

FAMILY LAW

IN MALAYSIA

CIVIL AND SYARIAH PERSPECTIVES

General Editors

Ashgar Ali Ali Mohamed
Muhamad Hassan Ahmad



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PREFACE

Marriage, which is essentially a contract between a man and a woman, is a fundamental institution of human life that regulates the legal relationship between the sexes. Beyond the fulfilment of sexual desire, marriage primarily functions to produce offspring, thereby securing the perpetuation of a reputable lineage through successive generations. For Muslims, the legal foundation of marriage is derived from divine sources — the Holy Quran and the traditions of the Prophet Muhammad (peace be upon him) — while for non-Muslims, it is governed by their respective personal laws. However, same-sex marriage, commonly referred to as gay marriage, is not recognised in Malaysia. Although such relationships have gained wider acceptance in several countries, they are prohibited under the major religions, which consider them inconsistent with the traditional concept of marriage and the conventional understanding of human reproduction.

Before colonisation and the enactment of the Law Reform (Marriage and Divorce) Act 1976 (LR(MD) Act) and the Islamic Family Laws of the respective States, both Muslims and non-Muslims in Malaysia solemnised their marriages in accordance with their respective personal laws. However, during the British administration of the Malay Peninsula, laws were introduced to regulate civil marriages, such as the Civil Marriage Ordinance 1952 and the Christian Marriage Ordinance 1956, both of which recognised only monogamous unions. Polygamous marriages under Chinese and Hindu customary laws, however, remained valid and undisturbed. Similarly, Muslim personal laws were left largely intact and were neither changed nor interfered with by the British administrators.

When colonisation ended, the legislature chose to recognise only monogamous marriages for non-Muslims, a position reflected in the LR(MD) Act. Similar to the British approach, Parliament did not interfere with or alter the existing Muslim personal laws. In fact, s. 3(3) of the LR(MD) Act expressly excludes Muslims from its application, as matters relating to marriage, divorce, custody and guardianship, maintenance of children, matrimonial property, and alimony fall within the jurisdiction of the State Legislatures under List II (State List) of the Ninth Schedule to the Federal Constitution. Consequently, it is the State Legislatures — and not Parliament (except for the Federal Territories) — that possess the authority to enact laws governing

these matters, and the Syariah Courts are vested with jurisdiction over the issues specified therein. Accordingly, two distinct regimes of family law operate in Malaysia: the Islamic Family Laws of the respective States, which govern Muslims, and the LR(MD) Act, which applies to non-Muslims. Both legal frameworks comprehensively regulate matters pertaining to family relations, including the requirements for a valid marriage, the registration of marriages, the types and grounds for divorce, the custody and guardianship of children, as well as the maintenance of the wife and children.

With that said, the book *Family Law in Malaysia: Civil and Syariah Perspectives* comprises 29 chapters and provides a comprehensive examination of the essential components of Malaysian family law from both the civil and Syariah standpoints. It commences with an overview of the two legal systems and proceeds to discuss topics such as betrothal, the requirements for a valid marriage, the legality of temporary (*muta'a*) marriage, polygamy, void and voidable marriages, and the process and registration of marriages. The discussion further extends to judicial separation and the statutory grounds for the dissolution of civil marriages, as well as the various forms of divorce recognised under Islamic law, namely *talaq*, *khulu'*, *ta'liq*, and *fasakh*. In addition, the book analyses the legal implications arising from the renunciation of Islam by either party to a Muslim marriage or the conversion to Islam by either party to a non-Muslim marriage, the dissolution of marriage through *li'an* (imprecation), and the concepts of '*iddah* and *ruju*' from the Syariah perspective.

Furthermore, the book examines the legal frameworks governing the maintenance of wives and children, guardianship and custody of children, and the division of matrimonial property, from both the civil and Syariah perspectives. It also addresses matters relating to legitimacy and legitimation, as well as the adoption of children, within both legal frameworks. In addition, the discussion extends to other pertinent aspects of matrimonial disputes, including domestic violence, injunctive reliefs, the jurisdiction of the courts, and the requirement for conciliation. The inclusion of topics on private and public international law pertaining to family matters further enhances the breadth of the discussion, setting this work apart from conventional texts on family law.

With this background, at the outset, as the general editors of this book, we wish to extend our profound appreciation to all contributors for their meticulous research and commitment in compiling the relevant laws, principles, and authorities. Their scholarly contributions and breadth of expertise have significantly enriched this work, rendering it an indispensable reference for students, practitioners, and readers interested in this field.

Our deepest appreciation and sincere gratitude are extended to Hon. Senator Dato' Setia Dr. Haji Mohd Na'im bin Mokhtar, Minister of Religious Affairs in the Prime Minister's Department, who had also served with distinction as the Chief Judge of the Syariah Court and the Director General of the Department of Syariah Judiciary Malaysia, for graciously devoting his valuable time to prepare the Foreword to this book. We are also profoundly grateful to CLJ Malaysia Sdn Bhd, the publisher, for their steadfast commitment, keen interest, and generous support in bringing this publication to fruition.

The laws and developments discussed in this book are current as of 10 November 2025.

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1 December 2025

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مِنْتَرِي دُجَائِبِ فُرْدَانِ مَنْتَرِي (حَالِ اَحْوَالِ كَلِمَرِ)

MINISTER IN THE PRIME MINISTER'S DEPARTMENT (RELIGIOUS AFFAIRS)

FOREWORD

The institution of the family lies at the heart of every society. It is within this intimate sphere that human relationships are formed, nurtured, and, at times, contested. In Malaysia, the regulation and protection of the family are governed by a unique and complex legal structure that reflects the nation's plural legal heritage in which both civil and Syariah legal systems coexist. This book, *"Family Law in Malaysia: Civil and Syariah Perspectives"*, is a timely and comprehensive contribution to the evolving discourse on family law in this pluralistic society. It addresses an urgent academic and practical need for a coherent, comparative, and analytically grounded exposition of the family law landscape in Malaysia.

Malaysia's dual legal system, developed within its rich multicultural and multireligious society, presents both opportunities and challenges in the governance of family relationships. The civil family law, as codified primarily in the Law Reform (Marriage and Divorce) Act 1976, applies to non-Muslims. In contrast, Muslims are governed by various State-enacted Islamic family laws, grounded in Islamic jurisprudence and administered through the Syariah Courts. On one hand, it ensures that the personal laws of different communities are respected and accommodated; on the other, it gives rise to complex questions regarding jurisdictional authority, legal harmonisation, and substantive justice.

This book brings together 29 chapters that traverse the entire spectrum of Malaysian family law, offering a systematic exploration of both the civil and Syariah perspectives. The opening chapter lays the foundational context by providing a comprehensive overview of civil and Islamic family law in Malaysia. It guides readers through the historical, constitutional, and legal underpinnings of Malaysia's dual system and explains how jurisdictional boundaries are drawn and interpreted by the courts. The subsequent chapters delve into the substantive and procedural aspects of marriage, divorce, maintenance, custody, matrimonial property, and related issues, with clear distinctions between civil and Islamic provisions. The book examines the requirements of civil and Muslim marriages respectively, while dissecting the various grounds and procedures for dissolution of marriage under both systems, including *talaq*, *fasakh*, *khul'*, and *li'an* in the Islamic context. These distinctions are not merely technical as they are rooted in different legal philosophies, moral values, and social expectations. This book handles these complexities with clarity, depth, and critical analysis.

The inclusion of emerging and often contentious topics such as polygamy, temporary (*muta'a*) marriages, and the legal effects of apostasy or religious conversion on marriage, further highlights the contemporary relevance of the text. These are issues that frequently reach the Malaysian courts and engage broader debates about religious freedom, legal pluralism, and constitutional rights. The book's comparative approach enables readers to appreciate both the civil and Islamic legal responses to these challenges and to critically assess their coherence and consistency.

Another significant strength of this textbook also lies in its commitment to highlighting both substantive and procedural justice within the family law framework. Chapters relating to maintenance, guardianship and custody, and matrimonial property division illuminate the gendered and economic dimensions of family law. These chapters thoughtfully address the rights and responsibilities of spouses and parents, particularly in the aftermath of marital breakdowns. In doing so, the book echoes the broader international human rights discourse, while remaining grounded in the Malaysian legal and cultural context.

The authors have also rightly extended the analysis to procedural issues and dispute resolution. Chapters on jurisdictional conflicts and alternative dispute resolution mechanisms are especially valuable in a dual system where parallel court structures and overlapping jurisdictions can result in delays, confusion, or even denial of justice. The discussion on the domestic violence and related protection mechanisms reflects a much-needed legal response to intimate partner violence, and the legal frameworks governing legitimacy, adoption, and transnational family law disputes demonstrate the expanding scope of family law in an increasingly interconnected world.

Another notable contribution of this book is its engagement with private and public international law in family matters. In a globalised era, transnational marriages, international custody disputes, and cross-border maintenance issues are becoming increasingly common. Hence, Malaysia cannot remain insulated from international legal developments. The final chapters dealing with international conventions and regional human rights instruments show how global norms are influencing domestic jurisprudence. These discussions are particularly significant for those interested in the harmonisation of Islamic family law with universal human rights standards.

The collaborative nature of this work – bringing together experts in civil and Islamic law – enhances its scholarly value. It represents a meaningful engagement with Malaysia's legal pluralism, not merely as a sociological fact but as a dynamic and evolving legal phenomenon. In doing so, it paves the way for deeper reflections on the future of family law in Malaysia as to how it can better serve justice, promote equality, and protect the dignity of every individual and family unit, regardless of religious affiliation. This book is much more than a descriptive manual of legal provisions. It is a thoughtful, rigorous, and forward-looking contribution to Malaysian legal scholarship. It challenges us to think critically about the role of family law in a changing society and to consider how our legal institutions can respond to the lived realities of families – whether Muslim or non-Muslim, local or transnational, traditional or modern.

Therefore, this book will serve as an essential resource for a wide spectrum of readers – law students seeking a solid foundation in family law; legal practitioners and lawyers requiring reliable reference material; officers in need of accessible legal guidance; and judges as well as academics engaging with complex family matters.

Last but not least, I extend my warmest congratulations to the editors and authors for their dedication, scholarship, and contribution to the Malaysian legal literature. I am confident that “*Family Law in Malaysia: Civil and Syariah Perspectives*” will stand as a reference point for years to come. It is my hope that this book will serve as a foundation for future reforms, better cross-jurisdictional understanding, and greater access to justice in family matters across Malaysia.

I wish you all great success with this publication. Thank you.



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TEMPORARY OR SHORT-TERM MARRIAGE CONTRACT (*MUTA'A* MARRIAGE): SYARIAH AND CIVIL PERSPECTIVES*

5.1 INTRODUCTION

Marriage is an important institution in human life, establishing and regulating the legal relationship between the sexes. It is meant to establish progeny and thereby continue a respectable lineage for generations to come. As mentioned in the earlier chapter, in Islam, the legal basis of marriage is provided in numerous verses of the Holy Quran and the traditions of Prophet Muhammad (SAW). For example, the Holy Quran proclaims, “Then marry women of your liking, two, three or four”.¹ “And marry those among you who are single, and the virtuous ones among your slaves, male or female”.² “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)”.³ The Prophet (SAW) said, “O ye young people, whoever can afford marriage should marry, for that will help him lower his gaze and guard his modesty. Whoever is not able to marry is recommended to fast, as fasting diminishes (his) sexual power”.⁴ In another version by Al-Bayhaqi, it reads, “When a man gets married, he gets one half of the religion. Thus, he should fear Allah in the other half”. Abu Hurairah reported that the Prophet (SAW) said, “There are three people whom Allah will surely help: a warrior in the cause of Allah, a slave who wants to free himself by a payable contract and whoever seeks chastity by marriage”.⁵

As evident from the above, marriage serves as a means of safeguarding one from committing sinful acts driven by lust and desires (*nafs*). According to Imam Al-Ghazaali, “the predominant destructive factors of one’s *deen* (religion) are the private parts and the stomach. One of these is satiated by *nikah*, because in *nikah* lies chastity and morality. It is a fort from *shaitaan* and saves one from the evil

* This Chapter is contributed by Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad.

1 *Surah An-Nisa* (4:3).

2 *Surah An-Nur* (24: 32).

3 *Surah Rum* (30:21).

4 Al-Bukhari & Muslim.

5 At-Thirmidhi.

diseases of lust. It curbs lusts and desires, keeps one's gaze in check and safeguards one's private parts. Furthermore, Mufti Abdul Jaleel Qasmi stated, "when a person makes *nikah*, he acquires a peaceful and serene disposition, then he will fulfil his natural desires in permissible avenues and means. He will understand it as his obligation to abstain from fornication, immorality and stray glances".⁶ In other words, marriage represents the most effective means of ensuring a virtuous life, safeguarded from immorality and emotional instability. The Holy Quran says, "They (your wives) are as a garment to you, and you as a garment to them".⁷ The husband and the wife are therefore mutual supporters, providing comfort and protection to one another. Apart from the gratification of sexual desires, safeguarding lineage and progeny and creating a bond between the families of the couple, marriage is also a social contract with wide and varied responsibilities and duties. It provides a woman with sustenance, clothing and a home enabling her to devote her time to the responsibility of rearing her children. Having established the foregoing, this Chapter proceeds to examine the concept of temporary marriage, commonly referred to as short-term or *muta'a* marriage from the standpoint of Islamic jurisprudence, and further analyses the legal status of such a marriage contract within the framework of Malaysian laws governing both Muslims and non-Muslims.

5.2 SOLEMNISATION OF MARRIAGE: THE CONDITIONS

Under Islamic law, marriage is essentially a contract between a man and a woman. Such contracts carry significance not only in legal terms but also in religious, moral and spiritual contexts. In *Khurshid Bibi v. Muhammad Amin*⁸ – a Pakistani case – it was stated that, "it is well settled, that marriage among Muslims is not a sacrament but in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones, but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause".

The marriage contract is entered into through an offer (*ijab*) and acceptance (*qabul*) between the parties in the presence of two competent adult male Muslim witnesses. The consent of the woman must also be obtained, usually through her guardian (*wali*). The expression of offer and acceptance used in the contract is intended to be one of permanency. This is because of the fact that the objects of the contract are to be committed to each other forever, to establish a family and to produce and

6 Mufti Abdul Jaleel Qasmi, *The Complete System of Divorce (Talaq)*, (Adam Publishers and Distributions, New Delhi, 2003), 23.

7 *Surah Al-Baqarah* (2:187).

8 (1967) PLD 97 SC.

raise children.⁹ According to the Shafi'i school, there are five requirements which are fundamental or essential for a valid Muslim marriage, namely; (i) the offer or the *ijab* of one contracting party; (ii) the acceptance or *qabul* of the other party; (iii) the offer and acceptance occurs at the same meeting before two witnesses, who have to be male, sane, adult and Muslims; (iv) the acceptance must be declared in a clear and unequivocal manner and both witnesses must be satisfied before the acceptance is declared valid; and (v) there must be a *wali* or a guardian for marriage. The *wali* is usually the father of the girl. He may also be the paternal grandfather, the brother or uncle. In the absence of such persons, the *kadi* may step in on behalf of the Ruler of the State as *wali raja*.

In the Federal Territories,¹⁰ pursuant to the Islamic Family Law (Federal Territories) Act 1984 [Act 303], a marriage shall be in accordance with the provisions of this Act and shall be solemnised in accordance with *Hukum Syarak* by: (a) the *wali* in the presence of the Registrar; (b) the representative of the *wali* in the presence and with the permission of the Registrar; or (c) the Registrar as the representative of the *wali*. Section 11 of the Act provides that "a marriage shall be void unless all conditions necessary, according to *Hukum Syarak*, for the validity thereof are satisfied". As noted earlier, Islam does not regard marriage as a union for the gratification of sexual lust alone but as a social contract with wide and varied responsibilities and duties. A husband is fully responsible for the family in its entirety. They are subject to various duties, such as providing for and protecting their spouse and children. As the Quran provides, "Men are the protectors and maintainers of women".¹¹ Maintenance for the wife consists of providing her with all the basic needs such as food and drink, clothing, housing and running a household. In his farewell pilgrimage, the Prophet (SAW) mentioned that the "rights of women upon the men are that the men should provide them with food and clothing in a fitting manner".¹²

9 This is because although Allah has made divorce permissible, it is highly disliked by Him. A *hadith* of the Prophet (SAW) states to the effect – "Of all lawful acts the most detestable to Allah is divorce" (Sunan Abu Dawud, *Kitab Al-Talaq* Vol. 2, p. 586). The provisions for *talaq* (divorce) are set out in the Holy Quran, *Surah Al-Baqarah* (2:229–232) and *Surah At-Talaq* (65:1–7). In line with these injunctions in the Holy Quran and the sayings of the Prophet (SAW), the legislation and the decisions of the Syariah courts have attempted to control the exercise of the right of *talaq*. See *Zainab v. Abdul Latif* (1991) 8 JH 297; *Rojmah v. Mohsin* (1991) 8 JH 268, [1991] 3 MLJ xxx; *Mohamed v. Roslina* (1992) 8 JH 275; *Mustafah v. Habeeba* (1990) 7 JH 255; *Jasni Abdul Rahim v. Rahmah Mohd Jono* (1991) 10 JH 213, [1992] 1 MLJ cxliii and *Razimah Haneem kwn. Yusuf Hasbullah* [2004] 1 CLJ (Sya) 242. The *talaq* takes effect when it is pronounced but it will not operate to dissolve the marriage until the expiry of the 'iddah period or the end of the pregnancy, as the case may be. *Talaq* pronounced in any form outside court and without the permission of the court is an offence. See Islamic Family Law (Federal Territories) Act 1984, s. 124.

10 The Federal Territories consisted of Kuala Lumpur, Labuan and Putrajaya.

11 *Surah An-Nisa* (4:34).

12 Sahih Muslim, *Kitab Al-Hajj*, Vol. 2, 615–616.

5.3 TEMPORARY OR SHORT-TERM MARRIAGE OR *MUTA'A*: FROM THE ISLAMIC PERSPECTIVE

Marriage is viewed as a permanent bond with a lifelong commitment between two individuals. This concept is often rooted in the belief that marriage is a sacred bond, a covenant, or a divinely ordained arrangement. Certain kinds of marriage that were practiced in the past were prohibited due to their contradiction with the essence of permanency and this includes temporary or short-term marriage or *muta'a* marriage. Temporary marriage or *muta'a* marriage is a personal contract of marriage between a man and woman to cohabit for a limited period of time, at the end of which she becomes automatically divorced, in return for a certain remuneration payable by the man. In *Ishak Haji Shaari v. PP*,¹³ *muta'a* marriage was defined as a "marriage contracted between a male Muslim and a female Muslim, a Jew, a Christian or a fire-worshipper, the former declaring to the latter, "I have united myself to thee" or "I have married thee" or words to this effect and by fixing the period of cohabitation for a day, a month, a year or a fixed term of years and by further specifying the amount of dowry".

Short-term or temporary marriages are an act of disrespect toward the marriage law. It is basically a form of concealed prostitution¹⁴ where the parties merely intend to have short-term pleasure but not to raise a family. It was reported that short-term marriage contracts were blessed by the local Islamic clerics in Puncak – a hill-top town south of Indonesia, frequented by tourists from Middle East.¹⁵ It is noted that during the rise of Islam, but before the Islamic legislative process was completed, such a contractual marriage was approved by the Prophet (SAW) and was practised for some time until it was forbidden completely. The initial

13 *Ishak Haji Shaari v. PP* [2006] 2 CLJ 325.

14 The word "prostitution" comes from the word prostitute, which means any person who offers his or her body for sexual gratification for hire whether in money or in kind. The Penal Code [Act 574] does not provide for the definition of prostitution. Prostitution as defined in the *Oxford Concise Dictionary* (8th Edn) as "a woman who engages in sexual activity for payment; a man or boy who engages in sexual activity especially with homosexual men for payment; a person who debases himself or herself for personal gain". A person exploiting another person for purposes of prostitution, persons living on or trading in prostitution and soliciting for purpose of prostitution, is prohibited in the Penal Code, ss. 372, 372A and 372B. The suppression of brothels is governed by s. 373 of the same Act. It is worth noting the *misyar* marriage, where the contracting parties mutually agree to relinquish certain marital rights, such as the wife's entitlement to cohabitation, housing, and maintenance. Although such a marriage is recognised and practiced in some Muslim jurisdictions as a legally valid contract on the grounds that it fulfils the essential requirements of a Syariah-compliant union, critics maintain that its primary function is the legitimisation of sexual relations. In this respect, it has been argued that *misyar* marriage bears close resemblance to *muta'a* marriage and, in effect, represents a lawful mechanism that facilitates relationships otherwise regarded as illicit.

15 See "Rural Indonesian women condemned for short 'pleasure marriages' with tourists for US\$500" at <https://www.scmp.com/news/people-culture/article/3279641/short-term-us500-pleasure-marriage-practice-among-poor-rural-indonesia-women-condemned>.

permission to contract such marriages was because the Muslims were passing through what might be called as a period of transition from ignorance (*jahiliyyah*) to Islam.

According to Yusuf al-Qaradawi, "After the advent of Islam, when they [Muslims] were required to go on military expeditions, they were under great pressure as a result of being absent from their wives for long periods of time. Among the Believers were some who were strong in faith and others who were weak. The weak ones feared that they would be tempted to commit adultery, a major sin and an evil course, while the strong in faith, on the other hand, were ready to castrate themselves, as stated by Ibn Mas'ud: 'We were on the expedition with the Messenger of Allah (peace be on him) and did not have our wives with us, so we asked Allah's Messenger (peace be on him), 'Should we not castrate ourselves?' He forbade us to do so but permitted us to contract marriage with a woman up to a specified date, giving her a garment as a dower (*mahr*)'. Thus, temporary marriage provided a solution to the dilemma in which both the weak and the strong found themselves".¹⁶

The prohibition of temporary marriage is evident from a number of the Prophetic traditions. On the authority of Ali ibn Abi Talib, "the Prophet (SAW) prohibited the *muta'ah* marriage on the battle of Khaybar".¹⁷ On the authority of Al-Juhani who stated that during the conquest of Makkah, the Prophet (SAW) gave some Muslims permission to contract temporary marriages. However, before leaving Makkah the Messenger of Allah (SAW) prohibited temporary marriage.¹⁸ The Prophet (SAW) had prohibited absolutely *muta'a* marriage by the following utterance; "Allah has made it unlawful until the Day of Resurrection".

Yusuf al-Qaradawi raised the question whether temporary marriage is absolutely forbidden, like marriage to one's own mother or daughter, or if it like the prohibition concerning the eating of pork or dead meat, which becomes permissible under necessity – the necessity in this case being the fear of committing the sin of *zina* (adultery)? On the above question, he stated; "The majority of the Companions held the view that after the completion of the Islamic legislation, temporary marriage was made absolutely *haram*. Ibn Abbas, however, held a different opinion, permitting it under necessity. A person asked him about marrying women on a temporary basis and he permitted him to do so. A servant of his then asked, "Is this not under hard conditions, when women are few and the like?" and he replied, "Yes". Later, however, when Ibn Abbas saw that people had become lax and were engaging in temporary marriages without necessity, he withdrew his ruling, reversing his opinion".¹⁹ Ibn Abbas had said, "marriage for enjoyment was

16 Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, English translation by Kamal El-Helbawy *et.al.* (Islamic Book Trust, Kuala Lumpur, 2001), 189.

17 Al-Bukhari & Muslim.

18 Muslim.

19 Yusuf al-Qaradawi, *supra* at note 16, at p. 190.

practiced after the advent of Islam, but when this verse was revealed, "Except from their wives and what their right hands possess"²⁰ it was legitimately repealed."²¹ As it currently stands, *muta'ah* marriage is unanimously termed as prohibited by all Muslim scholars.

Having described the notion of marriage in Islam and the prohibition of *muta'ah* marriage, it would be worthwhile to discuss the Court of Appeal's decision in *Ishak Haji Shaari v. PP*,²² particularly in relation to *muta'ah* marriage. The brief facts of the above case are as follows: the applicant, an *ustaz* or religious teacher, whom the victim's parents had entrusted their daughter, a 14-year-old schoolgirl, was charged for having outraged her modesty an offence under s. 354 of the Penal Code. The applicant took the victim to his house, where no one else was present except the girl, and after inviting her to join him in prayer, he purported to undergo a summary marriage ceremony with her. He clasped her hand and declared to her as follows: "*Sahaja aku nikahkan diriku dengan Ramlah bte Mahden dengan mas kahwin RM40 hutang*" (Verily I marry myself to Ramlah bte Mahden with a dowry of RM40, deferred). Thereafter, he told the girl to dress up scantily in order for him to consummate the marriage. He also coaxed and fondled her. As she persistently refused his request, the applicant then placed a copy of the Quran on the victim's head and made her swear on the Holy Book that she would not reveal to anyone the events that had happened in his home.

The Magistrate's Court convicted the applicant and sentenced him to a term of four years' imprisonment and two strokes of the *rotan*. Against the conviction and sentence, the applicant appealed to the High Court. The court upheld the conviction, however, the term of imprisonment was reduced from four to two years and the sentence of whipping was set aside. The applicant then applied for leave to appeal to the Court of Appeal, pursuant to s. 50(2) of the Courts of Judicature Act 1964. The leave application was dismissed because the requirements of s. 50(2) of the Act were not satisfied, namely, the questions framed by the applicant were merely questions of fact and not an issue of law. However, in relation to the sentence, the court drew the attention of the counsel for the accused to r. 76 of the Rules of the Court of Appeal 1994 and a question was posed, namely, whether that rule on its proper construction empowered the court to intervene and restore the sentence imposed by the magistrate.

In answering the above question in the affirmative, Gopal Sri Ram JCA stated:

[I]t is clear beyond a peradventure that when an application is made to this court under s. 50(2) of the Act, the powers exercisable by us under r. 76 include all those powers exercisable by the High Court by virtue of the Criminal Procedure Code

20 *Surah Al-Mu'minun* (23:6).

21 Narrated by At-Tirmidhi.

22 [2006] 2 CLJ 325.

in an appeal or revision brought before that court. Accordingly, if this court when moved for leave to appeal under s. 50(2), is satisfied in any given case that the High Court ought not to have disturbed an order made by a sessions judge or magistrate it is perfectly entitled, when refusing leave, to correct the position and to remedy any injustice.²³

After reading the motion paper provided to it, the court was satisfied that the learned trial judge had erred in altering the sentence imposed by the learned magistrate and restored the original sentence of four years' imprisonment and whipping imposed by the magistrate which in the opinion of the court was not manifestly excessive having regard to the facts of this case and public interest.

In relation to the declaration of the marriage by the applicant above, Mohd Noor JCA stated:

The applicant had purportedly married the girl and thus circumvented the statutory injunction against *zina*/sexual offences and its punishment in this world and the wrath of God in the hereafter. In so doing, the applicant had imitated a marriage which flourished among the Sabeans and Zoroastrians from earlier times which seem to have continued after their conversion to Islam. Today, only the Isna-Ashari Shia, one of the schools of Shia Law, regard *muta'a* as a valid marriage. Other schools of Shia Law including the Ismaili Shias do not recognize such marriage. Whereas according to the Sunni Law which is practiced in our country, *muta'a* marriage is prohibited by the Prophet Muhammad, peace be upon him. The Sunnis rely on a Tradition reported by Saidina Ali himself 'Verily the Prophet prohibited, on the day of the battle of Khaiber, a *muta'a* marriage which is for a fixed time'. There is another tradition according to which a *muta'a* marriage was once permitted for three days after which it was forbidden by the Prophet.

His Lordship further noted that a few years ago, "our students in Iran and in the Middle East contracted a temporary contract of marriage, a pseudo-name for *muta'ah* marriage. Let it be known that in our country, such marriage is prohibited. It is unlawful, invalid and is not recognized".²⁴ In light of the foregoing, it is evident that *muta'ah* marriage is expressly prohibited in this country. Accordingly, should such a purported marriage be consummated, the parties concerned would be regarded as having committed an offence which, under Islamic law, amounts to *zina* and is subject to severe punishment. It is worth noting that *zina* or illicit sexual intercourse between a man and a woman who are not validly married to each other, is a sinful act and hence forbidden in Islam. It is irrespective of the fact that the woman was a willing partner to the act. The words of the Holy Quran in this respect are: "Do not approach (the bounds of) adultery".²⁵ Islam regulates the institution of marriage, disciplines sexual behaviour, condemns adultery

²³ *Ibid*, p. 413.

²⁴ *Ibid*, p. 414.

²⁵ (17:32).

and prescribes severe punishment for the offence of *zina*. "And come not near to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)" (17:32). Again, "Those who invoke not with God any other god, nor slay such life as God has made sacred, except for just cause, nor commit fornication, and any that does this meets punishments" (25:68). Again, "O Prophet! When believing women come to you to take the oath of fealty to you, that they will not associate in worship any other thing whatever with God, that they will not steal, that they will not commit adultery (or fornication) that they will not kill their children, that they will not utter slander, intentionally forging falsehood and that they will not disobey you in any just matter then do you receive their fealty" (60:12).

The involvement of an unmarried male or female in sexual relationship is called fornication. But those who indulge in sexual acts not being legally married to each other, and where both or either of them is married to some other male or female, then the sexual relationship is called adultery. The punishment for fornication is 100 lashes. "The woman and the man guilty of fornication flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the last day: And let a party of the believers witness their punishment".²⁶ While the punishment for adultery is stoning to death. The Prophet (SAW) said, "The killing of a Muslim is not permissible except in three cases: (i) when he kills another person; (ii) when he commit *zina* after being married; and (iii) when he becomes apostate".²⁷ Sayyid Sabiq in his *Fiqh-us-Sunnah* stated: "*Zina* is a wrongdoing which is exceedingly despicable and also against the manners and honour of mankind. *Zina* also harms the security of the family and household and gives rise to various wrongdoings and harms the life of the individual and the society. *Zina* also harms and causes the loss of the good name and existence of an *ummat*. Although this is so, yet Islam is still very careful in imposing the punishment of *zina*, by requiring conditions which are almost impossible to fulfil. The punishment of *zina*, because of this, is more inclined towards prevention and causing fear of the punishment rather than the carrying out of the punishment itself".

It is worth mentioning that *zina* may be established where a woman gives birth to a fully developed child while not being legally married to a man, or, if married, where the birth occurs within six *qamariah* months from the date of the marriage – such circumstances being deemed as pregnancy out of wedlock. The total period of gestation and nursing in Islam is 30 months. In *Surah Al-Ahqaf* (46:15) where it is stated "And We have commended unto man kindness toward parents. His mother carried him in pain and gave him birth in pain, and the carrying of him and the weaning of him is thirty months". In *Surah Al-Baqarah* (2:233) and *Surah Luqman* (31:14), the Quran gives the period of nursing as 24 months. *Surah Al-Baqarah* verse 233 provides: "Mothers shall suckle their children for two whole years; for those

²⁶ *Surah An-Nur* (24: 2).

²⁷ Sunan Abu Daud, Vol. 11, p. 117.

who wish to complete the suckling.” Again, in *Surah Luqman* verse 14 provides: “And We have enjoined upon man concerning his parents— his mother bearing him in weakness upon weakness, and his weaning in two years—Give thanks to Me and to your parents”. As from the above verses of the Holy Quran, 30 months is given as the total for gestation and nursing. The 30 months minus 24 months, leaves only six months for the period of gestation, but normal gestation lasts nine months.

5.4 TEMPORARY OR SHORT TERM MARRIAGE: WITH REFERENCE TO ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) ACT 1984

While the contract of marriage gives the right of enjoyment and not enslavement, the husband is fully responsible for the family in its entirety. With such a heavy duty imposed on him, it is only then that a man will take marriage seriously and be more cautious when he contemplates a polygamous union. Women are perceived generally to be the weaker sex, and thus, have been accorded various protections which have been incorporated in this Act. The preamble to the Act provides: “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”. In light of the several provisions from the Act as highlighted in the following discussion, it would be obvious to any sensible person that the Act does not condone nor recognise temporary or short-term marriage.

Section 16 of the Act provides that the parties to the intended marriage shall apply in the prescribed form for permission to marry to the Registrar for the *kariah masjid* in which the woman is resident.²⁸ Section 17 of the Act provides that the Registrar, on being satisfied of the truth of the matters stated in the application, of the legality of the intended marriage, and, where the man is already married, that the permission required by s. 23 has been granted,²⁹ shall, at any time after the application and upon payment of the prescribed fee, issue to the applicants his permission to marry in the prescribed form.³⁰ Section 18 of the Act provides that for permission in any of the following cases, the Registrar shall refer the application to the Syariah Judge having jurisdiction in the place where the woman resides. (a) where either of the parties to the intended marriage is below the age specified in s. 8; (b) where the woman is a *janda* to whom s. 14(3) applies; or (c) where the woman has no *wali* from nasab, according to *Hukum Syarak*. The Syariah Judge on being satisfied of the truth of the matters stated in the application and the legality of the intended marriage and that the case is one that merits the

28 The prescribed form for application to marry is given in Form 1 (for male) and Form 2 (for female). See the Islamic Family Law (Forms and Fees) Rules 1987.

29 A man desiring to contract polygamous union is required to obtain the permission of in writing of the court: see s. 23. Form 3 shall be used as permission to marry under the above section: see the Islamic Family Law (Forms and Fees) Rules 1987, r. 2.

30 The fee is prescribed in Sch. 2 of the Islamic Family Law (Forms and Fees) Rules 1987.

giving of permission shall, at any time after reference of the application to him and upon payment of the prescribed fee, issue to the applicants his permission to marry in the prescribed form.³¹

Section 19 of the Act provides that no marriage shall be solemnised unless a permission to marry has been given: (a) by the Registrar under s. 17 or by the Syariah Judge under s. 18, where the marriage involves a woman resident in the Federal Territory; or (b) by the proper authority of a State, where the marriage involves a woman resident in that State. Section 20(1) provides that no marriage shall be solemnised except in the *kariah masjid* in which the woman resides. However, the Registrar or Syariah Judge giving permission to marry under s. 17 or 18 may give permission for the marriage to be solemnised elsewhere, whether in the Federal Territory or in any State.³²

Section 21(1) of the Act provides that the *mas kahwin* shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnising the marriage and at least two other witnesses. Section 21(2) further provides that the Registrar shall, in respect of every marriage to be registered by him, ascertain and record: (a) the value and other particulars of the *mas kahwin*; (b) the value and other particulars of any *pemberian*; the value and other particulars of any part of the *mas kahwin* or *pemberian* or both that was promised but not paid at the time of the solemnisation of the marriage, and the promised date of payment; and (c) particulars of any security given for the payment of any *mas kahwin* or *pemberian*. Section 22 of the Act provides that immediately after the solemnisation of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other *ta'liq* of the marriage in the Marriage Register.³³ The entry shall be attested to by the parties to the marriage, by the *wali*, and by two witnesses (other than the Registrar), present at the time the marriage is solemnised. The entry shall then be signed by the Registrar.

Insofar as the prerequisites of the marriage are concerned, s. 8 deals with the age of marriage while s. 9(1) concerns the prohibited categories of marriage. Section 10(1) prohibits a Muslim man from marrying non-Muslim, except if the woman is among the People of the Book (*Kitabiyah*) while a Muslim woman is

31 The prescribed form for permission to marry is given in Form 4 in the Islamic Family Law (Forms and Fees) Rules 1987.

32 The permission to marry in another *kariah masjid* is contained in Forms 3 and 4 in the Islamic Family (Forms and Fees) Rules 1987.

33 The prescribed form of *ta'liq* in the Federal Territories is to the effect: "I do solemnly declare when I leave my wife for four months voluntarily or by force, and I or my representative do not give her maintenance for such period whereas she is obedient to me or I cause hurt to her person, and she makes a complaint to the Syariah Court and it is found by the Syariah Court to be true and she gives to the Syariah Court which received it on my behalf a sum of one ringgit, then she is divorced by one *talaq khul'*". See Form 5 of the Islamic Family Law (Forms and Fees) Rules 1987.

prohibited from marrying a non-Muslim altogether. Section 13 of the Act provides that a marriage shall not be recognised and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either: (a) the *wali* of the woman has consented thereto in accordance with *Hukum Syarak*; or (b) the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorised in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as *wali Raja* in accordance with *Hukum Syarak*. Such consent may be given wherever there is no *wali* by *nasab* in accordance with *Hukum Syarak* available to act or if the *wali* cannot be found or where the *wali* refuses his consent without sufficient reason. Section 14(1) of the Act provides that: "No woman shall, during the subsistence of her marriage to a man, be married to any other man".

Section 11 of the Act provides that: "A marriage shall be void unless all conditions necessary, according to *Hukum Syarak*, for the validity thereof are satisfied". As noted earlier, under the Shafi'i school of jurisprudence, five elements are considered essential for the validity of a Muslim marriage (*nikah*). These are: (1) a male who is a prospective husband; (2) a female who is a prospective wife; (3) There must be a *wali* or a guardian for marriage. The *wali* is usually the father of the girl, but may also be the paternal grandfather, brother or uncle. In the absence of these persons, the *kadi* may step in on behalf of the Ruler of the State as *wali raja*; (4) two witnesses, who must be male, sane, adult and Muslims; and (5) the offer (*ijab*) by one contracting party and the acceptance (*qabul*) of the other party. The acceptance must be declared in a clear and unequivocal manner and both witnesses must be satisfied before the acceptance is declared valid.

Further, the marriage after the appointed date of every person resident in the Federal Territory and of every person living abroad who is resident in the Federal Territory shall be registered in accordance with this Act.³⁴ Upon registering the marriage and upon payment to him of the prescribed fees, the Registrar shall issue marriage certificates in the prescribed form to both parties to the marriage. The Registrar shall also, upon payment of the prescribed fees, issue a *ta'liq* certificate in the prescribed form to each of the parties to the marriage.³⁵ Every Registrar shall keep a Marriage Register and such books as are prescribed by this Act or rules made under this Act, and every marriage solemnised in the Federal Territory shall be duly registered by the Registrar in his Marriage Register.³⁶

34 Section 25 of the Islamic Family Law (Federal Territories) Act 1984. The Act came into operation on the 29 April 1987 *vide* PU (B) 236/1987.

35 Section 26 of the Islamic Family Law (Federal Territories) Act 1984. The prescribed form of marriage certificate is given in Form 5 in the Islamic Family Law (Forms and Fees) Rules 1987. It includes the prescribed form of *ta'liq* certificate. The fee is prescribed in Sch 2 of the Islamic Family Law (Forms and Fees) Rules 1987.

36 Section 29 of the Islamic Family Law (Federal Territories) Act 1984.

Section 31 of the Act deals with the registration of foreign marriages which are valid in accordance with *Hukum Syarak*. Upon the registration, a certified copy of the entry in the Marriage Register signed by the Registrar shall be delivered or sent to the husband and another copy to the wife, and another certified copy shall be sent to the Chief Registrar who shall cause all such certified copies to be bound together to constitute the Foreign Muslim Marriages Register. Section 34 of the Act provides: "Nothing in this Act or rules made under this Act shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered".

In relation to divorce, the most powerful and easiest method of divorce or repudiation lies in the hands of men which is *talaq*. In its primitive sense, *talaq* means dismissal, in law it signifies the dissolution of marriage or the annulment of its legality by certain words.³⁷ In the *hadith*, it is related to the following effect: Ibn Umar reported that the Prophet (SAW) said: "Of all lawful acts the most detestable to Allah is divorce".³⁸ Again, Muharib reported the Prophet (SAW) as saying: "Allah did not make anything lawful more abominable to Him than divorce".³⁹ In line with these injunctions, the legislation and the decisions of the Syariah courts have attempted to control the exercise of the right of *talaq*. The enactment of the law is primarily intended to prevent reckless decisions about divorce.⁴⁰ The *talaq* is of three types: (a) *raj'i*, if it is with one or two *talaq* where the husband can still *ruju'*;⁴¹ (b) *ba'in sughra*, that is, the *khul'* divorce, where though irrevocable, the parties can remarry with a new *mas kahwin*; (c) *ba'in kubra* if it is with three *talaq* when it is irrevocable, the parties cannot inter-marry again except by the wife marrying another person, and being divorced by that person after consummation of the marriage. The procedure for *talaq* is contained in ss. 47 and 48 of the Act.

Basically, the *talaq* takes effect when it is pronounced but it will not operate to dissolve the marriage until the expiry of the '*iddah*' period or the end of the pregnancy, as the case may be. *Talaq* pronounced in any form outside court and without the permission of the court is an offence. Section 124 of the Act provides that "Any man who divorces his wife by the pronouncement of *talaq* in any form outside the Court and without the permission of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit

37 The provisions for *talaq* are set out in the Holy Quran, *Surah Al-Baqarah* (2:228, 229-232) and *Surah At-Talaq* (65:1-7).

38 Sunan Abu Dawud, *Kitab Al-Talaq*, Vol. 2, p. 586.

39 Sunan Abu Dawud, *Kitab Al-Talaq*, Vol. 2, p. 585-586.

40 See *Zainab v. Abdul Latif* (1991) 8 JH 297; *Rojmah v. Mohsin* (1991) 8 JH 268, [1991] 3 MLJ xxx; *Mohamed v. Roslina* (1992) 8 JH 275; *Mustafah v. Habeeba* (1990) 7 JH 255; *Jasni Abdul Rahim v. Rahmah Mohd Jono* (1991) 10 JH 213, [1992] 1 MLJ cxliii and *Razimah Haneem bkn. Yusuf Hasbullah* [2004] 1 CLJ (Sy) 242.

41 See s. 51 of the Islamic Family Law (Federal Territories) Act 1984.

or with imprisonment not exceeding six months or with both such fine and imprisonment". However, such pronouncement can still be registered and must be so registered within seven days.⁴² For *talaq* pronounced outside the court, to allow it to be registered under the Act, the court should examine the facts and the circumstances to be satisfied that all the requirements under *Hukum Syarak* and the Act were complied with.⁴³

Section 50 of the Act deals with divorce under *ta'liq* or stipulation. The above section provides: "(1) 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. (2) 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 Syarak*, confirm and record the divorce and send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration". The prescribed form of *ta'liq* in the Federal Territories is as contained in the the Islamic Family Law (Forms and Fees) Rules 1987, Form 5.⁴⁴ Meanwhile, s. 52 of the Act deals with order for dissolution of marriage or *fasakh*, while, s. 49 is on *khul'* divorce or *cera'i tebus talaq*.

Further to the above, s. 59 of the Act deals with the power of the court to order maintenance to a wife and for a divorced wife. Maintenance for a wife encompasses the provision of all her essential needs, including nourishment, clothing, suitable housing, and the upkeep of the household. The basis for maintenance is derived from the Holy Quran and the *hadith*. In the Holy Quran, it is stated to the effect: "The mothers shall give suck to their offspring for two whole years if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms".⁴⁵ In *Surah An-Nisa* (4:34), it is stated to the effect: "Men are the protectors and maintainers of women because Allah has given the more strength than the other and 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". In his farewell pilgrimage, the Prophet (SAW) mentioned that the "rights of women upon the men are that the men should provide them with food and clothing in a fitting manner".⁴⁶ In determining the amount of any maintenance to be paid, s. 61 of the Act provides: "The Court shall base its assessment primarily on the means and needs of the parties, regardless of

42 See s. 55A of the Islamic Family Law (Federal Territories) Act 1984.

43 See *Rojmah v. Mohsin* (1991) 8 JH 268; *Mohamed Sultan Ismail v. Saodah Abdul Ladir* [2004] 1 CLJ (Sya) 136; *Razimah Haneem kwn. Yusuf Hasbullah* [2004] 1 CLJ (Sya) 242; *Zainab v. Abdul Latif* (1991) 8 JH 297.

44 See footnote 33.

45 *Surah Al-Baqarah* (2:233).

46 Sahih Muslim, *Kitab Al-Haji*, Vol. 2, pp. 615–616.

the proportion the maintenance bears to the income of the person against whom the order is made". In regard to the amount of the maintenance, the Holy Quran, *Surah At-Talaq* (65:7) stated to the effect: "Let the man of means spend according to his means and the man whose resources are restricted to him spend according to what God has given him. God puts no burden on a person beyond what He has given him. After the difficulty God will soon grant relief".

As for the duration of orders for maintenance, s. 64 provides: "Except where an order for maintenance is expressed to be for any shorter period or is rescinded, and subject to section 65, an order for maintenance shall expire on the death of the person against whom or in whose favour the order was made, whichever is the earlier". Section 62 provides that: "The Court may, when awarding maintenance, order the person liable to pay the maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay the maintenance or a part thereof out of the income from the property". For claims by a divorced wife, s. 65(1) provides: "The right of a divorced wife to receive maintenance from her former husband under any order of Court shall cease on the expiry of the period of 'iddah or on the wife being *nusyuz*". The period of 'iddah for a divorced woman is three monthly periods.⁴⁷

In certain cases, the Holy Quran prescribes to the effect: "Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts is three months and for those who had no courses it is the same. For those who carry life within their wombs, their period is until they deliver their burdens".⁴⁸ *Nusyuz* refers to rebelliousness, which is a ground by which a Muslim husband is entitled to withhold payment of maintenance to his wife, i.e. where a woman is shown to be *nusyuz*, she is not entitled to maintenance. Disobedience of a wife to any order lawfully given by her husband is an offence.⁴⁹ The right to accommodation of the divorced wife is governed by s. 71 of the Act. This right is sanctioned in the Holy Quran, *Surah At-Talaq* (65:1) to the effect: "When you do divorce women, divorce them at their prescribed periods and count accurately their prescribed periods and fear Allah your Lord; and turn them not out of their houses nor shall they themselves leave, except in case they are guilty of open lewdness".

⁴⁷ See Holy Quran, *Surah Al-Baqarah* (2:228).

⁴⁸ *Surah At-Talaq* (65:4).

⁴⁹ Section 129 of the Islamic Family Law (Federal Territories) Act 1984 provides that: "Any woman who wilfully disobeys any order lawfully given by her husband according to *Hukum Syarak* commits an offence and shall be punished with a fine not exceeding one hundred ringgit or, in the case of a second or subsequent offence, with a fine not exceeding five hundred ringgit".

Lastly, s. 72(1) of the Act provides that it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable, having regard to his means and station in life or by paying the cost thereof. The duty to maintain depends on the ability of the father and on the fact that the child is young and unable to maintain himself. Section 73 of the Act primarily deals with the power of court to order maintenance for children. For the purposes of this Act, child means a person who has not completed the age of 18 years. Section 88(4) provides: "A person shall, for the purposes of guardianship of person and property, be deemed to be a minor unless he or she has completed the age of eighteen years".

It is also worth noting the various offences prescribed in the Act. Any person who, being required by s. 31 to appear before a Registrar, fails to do so within the prescribed time commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵⁰ Again, any person who contravenes s. 32 (keeping of unlawful registers and the issue of purported certificates of marriage) commits an offence and shall be punished with a fine not exceeding RM500 or with imprisonment not exceeding three months or with both such fine and imprisonment; and for a second or subsequent offence shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵¹ Likewise, any person who uses any force or threat – (a) to compel a person to marry against his will; or (b) to prevent a man who has attained the age of 18 years or a woman who has attained the age of 16 years from contracting a valid marriage, commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵²

Again, any person who, for the purpose of procuring any marriage under this Act intentionally makes any false declaration or statement commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵³ Any person who, not being authorised under this Act, solemnises or purports to solemnise any marriage, commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵⁴ Any person who knowingly solemnises or purports to solemnise, or officiates at, a marriage – (a) without there being a permission to

⁵⁰ Section 35 of the Islamic Family Law (Federal Territories) Act 1984.

⁵¹ *Ibid.* s. 36.

⁵² *Ibid.* s. 37.

⁵³ *Ibid.* s. 38.

⁵⁴ *Ibid.* s. 39.

marry as required by s. 19; or (b) otherwise than in the presence of at least two credible witnesses other than the person solemnising the marriage – commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment. Any person who marries, or purports to marry, or goes through a form of marriage with, any person contrary to any of the provisions of Part II commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.⁵⁵

From the foregoing discussion, it is evident that marriage in Islam transcends mere from sexual gratification, representing a sacred and enduring bond that entails moral and social responsibilities, including the provision for and protection of one's spouse and children. It is also worth noting that in Islam, the concept of male authority over women is recognised, as men are generally considered physically stronger and are accorded the role of head of the family. As the Quran provides: "Men are the protectors and maintainers of women".⁵⁶ Again in *Surah Al-Baqarah* (2:228), Allah (SWT) says: "And women shall have rights similar to the rights against them, but men have a degree (of advantage) over them". Based on the foregoing discussion, although the Act does not explicitly forbid temporary or short-term marriages, a careful reading of its relevant provisions indicates that marriage is legally intended to be a permanent institution; lasting until death, as reflected in the traditional marital vow, "till death do us part".

5.5 WHETHER TEMPORARY MARRIAGE IS RECOGNISED UNDER CIVIL MARRIAGE?

Civil marriage has been described as a "holy union"⁵⁷ leading to a virtuous life free from immorality and emotional inhibition. It is therefore considered a sacred union with a permanent bond. However, divorce is an option considered by many when marriages turn sour. It involves the termination of a marriage by a court of competent jurisdiction under certain conditions. Civil marriage involving non-Muslims is regulated by the Law Reform (Marriage and Divorce) Act 1976 (Act) which seeks to lay down a uniform law on marriage and divorce for non-Muslims in Malaysia.⁵⁸ Set out below are some important provisions of the Act, which are intended primarily to demonstrate that civil marriage, too, does not recognise temporary or short-term unions.

⁵⁵ *Ibid.*, s. 40.

⁵⁶ *Surah An-Nisa* (4:34).

⁵⁷ *Chong Lay Kwong v. Lim Lay Kuan* [2001] 2 CLJ 492.

⁵⁸ The Act however does not apply to Muslims who are subject to Islamic family law of the respective States. Further, the Act also does not apply to natives of Sabah and Sarawak, or the aborigines of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom. The natives or the aborigines may however, elect to marry pursuant to this Act in which case the Act shall then be applicable to them.

The preamble to this Act provides: “An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto”. One of the main objects of the Act is to prevent polygamous marriages among non-Muslims.⁵⁹ Although this Act recognises all marriages entered into under custom or usage prior to 1 March 1982, it prohibits a non-Muslim from further contracting a marriage during the subsistence of an earlier marriage.⁶⁰ A person who has been lawfully married under any law cannot lawfully marry any other person again during the continuance of that marriage whether in Malaysia or in any other country. If a person who has lawfully married under any law, religion, custom or usage marries again during the continuance of that marriage and in the lifetime of the husband or wife, then it is considered that the person has committed the punishable offence of bigamy under s. 494 of the Penal Code [Act 574].

Another object of the Act is to provide for registration of marriages.⁶¹ Since the coming into force of the Act in 1982, save for exceptions provided in respect of natives of Sabah and Sarawak and the aborigines of West Malaysia, a non-Muslim marriage may only be solemnised by a Registrar appointed under this Act.⁶² In *Yeoh v. Chew*,⁶³ Abdul Hamid Embong J (as he then was) held that a Chinese customary marriage performed in 1998 which was not registered in accordance with the provisions of the Act, was not valid. In respect of a Chinese customary marriage, Abdul Wahab Patail J stated in *Chia Kok Siong v. Chong Chee Chai*:⁶⁴

Marriages through custom or usage if unsupervised by an assistant registrar of marriages, are capable of abuse. Therefore, it is clear that this Act does not intend the marriages that are not solemnised by the assistant registrar of marriages to be recognised as a valid marriage. It would liberalise the very abuse that this Act seeks to control.

In *Leong Wee Shing v. Chai Siew Yin*,⁶⁵ Kamalanathan Ratnam J recognised a Chinese customary marriage that was solemnised after the coming into force of this Act. The said decision was affirmed by the Court of Appeal in *Chai Siew Yin v. Leong Wee Shing*.⁶⁶ However, the Federal Court reversed the decision of both the High Court and the Court of Appeal. The Federal Court held, *inter alia*,

Having heard the detailed arguments and having considered the relevant provisions of the Law Reform (Marriage and Divorce) Act 1976 and in the circumstances of this case, we are unanimous in our decision that this appeal be allowed with costs

59 See s. 7 of the Law Reform (Marriage and Divorce) Act 1976.

60 *Ibid.*, ss. 4 and 5.

61 *Ibid.*, Preamble.

62 *Ibid.*, ss. 3 and 9.

63 [2001] 4 CLJ 631.

64 [2003] 3 CLJ 415.

65 [2000] 1 CLJ 439.

66 [2004] 1 CLJ 752.

to be taxed. We are not in agreement with the reasoning of the judgments both in the High Court and the Court of Appeal. Section 34 of the said Act should not be read in isolation, but in harmony with the other provisions of the Act which encapsulate the overall intention of the Legislature in enacting the Act. To do otherwise would defeat the purpose and intention of the Act which was enacted to "provide for monogamous marriages and the solemnization and registration of such marriages".⁶⁷

In *Koh Lai Kiow v. Low Nam Hui*,⁶⁸ the court had occasion to determine the legal status of children who were born out of an unregistered marriage. Azahar Mohamed JC (as he then was) referred to the Federal Court decision in *Chai Siew Yin*, stating:

At this stage, I want to point out that the plaintiff alleged in her affidavit that she was married to the defendant on 12 April 1983 in Johore Bahru according to Chinese customary rites. I would assume for the purpose of this application that there was a customary marriage between the plaintiff and the defendant. It is not in dispute that the customary marriage has never been registered under the Law Reform (Marriage and Divorce) Act 1976. Learned counsel for the defendant has drawn to my attention the oral decision of the Federal Court given on 29 January 2004 in *Chai Siew Yin v. Leong Wee Shing* in Federal Court Civil Appeal No. 02-10-2003(W). In view of the decision of the Federal Court, to my mind there can be no doubt that the customary marriage between the plaintiff and the defendant is void and ought not to be recognised for non-registration. That is why, in my view, the legal consequences are that the two children who were born out of a relationship between the plaintiff and the defendant are the illegitimate children of them.

This Act also prescribes the requirements for a valid marriage, namely the attainment of the requisite age, free consent of the parties, compliance with the prohibited degrees of relationship, adherence to the prescribed procedure of solemnisation, and regulations pertaining to marriages between Malaysians and foreign citizens or those solemnised abroad, among others. For instance, marriages between close family members such as grandparents, parents, children, grandchildren, uncles, aunts, and siblings are strictly prohibited. A marriage can only be solemnised by a person who has been appointed as a Registrar of Marriages at the National Registration Department ('NRD'), Malaysian representative offices overseas or Assistant Registrar of Marriages at temples, churches or associations. This Act also requires the couple to re-register their overseas marriage under s. 31 of the Act either at the nearest NRD office or at the representative office of Malaysia overseas. This re-registration must be made within six months from the date of the marriage abroad and after the six-month period, a penalty will be imposed for late registration.

⁶⁷ See *Chai Siew Yin v. Leong Wee Shing* (Unreported in Federal Court Civil Appeal No. 02-10-2003(W)).

⁶⁸ [2005] 3 CLJ 139.

A caveat or objection against a marriage is a legal notice filed with the Registrar of Marriages to prevent a marriage from proceeding until the objection can be heard. A caveat acts as a warning to both parties to the marriage that the intended marriage is not complying with the requirements of the Act. If a caveat is entered, the Registrar will not issue the marriage certificate. The Registrar will make enquiries of both parties on the objections and then decide whether to issue the marriage certificate. If the caveat entered is subsequently withdrawn by the person who entered it, then the Registrar can issue the marriage certificate. Where there is doubt, the Registrar may refer such cases to the High Court to decide.

Further, either a man or a woman may initiate a divorce under this Act. There are two types of divorce namely, contested and mutual consent divorce. Parties must fulfill certain conditions before applying for a divorce, namely: (i) both parties must have been living, and will continue to live in Malaysia; (ii) both parties must be married for at least two years; and (iii) the marriage must be registered, or considered to be registered, under the Act. In a contested divorce, the petitioner is required to establish that his or her marriage has “irretrievably broken down” and the parties can no longer be expected to live with one another. In fact, the “irretrievably broken down” ground is often used by a party seeking to annul a valid marriage and more often than not, it facilitates the success rate in a divorce application. The circumstances leading to the irretrievable breakdown of the marriage as contained in s. 54 of the Act are as follows: (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; and/or (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. Adulterous relationships, extra-marital affairs or acts of infidelity towards one’s partner, which in fact smear the sanctity of the institution of monogamous marriages that this Act seeks to protect, have often been cited as the major reasons for filing contested divorces. “Extramarital affairs should not be condoned under the pretext of needing exact proof because they not only break up households but also injure the innocent children and damage their future causing embarrassment, stress and anxiety”.⁶⁹

The Act also introduces compulsory reference to the marriage tribunals or conciliatory bodies as a pre-condition for the filing of divorce petitions (except where s. 51 (conversion to Islam) and s. 52 (joint petitions) apply). In a contested divorce, the applicant must, before filing for divorce, obtain a certificate from a Marriage Tribunal or Conciliatory Body. In other words, a person contemplating a petition for divorce is required, before the presentation of the petition, to have

69 *Per Halijah Abbas J in Yew Yin Lai v. Teo Meng Hai* [2013] 8 MLJ 787 at 807.

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.

Section 57 of the Act relates to the contents of a divorce petition. Section 57(2) specifically requires that every petition for a divorce shall state the steps that had been taken to effect a reconciliation. The petition, which is annexed to the Divorce and Matrimonial Proceedings Rules 1980, Form 2, requires the petitioner to state, among others, the reconciliation attempts that have been made. Further, s. 106 of the Act provides that before the filing of the petition for divorce in court, the marital dispute ought to be referred to the conciliatory body. Section 106(1) provides that no person shall petition for divorce, except under ss. 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties.

The requirement to refer the matrimonial dispute to the “conciliatory body” shall not apply in any case – (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse; (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition; (iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend; (iv) where the respondent is imprisoned for a term of five years or more; (v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or (vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.⁷⁰

In the case of a mutual consent divorce, both parties must mutually agree to divorce and file a joint petition in court. The parties must also mutually agree to terms relating to custody of children, access to children, maintenance and division of the matrimonial property. It also introduced conversion to Islam as a ground for divorce where either party, or both parties, to a marriage to petition for a divorce.⁷¹ Section 51A to the Act further provides that where the converted spouse dies before the non-Muslim marriage is dissolved, the surviving spouse, the surviving children of the marriage and the parents of the deceased converted spouse will be entitled to participate in the distribution of the matrimonial assets of the deceased.⁷² The Act also provides for judicial separation i.e., where the parties does not wish to divorce, but want to live separately. The parties must agree

⁷⁰ See *C v. A* [1998] 4 CLJ 38.

⁷¹ Section 51 as amended *vide* the Law Reform (Marriage and Divorce) (Amendment) Act 2017 came into force on 15 December 2018.

⁷² *Ibid.*

with terms relating to child custody, access to children, maintenance and division of matrimonial property. The conditions applicable prior to applying for a divorce are also applicable in a judicial separation.

After hearing the petition for divorce, the court will grant a *decree nisi* which will not take effect until after three months. At the end of the three months, the *decree nisi* will be made absolute (*decree nisi* made absolute) and the parties will be legally divorced. For a marriage solemnised abroad and subsequently dissolved according to the laws of that foreign country, the Malaysian party to the said marriage is required to obtain a decree from the High Court in Malaysia in accordance with s. 107(3) of the Act. Although the foreign marriage has been re-registered at the Malaysian Representative Office or NRD under s. 31 of the Act, the Registrar-General of Marriages has no power to register the divorce document from the foreign court without a decree from the High Court of Malaysia.

Besides the above, the Act also enables either party to apply for his or her marriage to be declared a nullity. The court will annul the marriage *vide* a decree of nullity. A void marriage is one which is considered never to have existed in the first place. The marriage will be void if it falls under certain circumstances as listed in s. 69 of the Act namely: (i) where at the time of marriage, either party was already lawfully married, the former spouse is still living and the former marriage is still in force; (ii) where a male person marries under 18 years of age, or a female person who is above 16 years but under 18 years, marries without a special license granted by the Chief Minister; (iii) where the parties are within prohibited degrees of (close family) relationship unless Chief Minister grants a special license and (iv) where the parties are not respectively male and female.

Conversely, a voidable marriage is one which is considered to have existed, but after the decree of nullity is granted, it will no longer exist. Again, the marriage will be voidable if it falls under certain circumstances as enumerated in s. 70 of the Act namely, (i) the marriage has not been consummated due to the incapacity of either party to consummate it; (ii) the marriage has not been consummated due to the wilful refusal of the respondent spouse to consummate it; (iii) either party to the marriage did not validly consent to it, whether because of duress, mistake, unsoundness of mind or otherwise; (iv) at the time of the marriage, either party was a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 so as to be unfit for marriage; and (v) at the time of the marriage, the respondent spouse was suffering from a communicable venereal disease and the petitioner was not aware of this. Children born of a voidable marriage are considered legitimate under the law. In the case of a void marriage, however, the legitimacy of the child will be determined by the courts.

Aside from the above, in a joint petition, both parties would mutually agree to propose any arrangement as to the children of the marriage. However, in a contested divorce, either party can make an application for the custody of the children (if any). The court will decide the custody application after considering the following

factors namely: (i) the welfare of the child; (ii) the wishes of the parents; and (iii) the wishes of the child, if the child is eligible to express an independent opinion. The Act also provides a rebuttable presumption that the custody of a child below seven years of age is vested in the mother.

In the context of maintenance, generally the husband (or ex-husband) is duty-bound to maintain the wife (or ex-wife) and children with the same standard of living as she and the children enjoyed during the existence of the marriage. As for the apportionment of maintenance for the former wife, s. 78 of the Act suggests that the court needs to look at the “means and needs” of the parties when assessing the maintenance awarded. “In assessing the means and needs of the parties the court has always had regard to the duration of the marriage, whether there were any children of the marriage, the age of the parties, whether the husband had financially supported the wife during the duration of their marriage, the parties earning capabilities and whether the divorce would have affected the husband’s position financially.”⁷³

The courts generally take into account the following factors: (a) the income, earning capacity, property or financial resources which each party has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the marriage breakdown; (d) the age of each party and the duration of the marriage; (e) health, physical or mental disability of the parties; and (f) the respective contributions by the parties to the welfare of the family.⁷⁴

Further, in a joint petition, both parties can mutually agree to propose any arrangement to divide or transfer property. However, in a contested divorce, either party can make application for the division of matrimonial property. Where the property was acquired by the sole effort of either party, the court may divide the property as the court thinks reasonable. Generally, the party upon whose effort the assets were acquired will receive a greater proportion. However, if the property was acquired by joint effort, the court may divide the property as the court thinks reasonable after considering factors like the extent of the contributions made by each party. As stated in the foregoing, “the Act has effected a reform of the law of marriage and divorce in conformity with modern thinking on these subjects.”⁷⁵ It is manifest from the foregoing provisions of the Act that marriage is intended to be a permanent and enduring union; accordingly, any form of temporary or short-term marriage would strike at the very foundation and purpose of the Act.

⁷³ See *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105.

⁷⁴ See *Dr. Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly* [2011] 6 CLJ 782.

⁷⁵ Ahmad Ibrahim, *Family law in Malaysia*, 3rd Edn., (Kuala Lumpur Malayan Law Journal, 1997), 8.

5.6 MARRIAGE OF CONVENIENCE: THE LEGALITY

It is also worthwhile noting the concept of marriage of convenience, a term commonly used to describe a sham relationship entered into with a view of circumventing or exploiting the legal loopholes in order to secure personal gain or advantages. In the context of marriage law, a marriage contract must be based on a genuine desire for companionship through mutual love, besides begetting children. Further, the marriage must be legal in that it must comply with the requirements set by law.⁷⁶ However, marriage of convenience is “a marriage in which the partners have married not because they love each other, but in order to get an advantage, such as the right to live in the other partner’s country”.⁷⁷ It is “a marriage contracted for social, political, or economic advantage rather than for mutual affection”.⁷⁸

As from the above, in a marriage of convenience, the parties do not intend to live together as a husband and wife but instead enter into the union for personal gains which may include immigration benefits, financial gain, social status, or to avoid family pressure, among others. For example, a formal marriage of convenience may be entered into purely to enable the woman to apply and acquire federal citizenship. It is worth noting that, pursuant to art. 15(1) of the Federal Constitution, a married woman whose husband is a Malaysia citizen may make an application to the Federal Government to be registered as a citizen if the marriage was subsisting and the husband was a citizen at the beginning of October 1962, provided that she has resided in Malaysia throughout the two years preceding the date of the application, intends to do so permanently and is of good character.⁷⁹ In other words, a foreign woman married to a Malaysian citizen is eligible for citizenship if she is of good character, has lived in the Federation for two years prior to her application, and intends to stay permanently. This is referred to as the “kitchen-route citizenship”.⁸⁰ Hence, marriage of convenience is a sham relationship in which the parties enter into a contract with a view to circumventing or exploiting legal loopholes, for example, to gain citizenship or legal entry into another country where their spouse resides.⁸¹

76 Keeping a “mistress” or better termed as “common law wife”, is an obvious example of failure to adhere with the requirements of marriage laws. See *Heng Gek Kiau v. Goh Koon Suan* [2007] 6 CLJ 626.

77 <https://dictionary.cambridge.org/dictionary/english/marriage-of-convenience>.

78 <https://www.merriam-webster.com/dictionary/marriage%20of%20convenience>.

79 Federal Constitution, art. 15(1) provides: “Any married woman whose husband is a citizen is entitled, upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the husband a citizen at the beginning of October 1962, or if she satisfies the Federal Government – (a) that she has resided in the Federation throughout the two years preceding the date of the application and intends to do so permanently; and (b) that she is of good character”.

80 *Faruqi Documents of Destiny-The Constitution of the Federation of Malaysia* (2008), p. 413.

81 See for example *Goh Koon Suan v. Heng Gek Kiau* [1999] 8 CLJ 218.

In *HLC v. PTL & Anor*,⁸² Evrol Mariette Peters J noted, *inter alia*, that “the petitioner initially viewed the union as a means of ensuring financial stability for herself and SP3. Despite subsequently having five children with the respondent, she remained in the marriage primarily for convenience and financial security. Conversely, the respondent admitted to marrying the petitioner more out of a sense of duty rather than genuine affection, as she had become pregnant out of wedlock”. Again, in *Lim Yam Chang & Ors v. Lim Lai Khan*,⁸³ the plaintiffs, the lawful children and beneficiaries of the deceased’s estate alleged that the deceased’s marriage to the defendant, the plaintiff’s stepmother, was not a legal marriage but a marriage of convenience. They contended that the defendant was after the deceased’s property and in this case, the deceased had made a will within two years of the marriage giving all his shares in the family company to the defendant upon his death. Hence, they challenged the will. In dismissing the plaintiff’s claim, the court held *inter alia*, that there were no suspicious circumstances surrounding the making of the will and the plaintiffs had failed to prove forgery of the signature and had also failed to prove any fraud.

Having said the above, it is worth noting that a contract is a legally enforceable agreement between two or more persons by which legal rights and obligations are created. For a contract to be deemed valid, “there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a consensus *ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration”.⁸⁴ An agreement will be enforceable by law if it is made for a lawful consideration and for a lawful object. This is expressly noted in s. 10 of the Contracts Act 1950 which provides that “all agreements are contracts, if they are made by free consent of the parties competent to contract and that the consideration and object of the agreement must be lawful and not expressly declared to be void”. Hence, when the consideration or object of the agreement is unlawful, the agreement will become unenforceable by law. Section 2(g) of the Contracts Act 1950 provides that “an agreement not enforceable by law is said to be void”. “No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act”.⁸⁵ This is based on the following common law principle “*ex turpi causa non oritur action*”.

82 [2024] 5 CLJ 117.

83 [2009] CLJU 1492.

84 VC George J in *Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 20.

85 Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp 341 at 343.

Section 24 of the Contracts Act 1950 stipulates five circumstances in which the consideration or object is unlawful, namely: where (i) it is forbidden by law; (ii) it is of such a nature that, if permitted, it would defeat any law; (iii) it is fraudulent; (iv) it involves or implies injury to the person or property of another; or (v) the court regards it as immoral or opposed to public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.⁸⁶ In *Scott v. Brown, Doering, McNab & Co; Slaughter and May v. Brown, Doering, McNab & Co*,⁸⁷ Lindley LJ noted that “no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal”. It is submitted that marriages of convenience are void for being sham contracts and would accordingly attract the application of s. 24 of the Contracts Act 1950, as noted above. It constitutes nothing more than a short-term or temporary marriage contract which, if sanctioned, would defeat the very objectives of the marriage laws as previously discussed. Moreover, it is regarded as immoral, being tantamount to the legalisation of prostitution. As discussed earlier, all promiscuous relationships have been forbidden not only among Muslims but also among the non-Muslims and thus, heavy punishment has been prescribed for this crime, and the order has not been qualified by any conditions.⁸⁸

5.7 CONCLUSION

While marriage is obligatory for Muslims who have the means to support a wife, it is equally important that the institution be understood as one founded upon the principle of permanency. The same applies to non-Muslim marriage laws, as discussed in this Chapter. Hence, temporary marriage or *muta'ah* marriage or any other form of marriage that indicates a limited period for cohabitation renders such contract immediately invalid as it contradicts the fundamental principle of the permanency of a marriage contract and is therefore illegal pursuant to s. 24 of the Contracts Act 1950. As seen in the case of *Ishak Haji Shaari*, such a marriage is prohibited. It is unlawful, invalid and is not recognised. Thus, under Islamic law, a man who contracts such a marriage and engages in sexual intercourse with

86 *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay bin Abdullah* [2015] 8 CLJ 212.

87 (1892) 2 QB 724, at 728.

88 A person exploiting another person for purposes of prostitution, persons living on or trading in prostitution and soliciting for purpose of prostitution, is prohibited in the Penal Code, ss. 372, 372A and 372B. The suppression of brothels is governed by s. 373 of the Penal Code.

the woman shall be considered to have committed *zina* (illicit sexual intercourse) and will be liable to *hadd* punishment.⁸⁹ In relation to the punishment for *zina* as practiced in Malaysia, s. 23 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides:

Any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

Likewise, “any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof”. Although the Islamic Family Law (Federal Territories) Act does not expressly prohibit short-term or *muta'ah* marriages, its provisions, as previously discussed, unequivocally affirm that marriage is conceived as a sacred and enduring institution, with permanency as an essential feature, save for exceptional circumstances where dissolution is lawfully permitted. The same principle is entrenched under civil law through the Law Reform (Marriage and Divorce) Act 1976, which, although silent on an explicit prohibition of temporary or short-term unions, nonetheless upholds the fundamental notion that marriage must be permanent in character. In the context of *muta'a* marriage, as discussed earlier, such a marriage is unlawful, null and void, and is not recognised in this country. The contracting parties to such a prohibited union would accordingly be liable to penal sanctions for the commission of illicit sexual intercourse. Insofar as a marriage of convenience is concerned, being a contract entered into with the intention of circumventing or exploiting legal loopholes, for instance, to obtain citizenship or lawful entry into another country, it is undoubtedly an illegal contract or a sham relationship. Such a contract would not withstand judicial scrutiny if contested in court, pursuant to s. 24 of the Contracts Act 1950, and in line with the common law principle of *ex turpi causa non oritur actio*.

89 The Quran says, “The woman and the man guilty of adultery or fornication, flog each of them with hundred stripes. Let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day: And let a party of the believers witness their punishment” *Surah An-Nur* (24:2).

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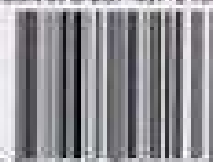
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