without her consent.⁸⁶ Iran has mandated what was made optional in other Muslim countries.⁸⁷ However, the Tunisian law of 1957 pursues

⁸² See Table 3.29.

⁸³ Art.11a of Law 100, 1985, Egypt; see also Iraqi family law, 1959. see also El Alami, Dawoud S., The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco, Graham and Trotman, 1992, p.131.

⁸⁴ See Article 45 of Iraqi Family Law; see also Esposito, 1980, p. 61.

⁸⁵ See Book 1, Article 31, Moroccan Personal Status Code, 1957.

⁸⁶ Article 2, Family Protection Act of Iran, 1967.

⁸⁷ Esposito, 1982, p. 92-4.

this notion to its extreme limit.⁸⁸ It prohibited polygamy⁸⁹ on the juristic basis, that the present day circumstances make it impossible for the Quranic condition of equal treatment of co-wives⁹⁰ to be properly fulfilled.⁹¹

The IFLA has not taken a great step forward in restricting polygamy, giving special precedence to the first wife, and the right to seek divorce where harm was caused to her by the second marriage. The only control over polygamy is done through the Sharia Court where any husband wishing to take on a second wife or subsequent wives must obtain the written consent of a Sharia judge.⁹² Consent will be granted only if the court is satisfied that:

- (a) the proposed marriage is just and necessary under the circumstances. The circumstances which the Court will consider include among others, sterility, physical infirmity, physical unfitness for conjugal relations, or insanity on the part of the existing wife or wives.
- (b) that the applicant has the means to support all his wives and dependents including the woman he proposes to marry and her dependents;
- (c) that the applicant will be able to treat all his wives equally;

⁸⁸ Tahir Mahmood categorize this reform as "extra-doctrinal" in which the reformers are considered as going beyond the limits of Islamic juristic opinion. Exercise of the power of reinterpretation of the basic legal principles (ijtihad) was, expressly or impliedly, made as the basis of such exceptional reform; Mahmood, 1992, p.269.

⁸⁹ Article 18, The Law of Personal Status of Tunisia, 1956.

⁹⁰ It is evident from the Al Qur'an, Surah An Nisa':3 that polygamy is limited to a maximum number of four, provided that the man could treat the wives with equality.

⁹¹ See Coulson, 1964, p. 210.

⁹² IFLA, section 23(1).

- (d) that the proposed marriage would not cause darar shar'i⁹³ to the existing wife or wives;
- (e) that the proposed marriage would not directly or indirectly lower the standard of living that the existing wife or wives and dependants had been enjoying and would enjoy were the marriage not to take place.⁹⁴

A person who contracts a marriage in contravention of this section is considered to have committed an offence under the IFLA punishable with a fine of 1,000 Malaysian ringgit and/or imprisonment not exceeding six months.⁹⁵ However, the present wife or wives are not entitled to use her husband's contravention of the law as grounds for divorce.

If this provision is strictly enforced it would curtail the husband's existing right in polygamy and in turn would protect the first wife's interests and other women against the abuse of polygamy. Intensive research in this area is therefore needed to see how far the existing provision have come to the rescue of Muslim women in Kuala Lumpur.

In Pakistan, the Dissolution of Marriages Act of 1939, although supposedly following Maliki law, had in several important instances ignored Maliki doctrine concerning the grounds for divorce. Unlike similar Egyptian legislation, which generally adhered to Maliki doctrine concerning grounds for divorce, the Pakistan law has failed to include the detailed procedures for arbitration in cases of desertion and cruelty. From a traditional juristic point of Pakistan's law of 1939 arbitrarily deviated from Maliki opinion and Egyptian legislation by

⁹³ Section 2 defines "harm according to what is normally recognised by Islamic law affecting a wife in respect of religion, life, body, mind or property". See proposed definition in Appendix II.

⁹⁴ IFLA, section 24.

⁹⁵ IFLA, section 25.

prescribing divorce by judicial decree (fasakh) rather than judicial repudiation (talaq). This deviation is significant not only because of change in the date that the divorce becomes effective. A divorce by fasakh takes effect immediately, but in divorce by talaq does not take effect until the expiry of the wife's 'iddah'. Therefore, in a divorce involving maintenance under the Egyptian legislation, a reconciliation is possible if during the 'iddah' period the husband shows that he is willing and able to maintain his wife, whereas Pakistan's law does not allow such a reconciliation.⁹⁶ This is especially noteworthy since the Maliki doctrine is based on a Quranic injunction.⁹⁷

The All- Pakistan Women's Association continued to press for further reform in marriage and divorce and proposed that in accordance with the Quranic sayings notice of the intention of divorce should be given to the authorities before the actual divorce notice, to improve the chance of avoiding divorce. Furthermore, the wife should stay in her husband's home during her 'iddat' so that by remaining together they may have a better chance of reconciliation.⁹⁸

The Ordinance of 1961 remedied this deficiency by involving the Arbitration Council for all cases of divorce.⁹⁹ In order to discourage the husband from hasty exercise of the husband's right of talaq, this reform legislation required written notice to the Chairman as well as to the wife.¹⁰⁰ A ninety waiting day period is stipulated during which the Council will attempt to reconcile the couple.¹⁰¹ The divorce take

⁹⁶ Esposito, 1982, p.97.

⁹⁷ See Al Qur'an, Surah An Nisa':35.

⁹⁸ Esposito, 1982, p.86.

⁹⁹ Section 80.

¹⁰⁰ Section 7 (1).

¹⁰¹ Section 7.4.

effect only when the ninety day period has expired or, if the wife is pregnant, when the baby has been born.¹⁰² Although failure to follow the above procedures can result in a fine and or imprisonment, the penalties are relatively light.¹⁰³ Thitogether with the fact that failure to comply with the regulations regarding the Arbitration Council does not invalidate the divorce, has diminished its effectiveness.¹⁰⁴

Although non-Muslims in seeking divorce (other than mutual consent) must appear before a conciliatory body before they can petition for divorce, this requirement is not mandatory under the IFLA. However, in accordance with the Muslim law, the qadhi handling the case can refer the couple to the Conciliatory Committee in which two close relatives who have knowledge of the circumstances of the case are usually chosen as members of the committee.¹⁰⁵

It is interesting to note that under the Malay custom in Negeri Sembilan, a husband who contemplates divorce must go through the arbitration called bersuarang.¹⁰⁶ This process is in line with the settlement of marital disputes as recommended in the Qur'an,¹⁰⁷ and the IFLA should therefore move along those lines in settling disputes. Arbitration Councils should be established and, following the spirit of

¹⁰² Section 7.3 and 5.

¹⁰³ Section 7 (2).

¹⁰⁴ Esposito, 1982, p.85.

¹⁰⁵ See IFLA, section 47.

¹⁰⁶ A small feast is held by the husband, to which he invites the relatives of his wife as well as his own. The husband will then state his grievances, so that they may be considered by the parties present. The elders of the family will try to reconcile the parties but if this fails, the divorce will be allowed after agreement as to the disposal of the conjugal property; Ali, Haji Mohamed Din bin, "Two Forces in Malay Society", Intusari, p.24.

¹⁰⁷ See Al Qur'an, Surah An Nisa':35.

the Quran, representatives of the involved parties (husband and wife) should be its members.¹⁰⁸

6.4 REFORM OF THE LRA

Section 47 of the LRA provides that “the court in all suits and proceedings in Malaysia should 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.” The value of this section has been questioned often enough and it is encouraging to find Shankar J. in the case of In re Divorce Petition Nos. 18, 20 and 24 of 1983¹⁰⁹ articulating the belief that provision like section 47 “may create far more problems than it solves”. The learned judge pointed out that;

“unlike section 5 of the Civil Law Act 1956 which only imports the application of English law in certain matters as it stood on April 7th, 1956, section 47 of the Act has no limitation. It must therefore be read in a contemporaneous context and if applied must refer to the corresponding position in England today.”

The learned judge examined the principles on which the High Court of Justice in England acts and gives relief in petitions for divorce. He seemed to agree with “juristic comment” in England that “the special procedure has resulted in a spiralling of divorce”. He then asks, “Are we going the same way?” concluding finally with the comment that perhaps the time has come for omitting from the Malaysian legislation provisions that are likely to give rise to uncertainty and confusion not only in the application and the interpretation of Malaysian law but also in deciding which English laws are or are not applicable.

¹⁰⁸ Ishak, Othman bin, Hubungan Antara Undang-undang Islam dan Undang-Undang Adat, Kuala Lumpur, Dewan Bahasa Dan Pustaka, 1979, p.129.

¹⁰⁹ [1984] 2 M.L.J 158.

This call for the repeal of section 47 of the LRA could well be extended to section 3 and 5 of the Civil Law Act, 1956. This section should be amended to sever the connection with English law. The Malaysian law of divorce must break out of the chains imposed by history and the adoption of the English common law. Section 47 is in itself too restrictive. Malaysia is in Southeast Asia, not western Europe. Since 1972, the United Kingdom has been a member of the European Community (now Union), a fact tending increasingly to bring its legislation into line with that of its European colleagues. As rightly put by Hickling, "to remain tied to the apron strings of Mother England is unlikely to be good for the future of Malaysian law."¹¹⁰ What is important is the quest for justice. However, if amendment is to be made, a suitable model is desirable. The LRA must be interpreted in Malaysian terms. In cases where no provision of the Act is applicable, local customs shall apply and if there is no such provision, the case shall be decided "by the general principles of the law." General principles of law should be interpreted in a wider sense, the judges would be free to range through the legal systems of the world in order to extract an acceptable solution and not to be fettered by any one system.

6.5 REFORM OF THE GROUNDS FOR DIVORCE UNDER THE LRA

6.5.1 Irretrievable Breakdown of Marriage

Acceptance of the breakdown of marriage as sole grounds for divorce, discarding the traditional fault-oriented grounds has been a radical change towards the reformation of divorce law for non-Muslims in Malaysia.¹¹¹ The LRA in this sense has put Malaysia at par with the law in England.

¹¹⁰ Hickling, R.H, Malaysian Law, Kuala Lumpur, Professional Law Books Publishers, 1988, p.144.

¹¹¹ Ibrahim, 1987, p.78.

Unfortunately, the breakdown theory in its actual working in England has not achieved its objectives.¹¹² Since the Malaysian Royal Commission on Non-Muslim Marriage and Divorce Laws adopted the objectives of the Royal Commission in England, that is “the object of reform should be to enable the empty shell of a marriage to be destroyed with the maximum fairness and the minimum of bitterness, distress and humiliation”,¹¹³ the adoption in a different culture has brought failure as well.

Section 54(1)(a) of the LRA read together with Section 58 seems to be inconsistent with the objectives of the LRA as adultery is still being singled out as a matrimonial offence. By reason of the fact that the parties are unable to obtain a divorce by mutual consent under Section 52, they or one of them, will be compelled to apply for a divorce under section 54 where one of the four facts will have to be proved; in order that the court may then arbitrate on the ancillary issues. This will result in protracted and expensive divorce proceedings when in actuality the dispute is only over ancillary matters.¹¹⁴

The interpretation problems which have confronted the English courts are also causing similar difficulties in Malaysia.¹¹⁵ We have also noticed how in English law the problem of interpreting “adultery” and intolerability has raised complications.¹¹⁶ All these problems are due to the fact that LRA, as pointed out by Ahmad Ibrahim, still retains

¹¹² In its review of the current law in England, the Law Commission argued that it does not serve to promote its intended objectives; Law Commission (1988a) *Facing the Future: A Discussion paper on the Grounds for Divorce*, Law Com No 170, London, HMSO ; see also Law Commission (1990a) *The Ground for Divorce* Law Commission, No. 192, London, HMSO.

¹¹³ See Law Commission, “The Field of Choice”, 1966, para 15, London, H.M.S.O.

¹¹⁴ Khoo, 1992.

¹¹⁵ See Chapter 3.

¹¹⁶ See Chapter 3.

the remnants of the old law. He pertinently questions why the requirement of desertion for the continuous period of at least two years is still retained when it is possible for the parties to show that the marriage has broken down where they have lived apart for the continuous period of at least two years. According to him, all this complication arises because the Malaysian reformers have simply followed or rather imported the English divorce law.¹¹⁷

Furthermore, it is doubtful whether the law in England has been successful in "taking the heat out of disputes." According to Cretney, the weakness or the drawback lies in the fact that the law incorporates the former grounds of divorce based on the notions of matrimonial guilt. These notions were used to prove marriage breakdown.¹¹⁸ The Law Commission stated that the retention of fault grounds prevents both the speedy termination of dead marriages and may aggravate rather than reduce bitterness and humiliation.¹¹⁹

H.A Finlay of Australia has said:

*"... If the great majority of divorces, even where ostensibly based on fault, are in reality the outcome of agreement, active or passive, between the spouses, and if the selection of fault is merely a means of fitting that agreement into the system, it makes a mockery both of the law and all its institutions."*¹²⁰

The general assumption based on comparative experiences, that the grounds for divorce are not efficient tools for diminishing the divorce rate does not imply that family stability does not have a value for family members and indirectly for society as a whole. On the contrary,

¹¹⁷ Ibrahim, Ahmad bin, Law Reform and Divorce Bill, (1975) J.M.C.L 354.

¹¹⁸ Cretney, S.M., Principles of Family Law, 4th ed., London, Sweet and Maxwell, 1984, p. 214-217.

¹¹⁹ Law Commission (1988a), para 3.22 - 3.27, (1990a), para 2.16; see also Booth, 1985, para 2.10.

¹²⁰ (1972) 46 Aust. L.J. at 546.

stable and happy families are of the utmost importance for the next generation. The question is whether such stability can be promoted by legal means.

In the past the factor given emphasis in most countries were the grounds for divorce and on the importance of preserving the existing family. These days, when there is a high divorce rate in most countries, it has become clear that the conditions for divorce offer very limited possibilities for preserving a marriage.¹²¹ If one spouse is determined to get a divorce, he or she will obtain it one way or the other.¹²²

Agell suggests that there are five stages in the development of grounds for divorce in the civil and the common law countries.¹²³ In the first stage is the acceptance of breakdown of the marriage as grounds for divorce, along with different forms of "fault" by one spouse. The second stage consists of the acceptance of marriage breakdown as the sole grounds for divorce, although some countries such as England have retained the aspect of fault. A third stage is to relax the requirements for proving that the marriage has really broken down permanently.¹²⁴ The fourth stage in the liberalisation process is the acceptance of unilateral divorce that an application by one spouse is considered sufficient proof of marriage breakdown. The fifth stage is even more liberal in that it consists of the acceptance of unilateral

¹²¹ Rheinstein, 1972; see also Goode, 1970, p. 27.

¹²² Those who were financially able to do so could go to another country, obtain citizenship, get a divorce, and then return to their own country; Sgritta, G.B, and Tufary, P. Italy, in R.Chester (ed), Divorce in Europe, Leiden, Martinus Nijhoff, 1977, pp.253-81.

¹²³ Agell, Anders, Grounds and Procedures Review in Mavis Maclean and Lenore Weitzman (eds), Economic Consequences of Divorce: The International Perspective, Oxford, Clarendon Press, 1992.

¹²⁴ In Italy, the period of separation in 1987 was decreased from five to three years; *ibid*.

divorce without any reference to marriage breakdown, the desire of one spouse to terminate the marriage being sufficient.¹²⁵

According to Agell, the most industrialised countries will continue changing their legislation until they reach the fourth stage or the fifth. Separation is in many countries claimed as evidence of permanent breakdown of the marriage, but only if it occurs before the application for divorce.¹²⁶ If the spouses obtain divorce after living apart for a very long period in order to show permanent breakdown of the marriage, this shows only that the legislature has tried in vain to save a dead marriage.¹²⁷

Agell is of the opinion that the law should contain only one sole ground for divorce, and the desire of a spouse to terminate the marriage should be respected.¹²⁸ It was also unanimously agreed that there should be some period of reconsideration, the length of which can be discussed, between an application for divorce and the issuance of a divorce decree. It was also stressed that it should not be necessary to claim that the spouses lived apart during the transitional period.¹²⁹

The English Law Commission in 1988 appeared to consider not only that the radical solution would be unacceptable to public opinion,¹³⁰

¹²⁵ Sweden since 1974, see Agell, 1992, p.55.

¹²⁶ Agell, 1992, p.56.

¹²⁷ In Italy, a minimum of five years' separation was made a prerequisite for divorce, and in some types of cases the period was seven years; Goode, 1970, p.26.

¹²⁸ Cretney stated that such a scheme has strong logical attractions, but argued whether it would be acceptable to public opinion. He suggests that a divorce law whereby divorce was made available, on proof of the breakdown after one year of marriage (which according to him is similar to the system of *talaq*) would be strongly opposed in England; Cretney, 1984, 5.09, p.52.

¹²⁹ Agell, 1992, p.57.

¹³⁰ As stated in Stage 5.

but also that the Commission itself had a role in influencing public opinion and should not endorse the attitude that divorce is a very easy way to end a marriage. According to the Commission divorce should not only be based on the desire of one spouse but also on an irrebuttable presumption that an application for divorce means that the marriage has broken down permanently.¹³¹

A close examination of the trends towards reforms of divorce law in contemporary society reveal that it has, perhaps unconsciously, marched in the direction of the fifth stage. This development without undue exaggeration, has similarities to the principle of shiqaq¹³² under the Islamic law. This principle is enshrined in the Qur'an.¹³³ Neither in the Qur'an or the Hadith are the grounds for divorce enumerated. This shows that Qur'an does not limit the causes to specified cases. However, the qadhi has the necessary authority to dissolve the marriage on various grounds.¹³⁴ These are specific causes which are not regarded as "shiqaq".

Hussein suggests the use of shiqaq (which is quite similar to the fifth stage) as grounds for divorce in place of breakdown in marriage in the LRA. This method has managed to settle complications (brought upon by the former grounds, that is breakdown of marriage) in its application in Pakistan. The courts in Pakistan while handling the principle of shiqaq have unequivocally ruled that procedural technicalities cannot become a hindrance in separating the spouses who cannot observe "the limits of God". They have also declared that a

¹³¹ Law Commission, Grounds for Divorce Law Commission No. 170, London, HMSO, 1988.

¹³² Shiqaq means discord and conflict between the spouses of such a serious nature that the bond of marriage is strained to a breaking point; Ahmad, 1972, p.232.

¹³³ If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them..." Surah Al Baqarah:229.

¹³⁴ See Chapter 4 pp.34-40.

judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.¹³⁵

6.5.2 Conversion to Islam

The other grounds for divorce in Malaysia under the LRA are those of conversion to Islam.¹³⁶ This provision has caused a lot of difficulties in its implementation since it is difficult to see how the court can make a decree or order against a Muslim, to whom the Act does not apply.¹³⁷ This section deprives the converting party of any remedies under the civil law, as he can neither apply under section 51 nor under section 53 as the Act¹³⁸ does not apply to Muslims. Neither can the converting party have recourse to the Sharia Courts as the Sharia Court has no jurisdiction where one party (the non-converting party) is not a Muslim.

Therefore, the party who has converted seems to be seen as the party at fault, and he is punished by not only giving his or her spouse a right to petition for divorce against him or her but also by depriving the party who converted to Islam of the right to put an end to his or her marriage which has clearly been broken.

According to Ahmad Ibrahim, in a statute which purported to make the breakdown of marriage the sole ground of divorce, it seemed odd that section 51 had been included. The provision seems to revive the outmoded fault principle, in that one of the parties has been given the right to petition for divorce because of the fault committed by the other party, in this case the conversion to Islam. He suggested that a

¹³⁵ Hussein, S.J, Marriage Breakdown under the LRA and in Islam: A Comparative View, Law Seminar, International Islamic University, 1987.

¹³⁶ See Chapter 2 pp.45-9.

¹³⁷ See Chapter 2 pp.45.

¹³⁸ With the exception of section 51.

better approach to the problem would have been to regard the conversion of one of the parties to Islam as evidence that the marriage had broken down and to give both the parties to the marriage the right to petition for divorce.¹³⁹

Although this study shows that the grounds of conversion have very little effect on the overall divorce trend, it is submitted that a more just result would be achieved if section 51(1) be amended, as suggested by Ahmad Ibrahim.¹⁴⁰

The need for this amendment is even more desirable because at present, if the non-converting party does not apply for dissolution under section 51, the converting spouse will be precluded¹⁴¹ from benefitting from orders for ancillary relief which the court may make subsequent upon dissolution under section 51(2).

On the other hand, for the Muslims in the case of renunciation of Islam, the situation is rather different. Section 46 of IFLA provides that renunciation of either party of Islam does not operate to dissolve the marriage unless and until so confirmed by the court. Section 130 of IFLA, in addition provides that any person who dislikes his or her spouse and by deception makes him or herself an apostate in order to annul his or her marriage, commits an offence and shall be punished.

This provision was probably taken from the Indian Dissolution of Muslim Marriage Act of 1939, section 4 which provides that the renunciation of Islam by a married Muslim woman or by her

¹³⁹ Ibrahim, Ahmad bin Mohamed, *The Need to Amend Section 51 of the Law Reform (Marriage and Divorce) Act, 1976*, [1990] M.L.J 1 viii.

¹⁴⁰ See Appendix I on proposal of reform in this area.

¹⁴¹ LRA, section 3(3).

conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. The Indian Act, however, was designed to protect the position of the husband rather than the wife. This is to avoid the practice commonly occurred in India where many Hanafi wives dissolved their marriages by resorting to apostasy.

6.5.3 Mutual Consent

Section 52 of the LRA also provides for divorce by mutual consent. Although this form of divorce is alien to the English divorce law on which the Act is based, it is not novel to Malaysia. It is interesting to note that this provision is taken from the Matrimonial Causes Ordinance of Sarawak.¹⁴²

Early in the twentieth century, several Americans also began to support a radical plan to soften the divorce process by replacing adversarial divorce with no-fault divorce. No-fault divorce laws are seen to reflect the new egalitarian attitude toward divorce which has effectively replaced moral responsibility.¹⁴³

Jessie Bernard predicted that this no-fault divorce would remove the last vestiges of stigma from divorce in America. She foresaw independence for women who were increasingly able to support themselves after divorce because of “spectacular” employment trends. And drawing upon studies showing that children fared better after divorce than in a disintegrating marriage, she foresaw stable mental health for children of divorce.¹⁴⁴

¹⁴² Section 7, Matrimonial Causes Ordinance of Sarawak (Cap.94).

¹⁴³ Riley, 1991, pp.161-168.

¹⁴⁴ Bernard, Jessica, “No News, but New Ideas,” in Paul Bohannon, (ed.) Drvice and After, New York, 1970, p. 3-25.

This study shows that due to the change in the philosophy of the law with its emphasis on no-fault, mutual consent is and will continue to be very popular, especially among childless couples or couples with very few children in Malaysia.¹⁴⁵

No-fault divorce did bring about a number of significant alterations in American divorce as it did in Malaysia. It changed the concept of divorce from a punishment of an offending spouse to a “remedy for situations which are unavoidable and unendurable.” And, although no-fault divorce law attempts to pressure marriages when possible, it provided relief to dissatisfied spouses on non-judgemental grounds¹⁴⁶.

Unfortunately, no-fault divorce also had some destructive effects. As early as 1973, the author of a women’s divorce manual noted that although no-fault divorce had been “hailed as the welcome end” to finding one party guilty and the other “a paragon of virtue” it might also bring “irremediable breakdown of the marriage institution.”¹⁴⁷

Research done by Weitzman shows how legal reform laid down to eliminate the bitterness of divorce themselves has created new pain and hardships for divorced women and their children. The result of this egalitarian approach in California,¹⁴⁸ is that a woman can expect a 73% drop in disposable income one year after divorce, while her ex-husband experiences a 42% increase.¹⁴⁹ It was apparent that no-fault

¹⁴⁵ See Chapter 4.

¹⁴⁶ Ginnow, Arnold O. and Nilcolic, Milorad, Corpus Juris Secundum: A Contemporary Statement of American Law as derived from Reported Cases and legislation, St. Paul, 1986, p.36.

¹⁴⁷ Hirst, Barbara B., Divorce: What a Woman Needs To Know Chicago, Chicago University Press, 1973, pp.72-3.

¹⁴⁸ The pioneer of no-fault divorce in America.

¹⁴⁹ Weitzman, Lenore J., The Divorce Law Revolution and the Illusion of Equality: A View from the United States, in Essays in Family Law, Current Legal Problems, M.D.A Freeman (ed), 1986, London, p.84.

provisions contributed to the poverty of growing numbers of women and children in the United States.¹⁵⁰ Work done by Riley also demonstrate that no-fault divorce worked against many divorcing women during the 1980s, especially if they possessed little education, job-skills, and work experience and received custody of several minor children. Non-fault divorce exposed a growing trend toward women's loss of custody of young children, wives' lack of redress for husband's adultery and defection from the marriage, and the failure of judges to offset women's low earnings with proportional property settlements.¹⁵¹

The crucial weakness in no-fault divorce according to Maler undermines "bargaining position of a dependent spouse" because the court has the power to determine "support and maintenance awards on the basis of demonstrated need and merit rather than on a mate's guilt." He concluded that this practice could be unfair in its impact in a particular case and was a "small price to pay for an honest system of determination."¹⁵²

During the 1980s, experts tried to answer this question-how had legislators adopted no-fault divorce without any searching analysis of what it would mean for women and children.¹⁵³ Sociologist Lenore Weitzman explained that creators of no-fault divorce laws had intended to establish norms for property settlements and alimony based on the concept of wives as full economic partners and failed to realise that

¹⁵⁰ Ibid.

¹⁵¹ Riley, 1991, pp.167-8.

¹⁵² Maler, Michael, Divorce and Annulment in the Fifty States, New York, 1975, p.99.

¹⁵³ For an answer to this query, see Jacob, Herbert, Silent Revolution: The Transformation of Divorce laws in the United States, Chicago, The University of Chicago Press, 1988.

no-fault provisions would have dire economic consequences for many divorcing women.¹⁵⁴

Weitzman's work, which draws on a ten year scientific study, is a timely reminder for the Malaysian reformers to reexamine the law on mutual consent. Will it be responsible for similar impoverishment? So far, the impact of mutual consent is unknown but there is on-going research¹⁵⁵ of the kind pursued by Weitzman's. If it brings negative results, perhaps we could improve the law and continually review the machinery to ensure that it will bring justice to all those who seek for it.

6.6 THE FAMILY COURT

The cost of marriage breakdown and divorce is higher than it need be and is paid in terms of the pain of the families concerned. The progressive reform and simplification of divorce legislation in Malaysia, especially the recognition of de facto breakdown and the de-emphasis on matrimonial fault, should make the dissolution of marriage less painful. Although the LRA has radically overhauled the divorce law, there has not been any reform as regards to the institutions which have to administer it. It is still based on a judicial system which has as its basis the traditional adversarial model of the Common Law. Without any reforms in this area, existing courts together with their time consuming and archaic procedures will continue to dispose off the sensitive and delicate issues involved in family disputes. This matter should be considered especially since the forerunners of the adversary court system have established beyond doubt that existing traditional

¹⁵⁴ Weitzman, 1985, pp.357-376.

¹⁵⁵ Research is being undertaken by Professor S. Jaffer Hussein, Kulliyah of Laws, International Islamic University.

courts and adversary procedures are inappropriate as a suitable dispute settlement body in family matters.

It has been suggested from many quarters that the present adversary process has outlived its usefulness.¹⁵⁶ In fact, the adversarial based legal system has added to the tension and distress among the estranged spouses.¹⁵⁷ Not only are the present traditional procedures and practices inadequate to deal with the present problems, they also impair possibilities of reconciliation. Family disputes thus necessarily require a far more humane approach. Immediate action is needed to ensure that resources are applied to provide assistance to family members in resolving their disputes in a dignified and inexpensive way.

Appropriate legal representation and other support services should be made available to all those whose interests may be affected by any dispute. These procedures should not be mixed up by the complexities of the current practices, but should be simple, speedy and inexpensive so as to constitute a guarantee for justice. This requires the development of new techniques and procedures for the resolution of marital disputes. There is a vital need for informal, flexible, and investigative procedures directed to the adjustment of the family as a whole.¹⁵⁸

¹⁵⁶ See Siraj, 1989; see also Khoo, 1992; see also Suppiah, Komathy; *The Need for Family Courts under the Law Reform (Marriage and Divorce) Act 1976*, Academic Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, 1982.

¹⁵⁷ See Hussein, 1986, p.60; see also Friedmann, W., *Law in a Changing Society*, Pelican Books, Harmondsworth, 1964.; see also Pearson J and Thoeness N, *Divorce Mediation: An American Picture in Divorce Mediation and the Legal Process*, Dingwall R. and Eekelaar, J., Oxford, Clarendon Press, 1988, p.71.

¹⁵⁸ Growing dissatisfaction with the adversarial nature of divorce and the conflict resulted by it, and concern about the effects of divorce on children has prompted the growth of conciliation in Britain; see Parkinson L., *Conciliation and Separation in Divorce: Finding Common Ground*, London, Croom Helm, 1986, pp 1-9.

The Law Reform Commission in Canada suggested that the elimination of the fault concept, without simultaneous changes in procedures and practices reflecting a less adversarial approach, cannot eradicate present problems.¹⁵⁹ Due to the same problems in Malaysia, techniques, therefore must be devised to encourage spouses in conflict to have early recourse to counselling and conciliation facilities. In fact, the Law Commission of England report on the financial consequences of divorce urged that "everything possible should be done to encourage recourse to conciliation instead of litigation."¹⁶⁰

Family courts have been set up in the United States for some time, and have also been introduced in Australia, England and New Zealand to fulfil these needs.¹⁶¹ In the United States, family courts are frequently seen as fulfilling a therapeutic role. In England, the family court is seen as an institution which will improve the present overlapping system, which has many weaknesses and defects. It is set to improve the machinery and services which are available to deal realistically with the practical problems resulting from marriage breakdown.¹⁶² Family courts also existed in Japan before the Second World War and clearly benefited a large number of Japanese.¹⁶³

In advocating the establishment of a family court in Hawaii, the Commission on Children and Youth stated that;

¹⁵⁹ Canada, Law Reform Commission, Working Paper No. 1: The Family Court, 1974, p.12.

¹⁶⁰ Law Commission, Family Law : The Consequences of Divorce, London, H.M.S.O, 1981.

¹⁶¹ See Brown, The Legal Background to the Family Court [1966] BJ Crim 139, USA; The Family Law Act 1975, Section 21, Australia, The Family Courts Act 1980, Section 4, New Zealand.

¹⁶² Finer M, Report of the Committee on One-Parent Families, Cmnd 5629, London. HMSO 1974, para 4.281, p.173.

¹⁶³ Minamikata, Satoshi, Kaji Chotei: Mediation in the Japanese Family Court, in Divorce Mediation and the Legal Process, Robert Dingwall and John Eekelaar, (eds), Oxford, Clarendon Press, 1988, p.116.

*"An effective family court dealing with children and families would need comprehensive jurisdiction, a full-time judge who can become a specialist, procedures which are relatively informal and directed towards determining the best disposition or adjustment of the family situation while protecting the interests of individual members, sufficient and competent probation and other social services; availability of medical, psychiatric and psychological services as required, adequate detention facilities and shelter care facilities for the temporary and emergency care of children awaiting disposition. In addition, such courts require the co-operation of other local and state agencies and the understanding and support of the general public."*¹⁶⁴

The suggestions advocated above by the Hawaiian Commission are quite relevant in Malaysia, which is in need of specialist judges, informal procedures and social services to cater for the present needs of Malaysian society. The importance of family law in this country undeniably justifies the creation of specialist courts and it would be seen as a valuable step in adapting traditional courts and procedures to the needs of the times.¹⁶⁵

The creation of a family court using divorce mediation is widely canvassed in Malaysia as the answer to many of the present difficulties in settling disputes at divorce.¹⁶⁶ It is the most logical first step to meet the pressing needs and also an important condition for further legal reform. In general terms, the advantages of a family court would be two fold. First, it would overcome the present problem of lack of specialisation in the Malaysian courts to deal exclusively in family matters. Secondly, a family court would substitute the traditional

¹⁶⁴ Commission on Children and Youth, State of Hawaii, Report No.28 (1964).

¹⁶⁵ The creation of the Family and Property Division in the Selangor High Court in 1971 can be seen as a step in this direction. Although this division has exclusive jurisdiction over family and property matters, however archaic procedures continue to be used. Improvement stops at specialization.

¹⁶⁶ See Siraj, 1989, see also Khoo, 1992, see also Komathy, 1982.

adversarial model and place much greater emphasis on conciliation.¹⁶⁷ In Malaysia, as in most other countries, the family is regarded as the basic sociological, economic and one of the bases on which modern society has evolved. Its fundamental role in society surely justifies the creation of a specialist system of family courts to cater its needs.

The traditional notion of a family court as described in the broad outline in the Law Society's¹⁶⁸ proposal, and as can be seen in some American, Canadian, and Australian models, include the idea of an institution that is judicial. In addition, it includes the use of such techniques as specialist judges, professional staff, modifications in rules, and physical designs more adapted to the needs of family law adjudication.

Supporters of the family court movement advocate that a system which operates informally and flexibly, simply, and speedily combines the best in terms of fairness, efficiency, accessibility, and economy.¹⁶⁹ However, there is a need to unify and rationalise the various procedures, remedies, and jurisdictions in the field of family law. Szwed believes that the main aim of any family court system should be the unification and uniformity of law and procedures if the intention is the provision of a service that is flexible, consistent, efficient, accessible, and fair.¹⁷⁰

¹⁶⁷ A family court would substitute the accusatorial system with a more diagnostic and therapeutic process, more appropriate for family dispute settlement; Horgan, D.T, "Family Court; The Need and the Obstacles" (1976), 27 Northern Ireland Law Review 123.

¹⁶⁸ Law Society, A Family Court : Consultation Paper, London, Law Society, 1985.

¹⁶⁹ See Booth, Mrs Justice, Report of the Matrimonial Causes Procedure Committee, 1985, pp.17-23, see also Law Commission, The Ground for Divorce, Law Com. No. 192, London, HMSO, 1990.

¹⁷⁰ Szwed, Elizabeth, The Family Court in The State, The Law and the Family - Critical Perspectives, M.D.A Freeman (ed), London, Tavistock, p.270.

The concept of a specialist family court with its specialised full-time judge, seems to indicate that the family court judge should be resident and adjudicate exclusively in the family court. There are clear benefits to this but less obvious are the potential disadvantages. In British Columbia even judges with an interest in family court work expressed the need for a break from time to time, and preferred not to be restricted to only family cases.¹⁷¹

A lawyer, Ronald Khoo, said that the specialist judges at the family courts, if set up, could make appropriate decisions to promote family well-being in the long run. He said that a mediation process involving a third party would encourage the disputants to find a mutually agreeable settlement and added that with a family court, cases could be resolved faster.¹⁷²

The Chief Qadhi of the Sharia Court also agreed with the establishment of a family court coupled with a family court welfare service. The functions of the latter would include the provision of a service specifically concerned with conciliation. However, the provision of a court conciliation service is not dependent on the establishment of a family court. The conciliation service that is envisaged would exist side by side with the legal structure. Whereas the function of the courts is judicial, the main purpose of the conciliation service would be to help individuals and couples to sort out their views, attitudes and feelings, make decisions which are most beneficial to the mental and emotional health of themselves, their spouses and their children, and begin to adapt themselves to the implications of those decisions.¹⁷³

¹⁷¹ See Amren B and Mac Leod, F The British Columbia Unified Family Court Pilot Project 1974 to 1977: A Descriptions and Evaluations, Victoria, B.C, Information Services, 1979.

¹⁷² Khoo, 1992.

¹⁷³ Personal conversation with the Chief Kathi of the Sharia Court, Federal Territory of Kuala Lumpur, December, 1992.

High Court Judge Datuk Faiza Thamby Chik agreed with the establishment of a family court to speed up the disposal of cases under the LRA. However, with the proposal for a Court of Appeal under serious consideration, he doubted that a suggestion for yet another branch of the Judiciary would be taken up soon.¹⁷⁴

In addition, it is also recommended that special halls be provided so that each divorce could be discussed privately, thus guaranteeing “secrecy and safety” to the family involved. This would counteract the traditional argument opposing the handling of divorce cases in court because it would expose private family problems to public view.¹⁷⁵ Datuk Nafsiah Omar¹⁷⁶ added that a family court should be set up to hold divorce hearings. However, this and other family-related issues should not be open to the public as they are personal.¹⁷⁷ The family court should have a counsellor who knows the laws governing family issues well. She said such courts, if set up, could also act as adviser to couples facing a crisis in their marriage and, if possible, save the marriage.¹⁷⁸

H.R Hahlo recommended that divorce cases should be heard in chambers rather than in open court. According to him, it is in conformity with worldwide trends, of which the Australian Family Law is the latest manifestation, to hear divorce cases in private and to place restrictions on the publications of reports of such cases. In defended as well as in undefended divorce cases, rules of procedure

¹⁷⁴ Sunday Times, December 6, 1992.

¹⁷⁵ Esposito, 1982, p.60-1.

¹⁷⁶ Minister of National Unity and Social Development Ministry.

¹⁷⁷ The policy behind this suggestion is to encourage open and frank testimony, to prevent public embarrassment and to prevent a spectacle by the public and newspaper journalists who are seeking sensational filling for the press.

¹⁷⁸ New Straits Times, December 4, 1992.

should enable the courts to proceed with a minimum of formality. Unless the court directs otherwise, evidence on affidavit should be admitted. However, he still feels that representation by lawyers is still the best guarantee that the cases of both parties will be properly placed before the court.¹⁷⁹

However the idea of settling divorce cases in camera is totally rejected by the Chief Qadhi of the Sharia Court due to the fact that to have a fair trial, it should be open to the public. This is more so in the case of the Sharia Court since it is often criticised especially by women stating being impartial.¹⁸⁰

The statement made by the Chief Qadhi is correct in the sense that by the early 1980s, criticisms were being voiced with increasing frequency as to various aspects of Australian family law especially the principle of a closed court. There had been attacks on both judges and premises of the Family Court.¹⁸¹ Since the transactions of the court were closed to the public, it resulted in little or no public scrutiny of its work. Partly in response to these criticisms, Section 97 was amended in 1983 to the effect that all proceedings in the Family Court or any other court exercising jurisdiction under the Act are to be heard in open court. It also makes some modifications in giving the court power to make exclusion orders in respect of individuals or classes of persons in individual cases.¹⁸²

¹⁷⁹ Law Reform Commission of Canada, *Studies on Divorce*, 1975, p. 87.

¹⁸⁰ See note 173.

¹⁸¹ See Finlay, H.A, "Fault and Violence in the Family Court of Australia", (1985) 59 ALJ 559.

¹⁸² Subsection 97(1) of the Australian Family Law Act now states that all proceedings in the Family Court or any other court exercising jurisdiction under the Act are to be heard in open court. Subsection (2) makes some modifications in giving the court power to make exclusion orders in respect of individuals or classes of persons in individual cases.

Based on the experience of the Australian Family court and on a well-known principle in Administrative law that “justice must not only be done but also seen to be done”, I propose that divorce hearings should be held in open court instead of the judge’s chamber.¹⁸³ The divorce process should involve some degree of privacy but it should not be confused with total secrecy. A balance must be maintained between the rights of the family and the right of the public to have sufficient knowledge to assess the manner in which justice is administered. I consider that this competing interest can best be served by divorce hearings being open to the public, with the judge having power to make exclusion orders in respect of individuals or classes of persons in individual cases. This kind of provision does not materially impair the principle of the open court.

In sum, the time has come for the establishment of family courts in Malaysia and for specialist judges to bring about a cohesive approach in family law and assist in the development of such law.

It is also submitted that there should be consolidated trials. Under the present system, the various elements of a divorce are dealt with separately.¹⁸⁴ One disadvantage of this system of fragmented hearings of cases is the increased time, not all of which is immediately obvious. How much a hearing costs can be appreciated when it is considered how many people are typically involved; a judge or magistrate, the two spouses, their legal advisers, and perhaps witnesses and children as well. Furthermore, the preparation through each stage requires expenditure of time in getting the case ready for trial and some part of the actual hearing itself is taken up in reacquainting the court with

¹⁸³ The admission of the public was one of the normal attributes of a court and by preventing this, the court will be turned into “secret tribunals”; *Scott v Scott* [1913] A.C 132.

¹⁸⁴ Petition for divorce is heard by a judge in open court. Applicant for maintenance and other forms of financial relief are heard by a Judge or sometimes a Magistrate and application relating to the custody of children are heard by a judge in Chambers.

the facts of the case and informing it of the results of earlier proceedings. In some parts, lawyers may have to travel to reach the court which may be an appreciable factor in the cost of the case. The more often attendance at court is required, the greater is the likelihood of time being wasted in waiting because of slippage in court timetables. This last factor may not seem very significant to an outsider but anyone with experience of litigation will know that waiting time can contribute noticeably to legal cost.

A reduction in the number of separate hearings in divorce proceedings would bring about material savings in costs, both to private and public funds. This can be achieved simply by reorganisation of the present procedures. It can be arranged so that parties are required, to present a comprehensive case to the court which would then dispose of all the issues involved in the case at one time.

Apart from saving cost, a consolidated hearing procedure of the kind mentioned, would produce another benefit. In a number of cases, the various issues to be resolved are inter-dependant.¹⁸⁵ A court which has before it at one time full information on all aspects of the case is likely better able to judge the relative importance of the various issues involved and the consequences of its decision on any aspect. It would thus be more favourably placed to make the best possible arrangements than a court which did not at any time see the case as a whole, but only in separate instalments.

With the growth of population and the considerable increase in the workload of all courts and the importance of cases especially divorce petitions, custody and maintenance, the creation of a specialised family court is badly needed. Family disputes, by their very nature, require

¹⁸⁵ For example, the decision on who has custody of the children is likely to be a vital consideration in deciding who is to occupy the matrimonial home.

immediate treatment and careful treatment. If immediate treatment is denied, it may mean that the opportunity to help the parties is lost.

The economic cost of providing a family court will be great but the social cost of failing to do so will be greater. The real costs of an inadequate system for handling the broken families and desperate children can only be measured in terms of human anguish and degradation. The economic factor should be a secondary consideration in these circumstances.

As a conclusion, a proposed model of family court in Malaysia should include:

- a) a court that has broad substantive and geographical jurisdiction over all family matters so that the family could be viewed as a whole rather than as a series of individual problems
- b) informality, low-cost and easy access to the courts.
- c) judges who ideally have some training in both law and social sciences¹⁸⁶, and are capable of co-operation with staff in disciplines other than legal;
- d) court that has a proper status;
- e) a court that has a well-established conciliation service. Counsellors and social workers attached to the court should operate closely with the judges to provide information and encourage communication between potential litigants.¹⁸⁷

¹⁸⁶ It should be noted that Section 22 (2)(b) of the Family Law Act of Australia provides that a person shall not be appointed as the Judge of the Family Court of Australia unless "by reason of training, experience and personality, he is a suitable person to deal with matters of family law".

¹⁸⁷ The Family Court of Australia is equipped with a specialised Court Counselling Service, whose function is to counsel the parties, to assist them in reconciliation and in conciliation of their differences and to provide reports for the court on matters related to the welfare, custody and access to children, Finlay, 1992.

6.7 CONCILIATION

Simultaneous with the growth of the family court movement in various countries has been the development in the conciliation movement. This development has been accompanied by the growth of various processes aimed at the settlement of family conflict by informal negotiation.¹⁸⁸ Conciliation has been associated with the family courts and proposals of family courts have provided for a conciliation service as part of their structure. The practice of conciliation as a method of settling disputes has increased rapidly in many countries.¹⁸⁹

Finlay differentiates the adversarial process used in commercial and civil litigation but in the case of family disputes,¹⁹⁰ where the parties usually remain in some kind of relationship to one another, particularly as regards their children, a great deal of harm can happen if adversarial processes are applied.¹⁹¹ Schlesinger commented that adversarial approach de-emphasises concern for the feelings and social functioning of the children, as well as of the other spouse.¹⁹²

It follows from this that what is required in the circumstances is the need to bring the estranged parties together and to stop them being

¹⁸⁸ Davis, 1983, p.131.

¹⁸⁹ The American experience of conciliation suggests that "counselling frequently has resulted in reduced tensions and hostilities to the point where statutory settlements of support payments, custody, visitation and other problems, have been accomplished prior to the final divorce hearing, and which results otherwise would not have occurred without a bitter court contest", Henderson, L.L. "Marriage Counselling in a Court of Conciliation", (1969) 52 Judicature 253 at 256.

¹⁹⁰ Divorce litigation is unique among all legal actions in that it is almost invariably accompanied by the most intense and intimate emotions. It is rarely a clear cut and dried piece of business with a clear beginning and end which can be handled and filed away, Irving, Howard and Bohn, Peter; "A Social Science Approach to Family Dispute Resolution", 1978, Canadian Bar Journal, 39.

¹⁹¹ Finlay, 1992, p.39; see also Irving H. and Irving B., Conciliation Counselling in Divorce Litigation, Reports of Family Law, Vol. 16, 1974.

¹⁹² Schlesinger, Benjamin; "Children and Divorce - A Selected Review", (1977) Conciliation Courts Review, 36.

driven further apart by the polarising process of litigation, to create constructive opportunity for a reconciliation and if that is not possible to reduce emotional temperatures so that other related issues can be amicably discussed and resolved. Hence, when the marriage is dead, proceedings should be of a nature which would allow the marriage to be buried with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future.

In Japan, failure to reach agreement upon divorce where one party is anxious to have the marriage terminated, results in bringing the matter before the Family Court. The conciliation committee will seek to effect either a conciliation and continuation of the marriage or, more frequently, an agreement concerning terms on which the marriage may be ended. It is reported that in the overwhelming majority of cases, divorce is effected by extrajudicial agreement of the parties. Cases in which the courts must intervene are rare.¹⁹³ The Japanese system cannot be used as an example of how to deter divorces but it does serve as a model of how to manage the problem of marriage breakdown, pointing at the adjustment of conflicting interests of individuals so that individual freedom is combined with flexibility.

In England, there is the increased awareness, since 1976, of the benefits of conciliation in divorce. An amicable divorce is now perceived as better for parties and, importantly, for their children than a hostile one. As one leading exponent of conciliation has said;

*“A legal process which facilitates agreement can help couples to re-organise their lives and relationships in a humane and civilised way, whereas a process which concentrates on establishing which spouse is the guilty one increases antagonism and discourages constructive solutions.”*¹⁹⁴

¹⁹³ Minamikata, 1988, p.117.

¹⁹⁴ Parkinson, 1986, p.11.

Conciliation has become accepted and established so quickly in England because the movement has been based on two fundamental and crucially important principles. First, there is the absolute importance of maintaining high standards in the selection, training and supervision of mediators. Secondly, there is the obvious fact that mediation has to be interdisciplinary. It offers clients a greater and more flexible range of ways of handling their problems.¹⁹⁵

In England, the Finer Committee led the way in offering the first official articulation of conciliation as something distinct from reconciliation. Conciliation is defined as:

*“assisting the parties to a dispute to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers’ fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.”*¹⁹⁶

Parkinson defines conciliation as:

*“a structured process in which both parties to a dispute meet voluntarily with one or more impartial third parties (conciliators) who help them to explore possibilities of reaching agreement, without having the power to impose a settlement on them or the responsibility to advise either party individually.”*¹⁹⁷

¹⁹⁵ Westcott, John. Mediation - What Next?, July [1992] Fam Law 279.

¹⁹⁶ Finer Com., op.cit., para 4.288; The Booth Committee while also adopting the Finer definition, added further that the essence of conciliation is that responsibility remains at all times with the parties themselves to identify and seek agreement on the issues arising from the breakdown of their relationship, Booth, 1985, para 3.10.

¹⁹⁷ Parkinson, 1986, p.52.

While this last definition is more precise as to the institutional representation of the general idea of conciliation, that is as involving some independent third party intervention, it still leaves many practical aspects of the concept quite “hazy”.¹⁹⁸ The term conciliation, according to Parkinson, is often used much more loosely. However, it is clear from her definition that the basic concept has been modified and adapted in a variety of ways by the different groups of professionals who have sought to incorporate it into their own fields of activity.¹⁹⁹ Bottomley suggests that this is understandable given their professional concerns but unsafe if the effects are not fully explored.²⁰⁰

Davis stated that,

*“the common thread of an idea can be almost lost through the speed with which it is modified to suit the purposes of practitioners in different fields. The creation of a new role merely confuses the issue if the task is not clearly defined or if the mediator regards it as no more than a new name for dealing with an old problem.”*²⁰¹

The ambiguities of conciliation are further stressed by the evidence obtained by the Newcastle Conciliation Project Unit²⁰² of the views

¹⁹⁸ See Roberts S., “Mediation in Family Disputes” Modern Law Review 1983, pp. 537-557, Even Parkinson agrees that conciliation as currently practised is, “still far from being unambiguous as well as a discrete process”, Parkinson, L, “Mediation Matters” December [1990] Fam Law 477.

¹⁹⁹ Howard J. and Shepherd G., Conciliation, Children and Divorce. A Family Systems Approach, London, BT Batsford Ltd, 1987, p.8.

²⁰⁰ Bottomley A, 1984, p.296; This issue has been thoroughly examined by Davis G., in “Conciliation and the Professions” Family Law, 1983, p.6.

²⁰¹ Davis, 1983, p.11.

²⁰² See Roberts S., “A Blueprint for Family Conciliation” 53, Modern Law Review, 1990, pp. 88-90 see also Eekelaar, John, Regulating Divorce, Oxford, Clarendon Press, 1991, pp.155-164.

of relevant professional bodies as to the objectives of conciliation.²⁰³ Davis points out that conciliation should be a means of seeking reasonable compromise solutions to disputes over specific issues rather than a mechanism for safeguarding children's interest but one consistent point that emerges from discussions of conciliation is that its primary justification and focus is the welfare of children involved in divorce.²⁰⁴

To view mediation primarily in terms of protecting children's interests could lead to a very authoritative and judgmental form of conciliation. According to Gerard, the development is one-sided since the majority of schemes at present in United Kingdom limit their assistance to problems relating to children.²⁰⁵

The costs and benefits of various conciliation services have been the subject of a major research study conducted by the University of Newcastle.²⁰⁶ This has revealed that conciliation is effective, both in reducing the areas of conflict and in increasing the parents' satisfaction with the arrangements made, but to be most effective, it should be a recognised alternative to legal procedures for the resolution of

²⁰³ Follow-up interviews conducted by the Newcastle researchers showed that many of those who came to conciliation had been confused about the conciliator's objective and role, Conciliation Project Report, 1989.

²⁰⁴ Bottomley, 1984, p.292-303; see also Newcastle CPU 1989, Report to the Lord Chancellor on the costs and effectiveness of conciliation in England and Wales, University of Newcastle, para 5.6; see also Parkinson, 1990.

²⁰⁵ Gerard, A., "Conciliation: Present and Future" in The State, The Law and The Family : Critical Perspectives, M.D.A Freeman (ed), London, Tavistock, p.281. Although some National Family Conciliation Council affiliated conciliation services are now seeking to extend the scope of conciliation to encompass all issues, others are continuing to restrict their help to child-related issues only. According to Parkinson, the move from conciliation on child-related issues to all issues "is not a simple step", Parkinson, [1990].

²⁰⁶ The Newcastle Conciliation Project unit (CPU) was established by the Lord Chancellor's Department, with the purpose of researching the cost and effectiveness of all conciliation schemes in operation in England and Wales and of submitting a report to the Lord Chancellor to enable him to decide, whether and how, a national family conciliation might be established.

disputes. The committee's view was that, if such a service were to be introduced, it should firmly be based on the principle of voluntary participation and that its distinguishing feature should be to enable couples to retain control of the decision-making process consequent on separation and divorce, encouraging them to reach their own agreements.²⁰⁷

Research findings show that agreements are reached in a substantial proportion of cases, especially if conciliation is sought as the first resort, and not as a last-ditch effort.²⁰⁸ Parkinson says that,

*"conciliation should be available to the parties at an early stage... and should also be quickly accessible in crisis situations."*²⁰⁹

However, according to Sanctuary, any attempt to provide marital conciliation under compulsion will end in failure.²¹⁰

Conciliation is developing as an interdisciplinary initiative taken in different parts of the world by senior lawyers, probation officers and others.²¹¹ In England, many different approaches to conciliation are being explored in different parts of the country, but working towards

²⁰⁷ Newcastle Conciliation Project Unit. Report to the Lord Chancellor on the costs and effectiveness of conciliation in England and Wales, University of Newcastle, 1989, para 20.19.

²⁰⁸ Research on Conciliation in Divorce by Gwynn Davies, Dept. of Social Administration, University of Bristol.

²⁰⁹ Parkinson, 1990, p.24.

²¹⁰ Sanctuary, G., Marriage under Stress: A Comparative Study of Marriage Conciliation, London, George Allen and Unwin Ltd, 1968, p.193.

²¹¹ In Australia, demands for the development of some alternative models had arisen, which resulted in the establishment of the Family Law Mediation Service Pilot Project which commenced to operate at the Marriage Guidance Council of Victoria. The Australian government have begun to realise that mediation and other alternative methods of dispute resolution are actually more effective, as well as much cheaper, than traditional court-based services; Finlay, 1992, p.43.

the same goal.²¹² Generally, these can be categorised into two types; “in-court” and “out-of-court”.

The problems with conciliation conducted by or at the court, although it is valuable and effective, include the inevitable pressure to reach a settlement quickly. The authority of the registrar or court welfare officer conducting it, may unconsciously or consciously dictate the outcome. And there are risks of confusing the welfare officer’s different roles of reporting to the court and assisting the couple to reach agreement.²¹³

In Bristol, conciliation management committees are chaired by local circuit judges.²¹⁴ The out-of-court schemes are well-established in Bristol in terms of past experience, but face an uncertain future because of lack of funds.²¹⁵ Lisa Parkinson suggested a practical way in which conciliation might be funded but, clearly, funding will be the major obstacle in the way of the establishment of a national mediation service in England.²¹⁶

Despite the widespread support for conciliation, there have also been many criticisms at its implications. The main advantages claimed for conciliation are that it offers the parties greater control over the proceedings, and that it encourages agreement by moving away from

²¹² See Parkinson, L., Mediation Matters, December [1990] Fam Law. For recent developments in Cambridge, see Richard, Martin, “Divorce Cambridge Style; New Developments in Conciliation”, November, [1990] Fam Law 436.

²¹³ Newcastle CPU, 1989, para 5 18.

²¹⁴ Parkinson, 1982, p. 77.

²¹⁵ Gerard, 1984, p.282. It is widely acknowledged that one of the major problems for conciliation in UK is funding, see May, [1992] Fam.Law.

²¹⁶ Parkinson, 1992, p.25.

adversarial court-based proceedings.²¹⁷ It can save court costs and court time and assists in promoting the welfare of children. It is however, the last two claims, that is legal savings and children's welfare, which are both the most contentious and potentially most liable to move the concept in a divergent position. Davis stated that,

*"if mediation is justified principally in these terms, and developed so as to support these claims, it will ultimately be diminished and subverted."*²¹⁸

In addition, Eekelaar argued that there is no evidence that conciliation saves overall costs.²¹⁹

It has also been argued that conciliation implies a degree of loss of control by the parties, since the definition they have been unable to resolve the dispute on their own.²²⁰ This in turn may lead to a situation in which the conciliator actively encourages a certain form of settlement, rather than allowing the parties to define the terms of their own agreement.²²¹ For this reason, Davis has pointed to the dangers of forcing the parties into a settlement.²²²

This is in turn associated with the view that, rather than offering an alternative to adjudicatory proceedings and thus a form of

²¹⁷ See Parkinson, 1992, p.69; see also Murch, 1980, p 210; see also The Family Law Sub-Committee of the Law Society; A Better Way out, para 15, 1983; Gerard A., 1984, p.286.

²¹⁸ Davis, 1983.

²¹⁹ Eekelaar, 1991, p.160.

²²⁰ Roberts, 1983, p.541.

²²¹ See Bottomley, 1984, pp.293-303.

²²² Davis, G., "Mediation in Divorce: A Theoretical Perspective" Journal of Social Welfare Law, 1983, p.135.

deregulation, conciliation offers an extension of regulation.²²³ This arises from the fact that, first, conciliation as practised is not confined only to those cases that would have gone on to be disputed in a full hearing, but is applied in any case manifesting a dispute at an early stage, even though that dispute might be settled by other means, probably through solicitors if conciliation has not been available.

Second in relation to in-court schemes, the fear has been expressed that conciliation has not in practice dissociated itself from the adjudicatory function of the court and its personnel, rather, it has become “effectively assimilated into the standard practice of the courtroom.”²²⁴

This is argued to have particularly adverse consequences for women, since the focus of much conciliation is the needs of the children.²²⁵ Thus, in the process of conciliation, women may be pressurised to compromise in the interests of securing agreement “for the sake of the children” even though their view of the needs of the children may be different. This may in turn weaken the bargaining power of women in relation to property and finance. Some feminists have argued against the growth of conciliation (which presumes party competence) on the ground that it is likely to favour men.²²⁶

Nevertheless, conciliation is characterised by a wide diversity of practice, not all of which will present the dangers outlined here. What remains in question, is the extent to which conciliation actually

²²³ Bottomley, 1984, p.294.

²²⁴ Davis,G., “Public Issues and Private Troubles: The Case of Divorce”, Family Law, 1987, p.306; In 1985, the Family Law Council in Australia proposed to separate conciliation from the judicial functions of the court, Finlay, 1992, p.45.

²²⁵ See note 128 and 129.

²²⁶ Bottomley A., 1984.

achieves the objectives that have been set for it, rather than simply becoming an administratively convenient method of processing disputes.

There are many experiments going on in this field, and organisations in different countries have tackled the problems in different ways. It is understandable why the provision of marriage conciliation by one means or another, has been gaining support, as it being understood in all parts of the world that society has a vested interest in the preservation of the family as a unit.

6.7.1 Lessons for Malaysia

It is one of the features of modern family law in many other western countries with a common law tradition that both the law and the procedures by which it is administered now conform less strictly than they once did to the adversarial model of justice. These countries have responded to changes in public attitudes to divorce by introducing new legislation, setting up family courts and promoting opportunities for conciliation in preference to adversarially conducted court proceedings.²²⁷

It is submitted that any reform in the area of divorce in Malaysia should not neglect this aspect, for the best laws serve no purpose if the judicial institutions which are going to administer this law are not adequately structured for this purpose. Moreover, if the court process were to remain so formal, the client may have no understanding of what is going on or that understanding be so minimal or distorted and have the effect of reducing the likelihood of any conciliation. This necessarily encourages the parties to delegate responsibility for negotiation to their respective lawyers, thereby forfeiting the

²²⁷ Davis, 1983, p.131.

opportunity of experience of direct participation in solving their own problem.²²⁸

It has been suggested by Eekelaar that a shift away from legal procedures and personnel is essential if the “adjustive” function of the law is to be perfected, since the “adjustive” function, properly applied, demands that the institutional arrangements direct the parties’ attention towards the future and maximise their opportunities to realign their lives towards new family arrangements which cause the minimum friction to all concerned.²²⁹

No doubt there is the tendency²³⁰ to adopt conciliation as practised in the West but it seems on balance that the nature of conciliation as practised in England is unsuitable for resolving marital disputes within the patriarchal Malaysian society where the extended family is still dominant and strong.

Before colonisation, conciliation was used in almost all matters in Malaysia. The Malays in general are not litigious persons.²³¹ Disputes between individuals are settled in such a manner that does not bring resentment to those affected by it. The Malay Muslims, use the Sharia and Adat. Arbitration plays a very important role;

²²⁸ See Herman, Margaret S., Mc. Kenry, Patrick C. and Weber, Ruth E., Mediation and Arbitration applied to Family Conflict Resolution, The Arbitration Journal, 19.

²²⁹ Eekelaar, 1984, p.54.

²³⁰ The rigid social stratification of the Malaysian society discouraged litigation and judicial decision-making.

²³¹ Minnatur, 1968, p.32.

“small matters are the place for arbitration, great for the application of custom, the most weighty for ancient ancestral rights.”²³²

In Negeri Sembilan under the Malay custom, the Malays have been known for practising the process of mediation in divorce matters which has some similarities with the conciliation process in the western context.

The advantages of the process of bersuarang compared to “conciliation” is three-fold. First, both parties will be assured to have equal bargaining powers due to the presence of elders from both sides. Under the Malay custom, custody of the children are normally given to women.²³³ Therefore women will not be pressurised to compromise in the interests of securing agreement “for the sake of the children.”

Secondly, it moves away from the adversarial court based proceedings, thus reducing the chances of the case being delayed and it would cut cost to a minimum. The informal atmosphere in which the discussion takes place is different from the formal proceedings within an adjudicatory framework, and would also enable and encourage the participants to assume an active role in their own problems.

Thirdly, a better decision can be reached where the literal application of law could be avoided as it could lead to an undesirable result. The adjudicatory procedure must be viewed as a narrow construct which adheres strictly to legal rules and the doctrine of “stare decisis.” The bersuarang process however, utilises facts, circumstances, social consequences and a host of other factors which do not fall strictly within the perimeter of the law as an instrument for dispute settlement. The bersuarang is based on the customary saying;

²³² Dudok dengan aturan, kecil nama mempakat, besar nama Adat; gedang bernama pesaka sembah, Caldecott, 1908.

²³³ Selat, 1976, p.128.

*"The greatness of men lies in taking counsel together;
The greatness of prophets in performing miracles;
As a bamboo conduit makes a round jet of water;
So taking counsel together rounds men to one mind."*²³⁴

Under the Malay custom, since marriage entails the co-relationship of a host of relatives, divorce would present considerable embarrassment to the families concerned. Therefore, the family conflict is resolved within the families itself so that they could save their family's "face."²³⁵

Bersuarang has striking similarities with the process of hakam in Islam. It is said that the process of bersuarang adopted the spirit of hakam with some modifications. It is provided by the Qur'an that the institution of hakam be invoked whenever there is shiqaq (constant conflict) between the husband and the wife. As stated in the Quran, which says to the effect: "If you fear a breach between the husband and wife appoint a hakam (arbitrator) from his family and a hakam from her family; if they shall desire a reconciliation, God will cause them to agree."²³⁶

Where arbitrators are appointed but are unable to effect a reconciliation between the parties, the dominant view of the Hanafi and Shafi'i schools is that the powers of the arbitrators cease and they may arrange a divorce or khulu' only where they have been specifically empowered to do so, as an authorised agents, by the husband in the

²³⁴ Kelebihan umat dengan muafakat
Kelebihan nabi dengan mukjizat
Bulat air kerana pembentung;
Bulat manusia kerana muafakat.
Caldecott, 1908.

²³⁵ For further details see Chapter 1.

²³⁶ See Al Qur'an, Surah An Nisa': 35.

first case and by both spouses in the second. In the dominant view of the Maliki school, on the other hand, the arbitrators have the right to decide that nothing but divorce or khulu' will meet the case, and this decision will be upheld and enforced by the court.

There is a minority Shafi'i opinion which follows the Maliki view. Al-Sharbini states "in one view they (the two arbitrators) are two judges appointed by the Ruler (or by the judge). This view has been preferred by many on the ground that the Qur'an has named 'arbitrators' (hakaman) and an agent is not an arbitrator... So the consent of the two parties is not a condition of their appointment, and they may give what judgement they consider beneficial, whether it be that the marriage should be continued or dissolved." Ibn Hajar said: "And they are two agents who may act only by consent of the parties. But on another view they are the two judges appointed by the Ruler."²³⁷ Different Muslim countries have introduced the institution of hakam in different forms.²³⁸ However, it could be summarised that all of them used hakam as a process for reconciliation. If reconciliation failed, matters relating to children, maintenance or matrimonial property which is considered as legal issues are handled by the qadhi and not hakam.

Although IFLA has a provision on hakam,²³⁹ it is a pity that the judge does not fully resort to it as a means for conciliation. Hakam in the provision has been used in certain cases only and has been interpreted as fulfilling a role for reconciliation rather than conciliation. According to Mahmood, one very important administrative blunder which has occurred in Kelantan (and still does) is the fact that

²³⁷ Anderson quoting Al Sharbini and Ibn Hajar, 1954, p.335.

²³⁸ For further discussions see Chapter 3.

²³⁹ See IFLA, section 48.

the institution of hakam has not been put to its proper use. In Kelantan, this process is only resorted to by the qadhi in cases relating to an application of divorce made at the wife's request.²⁴⁰ It should be extended to other cases where there is conflict. Such a conflict can be readily presumed to exist when the couples have decided to divorce irrespective of which method of divorce they have decided.²⁴¹ The practice of hakam would allow the estranged couples to review their decisions, and if they have decided on terminating the marriage, they could come to a compromise on matters relating to post divorce arrangements for the children (if any) and matters relating to the matrimonial property.

Little is known regarding the practice of this concept in the Federal Territory of Kuala Lumpur because it is done behind closed doors in the Sharia' Court. So far, no research has been done yet on the practice of hakam. However, from the provisions under IFLA, it could be seen that hakam is not invoked in cases where the husband has pronounced talaq.²⁴² It could be deduced that due to this factor, the function of hakam is interpreted as a mechanism to unite the parties rather than conciliation. Even so, through the experience of one Sharia judge, it has failed to unite the estranged spouse since by the time hakam has been invoked, the marriage has irretrievably broken down.²⁴³ Introducing hakam at this stage is useless. It should be introduced earlier, that is when both parties went for counselling at the Unit Perunding dan Pembangunan Keluarga. Unfortunately since Unit Perunding dan Pembangunan Keluarga is not under the administration of Sharia Court, the Sharia Court could not interfere.

²⁴⁰ That is when the wife applies for a divorce using section 69 but the husband refuses either to divorce her or by redemption.

²⁴¹ Mahmood, 1982, p.93.

²⁴² Personal Conversations with Sharia Lawyers in December, 1992.

²⁴³ Personal conversation with Abdul Aziz Mashuri, Sharia Court Judge, August 1993.

Since there is a provision on hakam under IFLA, it is proposed that this provision be fully utilised to all parties intending to divorce at a much earlier stage. It is very ironic that when Islamic law has laid down the means to settle disputes in a peaceful manner through the concept of hakam, the Sharia court judge has had to deal divorce cases through the adversarial system.

Bersuarang should also be revived for those who do not want any intervention from the court, so that disputes can be settled within the families with expert help from a mediator. The arbitrators from each family would know the trait of both parties, and would be able to effect a reconciliation and if that fails will conciliate the parties into settling their disputes in an agreeable way. It also act as a safeguard to ensure that agreements are fair and freely negotiate. Bersuarang which includes both the process of reconciliation and conciliation is suitable for settling family disputes, without too much publicity, or a resort to the adversary court-based for the Malay-Muslims in Malaysia.²⁴⁴ It could work along similar lines as “out-of-court conciliation” as practised in England, with some modifications made to suit the present modern Malay society.

As for the Malaysian Chinese, they are also known to use conciliation to settle their disputes. According to Goh Bee Chen, Chinese are non-litigious people because they are heavily influenced by the Confucian views based on family and morality. She stated that;

“Culturally, the common law justice system runs counter to the rural Chinese Malaysian beliefs. The English judicial process requires of a judge a verdict rather than a compromise solution. This necessarily excludes the Confucian concept of yielding and compromise...”

²⁴⁴ In the majority of cases, the misunderstanding can be mended. see Ali, 1964, p.194.

She added that to have one's case adjudged in the law court is a public display of family shame in the Chinese sense.²⁴⁵ Most of them rely on kan-ching (good relations) and settle disputes through mediation.²⁴⁶

It is interesting to note that the secret societies had their own system of law which was in part embodied in written regulations of the society and dealt not only with the internal regulation of the members' behaviour towards one another and this includes prohibition against litigation between members. Traditional Confucian familial concepts, reinterpreted in the light of the new social situation, found their way into the disciplinary code of the society.²⁴⁷

For the Indian Tamils, arbitration is normally dealt by a village headman or elder. It is said that,

*"the practice of settling disputes out of court is...the virtual preserve of the Tamil Indian."*²⁴⁸

The mediator in their context takes a much broader view of the issues involved than any common law judge, whose area of investigation is limited by narrow concepts of what is relevant and what is not.²⁴⁹

²⁴⁵ Goh, Bee Chen, *The Traditional Chinese Concept of Law, Justice and Dispute Settlement*, Academic Exercise, Faculty Law, University of Malaya, Kuala Lumpur, 1983, p.204.

²⁴⁶ *Ibid*, p.173.

²⁴⁷ Comber, 1961, pp. 56-9.

²⁴⁸ Hon, Phaik Hong, *Extra-Legal Methods of Settling Disputes*, Academic Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, 1977, p.34.

²⁴⁹ "Once a matter is in the hands of the legal specialists, the lawyers and the judge, they impose their own construction upon it in such a way that both the form and the course which the dispute takes are largely beyond the disputants' control. What is in dispute and how it is to be dealt with are determined by the reach of legal rules... A narrow concept of relevance also requires that the precise issue in dispute is separated from any larger complex of relations between the two disputants, and dealt with in isolation from their relationship"; Roberts, 1979, p.21.

However, the Ceylonese, Punjabi and Chettiar community who form the upper crust of the Indian society are more litigation conscious, primarily because they have the means to bear the legal costs.²⁵⁰

Unfortunately, the present LRA which governs the non-Muslims does not have any provisions on conciliation. The law requires the petitioner through rules of court to “have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged.”²⁵¹ Where divorce is on the grounds of irretrievable breakdown, there is a compulsory reference of the matrimonial problem to a “conciliatory body” at which the parties attend without their lawyers. It is only after the conciliatory body “has certified that it has failed to reconcile the parties” that the petition can be presented, with certain exceptions.²⁵²

Even the role of mediator in conciliation in the definition given by Parkinson is very different from the role of the “conciliatory body” under the LRA. Parkinson stated that;

“Conciliation is not synonymous with divorce counselling because counselling may involve only one party and because counselling may take place on the periphery of the legal process, without addressing the legal issues. Furthermore, counselling may continue over a long period, with abstract rather than practical objectives. Conciliation, in contrast, is concerned with helping both parties to reach consensual decisions on specific issues in the short term. These decisions usually have major legal and financial implications and consequences. Therefore, it must be clearly understood that

²⁵⁰ Ibid.

²⁵¹ LRA, section 106.

²⁵² Ibid., the exceptions are contained in the proviso to section 106 (1). The exceptions relate to the disappearance or unavailability of the respondent, wilful refusal of the respondent to attend a conciliation hearing, imprisonment of the respondent for a term of five years or more, incurable mental illness of the respondent, or other exceptional circumstances.

*conciliation offers an alternative to contested court proceedings, not a substitute for legal advice and assistance.”*²⁵³

And according to Mnookin, in private ordering the role of the law is to act as a safety net where the bargaining spouses fail to agree. This bargaining takes place against a legal backdrop.²⁵⁴

It is high time that the present marriage guidance organisations in Malaysia should no longer see themselves as involved simply in procuring reconciliation. The range of service should be much wider to include conciliation as well. According to Freeman, conciliation is important because “divorce does not end the problems of marriage. Indeed, many problems only begin on divorce.”²⁵⁵ The present law pays no attention to the post-divorce problem, therefore, it is proposed that the provision on reconciliation be extended to conciliation as well.²⁵⁶ This process would allow people to disengage from a marital relationship effectively and humanely, and in such a way that future relationships are not prejudiced by the divorce.

In spite of much evidence of using conciliation to settle disputes in various cases, however, it is difficult to assess the attitude of the Muslims and non-Muslims in Malaysia since some have entered a sophisticated urban society while, at the other end of the scale, others have preserved the traditional values of older society. Whether conciliation offers any solution to the problems in Malaysia depends on several factors such as the philosophy behind it as well as its

²⁵³ Parkinson, L. “Bristol Courts Family Conciliation Service” [1982] 12 Fam.Law 13.

²⁵⁴ For further details see Mnookin, R., “Bargaining in the Shadow of the Law,” The case of divorce [1979] Current Legal Problems, 65.

²⁵⁵ Freeman, M.D.A, “Legal Responses to Marriage Breakdown,” Current Legal Problems, 1978, pp.121.

²⁵⁶ See proposal in Appendix I.

method of operation. Much also depends upon the expectations held, its aims, and of the role of conciliation in meeting the legal and social needs of the Muslims and non-Muslims society in Malaysia. A Research Committee should be appointed to look into research findings from countries whose experience of conciliation is more extensive. Care should be taken however not to draw generalised conclusions from countries with different laws, legal systems and different social, economic and cultural conditions.

APPENDIX I

An Act to amend the Law Reform (Marriage and Divorce) Act, 1976, relating to divorce.

Short Title 1. This Act may be cited as the Law Reform (Marriage and Divorce)(Amendments Act, 1993)

Application of the law 3. The Law Reform (Marriage and Divorce Act, 1976 (hereinafter referred to as the principal Act) is amended by amending section 3 thereof -
3A. Section 3 be amended to read; This Act shall not apply to a Muslim or to any person who is married under Muslim Law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act, but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a divorce on the petition of either party to the marriage where one of the party to the marriage has converted to Islam, and such decree shall, notwithstanding any written law to the contrary, be valid against the parties to the marriage.

New Section 4A 4.The Law Reform (Marriage and Divorce) Act, 1976 is amended by inserting after section 4 thereof the following new sections -

Abolition of Domicile of Dependent 4A. (1) Subject to subsection (2), the domicile of a married woman as at any time on or after the commencement of the Law Reform (Marriage and Divorce) (Amendment) Act, 1993 shall instead of being the same as her husband's by virtue only of the marriage, be ascertained by reference to factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before the commencement of the Law Reform (Marriage and Divorce) (Amendment) Act, 1993, a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of

origin) unless and until it is changed by acquisition or revival of another domicile either before or after the commencement of the Act.

Repeal of
section 47

Section 47 of the principal Act is hereby repealed.

Repeal and
re-enactment
of section 48

Section 48 of the Act is hereby replaced and the following new section substituted therefor-

Jurisdiction

48. The Court shall have jurisdiction to of court entertain proceedings for divorce, in matrimonial presumption of death and divorce proceedings or judicial separation only if -

- (a) the marriage has been registered under this Act, or is deemed to be registered under this Act, or was solemnised under a law which expressly or impliedly provides that the marriage shall be monogamous; and
- (b) either of the parties to the marriage is -
 - (i) domiciled in Malaysia at the commencement of the proceedings; or
 - (ii) habitually resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings

Repeal of
section 49

Section 49 of the principal Act is hereby repealed

Repeal of
and re-
enactment
section 51

Section 51 of the principal Act is hereby repealed and the following substituted therefor -

51 (1) Where one party to the marriage has converted to Islam, either party may petition for divorce;

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of conversion.

Repeal
and
re-enactment
of section 55.

Section 55 of the principal Act is hereby repealed and the following new section substituted therefor-

Conciliation

Section 55.(1) It shall be the duty of the court in which a petition for divorce or judicial separation has been instituted to give consideration, from time to time to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of the parties or of either of them that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following;

- (a)** adjourn the proceedings to afford the parties the opportunity of being reconciled or to enable anything to be done in accordance with either paragraph (b) or (c);
 - (b)** with the consent of the parties, interview them in chambers, with or without their solicitors, as the court thinks proper, with a view to effecting a reconciliation; and
 - (c)** nominate conciliation officers to endeavour the settlement of matrimonial property and custody of the children.
- (2)** If, not less than fourteen days after the adjournment under subsection (1) has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with another judge, as the case requires, as soon as practicable.
- (3)** Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this section shall not be admissible in any court.

Repeal of sections 58 and 59

Sections 58 and 59 of the principal Act are hereby repealed

**Repeal and
re-enactment
section 78**

Sections 78 of the principal Act is hereby
repealed and the following new section of
substituted therefor -

**Assessment
of
maintenance**

78. (1) In determining the amount of any of
maintenance to be paid by a man to his
wife or former wife, the court shall have regard to
all the circumstances of the case including the
following matters:

- (a) the income, earning capacity, property and
other financial resources which each of the
parties to the marriage has or is likely to
have in the foreseeable future;
- (b) the financial needs, obligations and
responsibilities which each of the parties to
the marriage has or is likely to have in the
foreseeable future;
- (c) the standard of living enjoyed by the family
before the breakdown of the marriage;
- (d) the age of each party to the marriage and
the duration of the marriage;
- (e) any physical or mental disability of either of
the parties to the marriage;
- (f) the contributions made by each of the
parties to the welfare of the family,
including any contribution made by looking
after the home or caring for the family; and
- (g) in the case of proceedings for divorce or
nullity of marriage, the value of either of
the parties to the marriage of any benefit
(for example, a pension) which, by reason of
the dissolution or annulment of the marriage
that party will lose the chance of acquiring.

- (2) In exercising its power under this section,
the court shall endeavour so to place the
parties, so far as it is practicable and,
having regard to their conduct, just to do so,
in the financial position in which they would
have been if the marriage had not broken
down and each had properly discharged his
or her financial obligations and
responsibilities towards the other.

**Criminal Offence for concealing matrimonial assets;
imprisonment or fine or both.**

**New Section
87A**

**The principal Act is hereby amended by
inserting after section 87 thereof a new
section 87A-**

**87A. (1) Subject to this section, the court shall not
make absolute any decree for divorce or nullity of
marriage or pronounce a decree of judicial
separation unless the court is satisfied as respects
every child -**

**(a) that arrangements have been made for the
welfare of the child and that those
arrangements are satisfactory or are the best
that can be devised in the circumstances; or**

**(b) that it is impracticable for the party or
parties appearing before the court to make
any such arrangements.**

**(2) The court may if it thinks fit proceed
without observing the requirements of
subsection (1) if it appears that there are
circumstances making it desirable that the
decree nisi be made absolute or, as the case
may be, that the decree for judicial
separation should be pronounced without
delay, and if the court has obtained a
satisfactory undertaking from either or both
of the parties to bring the question of the
arrangements for the child before the court
within a specified time.**

**(3) In this section, "welfare", in relation to a
child, includes the custody and education of
the child and financial provision for him/her.**

Repeal of
and
re-enactment
section 106

Section 106 of the principal Act is hereby
repealed and the following substituted
therefor -

106. (1) The Minister may appoint such public
officers as he thinks fit to be Conciliation officers
for the purposes of this Act.

(2) Where there are differences between the parties
to a marriage the parties or either of them may
refer the differences to a conciliation officer for his
advice and assistance.

APPENDIX II

An Act to amend the Islamic Family Law (Federal Territory) Act, 1984 relating to divorce.

- | | |
|---|--|
| Short Title | 1. This Act may be cited as the Islamic Family Law (Federal Territory) (Amendment Act) 1993. |
| Definition | 2. Section 2 of the Islamic Family Law (Federal Territory) Act, 1984 (hereinafter referred to as the principal Act) is amended by amending the definition of "darar syarie" to read;
"darar syarie" means harm, according to what is normally recognised by Islamic Law, affecting a wife in respect of religion, life, body, mind, dignity, or property; |
| Repeal and re-enactment of section 47 (16) (17) | <p>Section 47 (16) and (17) of the principal Act is hereby repealed and the following substituted therefor -</p> <p>47 (16) A <u>Talaq raji'i</u> pronounced by the husband (except in cases of <u>ruju'</u> made during <u>'iddah</u> made explicitly or impliedly) or an order made by the court shall not be effective until the expiring of the <u>'iddah</u></p> <p>(17) If the wife is pregnant at the time the <u>talaq</u> is pronounced or the order is made, the <u>talaq</u> or the order shall not be effective to terminate the marriage until the pregnancy ends.</p> <p>(18) Nothing contained in this section shall affect any right that a marriage woman has after the dissolution of her marriage under this section from marrying her formal husband except when the dissolution is made effective after the third time.</p> |

New section
49 (7)

Section 48 is amended by inserting after section 48 (6) thereof the following -

Section 48 (7) No advocate and solicitor shall appear or act for any party in any proceeding before a conciliatory committee and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory committee.

Repeal of and
re-enactment of
section 55

Section 55 of the principal Act is hereby repealed and the following new section substituted therefor

Section 55 A.

No pronouncement if talaq or order of divorce or annulment shall be registered unless the Chief Registrar is satisfied that the order was made by the court.

(1) Notwithstanding section 54, a husband who divorces his wife by the pronouncement of talaq in any form outside the court and without the consent of the Court, a report of the talaq must be made to the Court within 7 days.

(2) The Court shall examine and make an inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to Hukum Shara', subject to section 124, confirm and record the divorce and send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

APPENDIX III

Divorce Survey Form For Sharia Court Files

1	Year divorce granted	-----
1.	1975	9. 1983
2.	1976	10. 1984
3.	1977	11. 1985
4.	1978	12. 1986
5.	1979	13. 1987
6.	1980	14. 1988
7.	1981	15. 1989
8.	1982	16. 1990
2	Age of husband at marriage	-----
1.	16-19	5. 35-39
2.	20-24	6. 40-44
3.	25-29	7. 45-49
4.	30-34	8. 50 and above
3	Age of wife at marriage	-----
1.	16-19	5. 35-39
2.	20-24	6. 40-44
3.	25-29	7. 45-49
4.	30-34	8. 50 and above
4	Age of husband at divorce	
1.	16-19	5. 35-39
2.	20-24	6. 40-44
3.	25-29	7. 45-49
4.	30-34	8. 50 and above
5	Age of wife at divorce	-----
1.	16-19	5. 35-39
2.	20-24	6. 40-44
3.	25-29	7. 45-49
4.	30-34	8. 50 and above
6	Ethnic group of husband	-----
1.	Chinese	
2.	Indian	
3.	Others	
4.	Malay	

7	Ethnic group of wife	-----
1.	Chinese	
2.	Indian	
3.	Others	
4.	Malay	
8	Occupational group of husband	-----
1.	Professional, technical and related workers	
2.	Administrative and managerial skills	
3.	Clerical and related workers	
4.	Sales workers	
5.	Service workers	
6.	Agricultural, animal husbandry and forestry workers, fishermen and labourers	
7.	Production and related workers, transport, equipment operators and labourers	
8.	Workers not classified above	
9.	Unemployed	
10.	Outside labour force	
9	Occupational group of wife	-----
1.	Professional, technical and related workers	
2.	Administrative and managerial skills	
3.	Clerical and related workers	
4.	Sales workers	
5.	Service workers	
6.	Agricultural, animal husbandry and forestry workers, fishermen and hunters	
7.	Production and related workers, transport, equipment operators and labourers	
8.	Workers not classified above	
9.	Unemployed	
10.	Outside labour force	
10	Sex of petitioner	-----
1.	Male	
2.	Female	
11	Methods of divorce	-----
1.	With permission from court	
2.	Without permission	
12	Types of divorce	-----
1.	<u>Talaq</u>	
2.	<u>Ta'liq</u>	
3.	<u>Fasakh</u>	
4.	<u>Khulu'</u>	

13	Grounds for divorce	-----
1.	Adultery	
2.	Cruelty	
3.	Desertion and separation	
4.	Mixture	
5.	Polygamy (unequal treatment)	
6.	Intolerable behaviour	
14	Number of children	-----
1.	One	
2.	Two	
3.	Three	
4.	Four	
5.	Five	
6.	Six or more	
7.	None	
15	Duration of marriage	-----
1.	Less than one year	
2.	1-2	
3.	3-4	
4.	5-6	
5.	7-8	
6.	9-10	
7.	11-12	
8.	13-14	
9.	15-16	
10	16 and above	
16	Ruju'	-----
1.	Yes	
2	No	

APPENDIX IV

Detailed Classification of Ethnic Groups by Region, Malaysia, 1980

1980		
<u>Malay</u>	-	Malay Indonesia Jakun Semai Semelai Temiar Other Indigeneous Other Malay race
<u>Chinese</u>	-	Hokkien Cantonese Khek (Hakka) Hainanese Kwongsai Hokchiu Hokchia Henghua Other Chinese
<u>Indian</u>	-	Indian Tamil Malayali Telegu Sikh Other Punjabi Other Indian Pakistan Bangladeshi Sri Lanka Tamil Other Sri Lankan
<u>Others</u>	-	Thai Vietnamese Other Asian Eurasian Others

APPENDIX V

List of Persons Interviewed

1. Associate Professor Abdullah Abu Bakar, International Islamic University, Malaysia.
2. Haji Idris bin Ahmad, member of the Technical Committee of Sharia and Civil Law
3. Puan Norsiah Baharin, Assistant Director, Legal Aid Bureau, Federal Territory of Kuala Lumpur.
4. Puan Siti Naaishah Hambali, Judge, Session Court, Federal Territory of Kuala Lumpur.
5. Puan Unaizah Mohammad, Senior Assistant Registrar, Family and Property Division, High Court, Federal Territory of Kuala Lumpur.
6. Shariah and Civil Lawyers in the Federal Territory of Kuala Lumpur.
7. Sheikh Ghazali Abdul Rahman, Chief Qadhi of the Shariah Court, Federal Territory of Kuala Lumpur.
8. Tan Sri Datuk Azmi Kamaruddin, Supreme Court Judge, Malaysia.
9. Tan Sri Datuk Professor Ahmad Ibrahim, Head of Technical Committee, Shariah and Civil Laws, Malaysia.
10. Ustaz Abdul Aziz Mashuri, Shariah Court Judge, Federal Territory of Kuala Lumpur
11. Ustaz Ismail Ahmad, Department of Religious Affairs, Federal Territory of Kuala Lumpur.
12. Ustaz Mahammad Ibrahim, Registrar of Sharia Court, Federal Territory of Kuala Lumpur.
13. Ustaz Wan Mohammad, Registrar of Marriages and Divorces, Department of Religious Affairs, Federal Territory of Kuala Lumpur.
14. Ustaz Wan Sulaiman, Head of Counselling and Development of Family Unit, Department of Religious Affairs, Federal Territory of Kuala Lumpur.
15. Ustazah Zawanah, Counsellor, Counselling and Development of Family Unit, Department of Religious Affairs, Federal Territory of Kuala Lumpur.

Population and Housing Census of Malaysia, 1980 Map Showing Distribution of Population of Federal Territory of Kuala Lumpur



GLOSSARY

Adat	Custom
Adat Perpatih	Matrilineal custom
Adat Temenggung	Patrilineal custom
Adat Istiadat Melayu	Malay custom
Agong, Yang Di Pertuan	The King
Allah	God
'Aql	intellect, reason
Bait al-Mal	Public Treasury
Bersuarang	Arbitration or Settlement
Bid'a	Innovation
Buapak	Elder of a family
Cerai ta'liq	Divorce by the breaking of a condition.
Cerai Tebus Talaq	Divorce by redemption
China Buta	Literally translated as "Blind Chinese", that is one who carries out the legal fiction of marrying a woman divorced from her husband by three talaq for the expressed purpose of divorcing her and thereby making it possible for her husband to remarry her
Darar Shari'i	Harm according to what is normally recognised by Islamic law, affecting a wife in respect of religion, life, body, mind, or property
Endogamy and exogamy	These term are used by the various authors to mean respectively; a rule of marriage which requires a person to take a spouse from within a kin group; a rule of marriage which requires a person to take a spouse from outside a kin group
Fasakh	Revocation, annulment of marriage by reason of any circumstances permitted by Islamic law
Hadith	Tradition
Hakam	Arbitrator

Hanafis	Followers of the largest of four school of law mutually considered "orthodox", derives name from Abu Hanifa. Shaybani and Yusuf are outstanding jurists, represents ancient 'Iraqi School, adopted as official school by Ottoman Turks and accordingly followed by courts of Sudan, Egypt, Palestin, Syria, Iraqi. Dominant in Central Asia and India
Hanbalı	Followers of smallest "orthodox" school, Wahhabis of Arabia repudiate many Hanbalı tenets but adhere to teachings of Hanbalı reformers, Ibn Taimiyya and Ibn Qaiyyim
Haram	Prohibited, forbidden
Hukum Shara'	The laws of Islam in any recognised sects
'Iddah	Period of retirement specified for termination of the legal effects of marriage
Islam	Literally means submission to the will of God
Kufu'	Marriage equality
Majlis Agama Islam	Council of Religion and dan Adat Istiadat
Melayu	Malay Custom
Malikis	Followers of "orthodox" school of Hijaz, Malik ibn Anas nominal founder; found in Sudan, Upper Egypt, throughout North and West Africa
Mufti	Jurisconsult; qualified to issue legal opinion
Muta'ah	Consolatory gift given to a divorced woman
Nushuz	Wife unreasonably refuses to obey lawful wishes of husband
Polygamy	This term is used to refer to polygyny
Qadhi	Judge
Ruju'	A return to the original married state
Shafi'i	Adherents of school founded by Shafi'i, predominant in lower Egypt, East Africa, much of Arabia, throughout Southeast Asia
Sunnah	A precedent based on the Prophets acts or sayings
Surat Ta'liq	"Certificate of condition" attached to a marriage which if broken entitles the woman to divorce
Semanda	Derives from Sanskrit "sambandhakaran"; meaning boundor wedded

Sunnah	A concrete implementation and tangible form and the actual embodiment of the will of Allah in the form of the Prophet Muhammad's deeds
Talaq	Divorce
Talaq raj'i	Revocable divorce
Talaq bain	Irrevocable divorce
Ta'liq	A promise expressed by the husband after solemnisation of marriage in accordance with Hukum Shara'

ABBREVIATION

A.C	Appeal Cases
A.L.J.	Australian Law Journal
ALL E.R	All England Report
A.I.R.	All India Report
I.L.R.	Indian Law Report
P.L.D	All Pakistan Legal Decisions
Q.B	Queen's Bench
S.A.W	Salla'l-lahhu-'alaihi wassallam
F.M.S.L.R	Federated Malay States Law Reports
J.H.	Jernal; Hukum
J.M.B.R.A.S	Journal of the Malayan Branch of the Royal Asiatic Society.
J.M.C.L	Journal of Malaysian and Comparative Law
J.S.B.R.A.S.	Journal of the Straits Branch of the Royal Asiatic Society.
Ky.	Kyshe's Reports
Leic.	Leicester's Straits Law Reports.
M.L.R	Malayan Law Review
M.C	Malayan Cases
M.L.J.	Malayan Law Journal
S.L.R	Straits Law Reports
S.S.L.R	Straits Settlements Law Reports

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