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SOLEMNIZATION OF MARRIAGE: CONCEPTUALIZATION AND STATUTORY INTERPRETATION

This article discusses how to identify a solemnization of marriage which is void for failure to fulfill the requirements of law. A recent decision of the High Court of Singapore offers opportunity for this discussion. While the Women's Charter lays down the requirements of a valid solemnization and provides a definition of solemnization, an interpretation of these provisions does not yield an unequivocal guide to differentiating a void solemnization from no solemnization. It will be argued that a clearer guide may only come from an appreciation of the concepts underlying these provisions.

THE High Court recently had opportunity to examine the requirements of the Women's Charter as to the solemnization of marriage. The court had to decide, in particular, if the action of two persons was a solemnization of marriage *albeit* one void for breach of the Act's requirements. Such opportunity is rare. The court did not have the benefit of a single precedent on this aspect of the case. The case raised several issues the resolution of which called for the proper interpretation of statutory provisions keeping in mind their underlying concepts. Justice GP Selvam invited submission on these issues from the Attorney-General, who obliged, and his Honour gave written judgment despite dismissing the petition on a preliminary point because "the matter is of public interest." The case, thus, bears some analysis even though it has not yet been reported.

Divorce Petition No 1593 of 1994 *Soniya Chataram Aswani (mw)* v *Haresh Jaikishin Buxani* was a petition brought by a married woman seeking a decree of nullity to declare that her marriage was void for breach of the requirements of section 21(1) of the Women's Charter on the formalities required of its formation. Section 99(a) of the Women's Charter, indeed, permits the grant of the decree on proof that the marriage "is not a valid marriage by virtue of ... section 21." On 15 July 1995 his Honour gave his decision. He dismissed the petition on the preliminary point that "the Court had no jurisdiction to entertain the petition as a matrimonial proceeding because the purported marriage did not come within section 86(1) of the Act."

I. *Soniya Chataram Aswani (mw)* v *Haresh Jaikishin Buxani*

The full facts can be gathered from the judgment and the submissions of the parties. The petitioner, a Singapore domicilary, was a Hindu of the Sindhi community. The respondent, a Malaysian citizen residing in Singapore, was employed here on a work permit. The parties never applied for nor obtained a marriage licence. The respondent, who was required by the terms of the work permit issued to him to obtain the approval of the Controller of Work Permits before he married a Singapore citizen, did not seek such approval. The parties were not married by a person licensed to solemnize marriages. What they did, instead, was that on 6 March 1992 they went through a ceremony of marriage according to the Hindu rites of marriage. This ceremony was performed by, in his Honour's description, the "official priest of the Sindhi Merchants' Association of Singapore and/or of the Sindhi Community of Singapore" although the priest was, unfortunately, not licensed to solemnize marriages. The ceremony appeared to be solemn (no pun intended) as, even, a wedding invitation card had been produced. From the time of this ceremony until 24 April 1994, *ie,* for twenty-five months or so, the parties lived as husband and wife at their matrimonial home in Mountbatten Road, presumably, until the wife started this petition for a decree of nullity.

Both petitioner and respondent accepted that the ceremony they went through was a ceremony of marriage according to the Hindu rites of marriage. There was also no dispute that the parties believed themselves married as reflected in their living together, for all intents and purposes, as husband and wife for more than two years after the ceremony. They also accepted that they had failed to comply with the requirements of section 21(1) of the Women's Charter which lays down the Act's most crucial requirements of the solemnization of marriage.

II. Requirements of Solemnization of Marriage

The requirements of the Women's Charter of the formation of marriage are easy enough to state. A valid marriage in Singapore is formed from the performance of the proper formalities required of the solemnization by two parties who have legal capacity to marry each other. There must be a conjunction of 'formal validity' and 'essential validity'.[1] That there are

[1] See *Moh Ah Kiu* v *Central Provident Fund Board* [1992] 2 SLR 569 where the argument that the parties had solemnized a marriage according to the Chinese custom in Penang was held, by the High Court and approved by the Court of Appeal, to be insufficient to lead to the claim of a valid marriage. In the result it was decided that the solemnization led, only, to a void marriage as the parties lacked capacity to marry.

rules as to the proper formalities of marriage and the legal capacity of the two parties underscore the contract within the formation of marriage. A marriage comes into existence upon the formation of the contract of marriage, *ie,* upon its solemnization. The contract of marriage is one contract in which society is exceptionally concerned so that there are far more detailed requirements of its solemnization than of the formation of commercial contracts. The pivotal provision on the requirements of solemnization is section 21(1).

A. *Authorization of Solemnization*

Section 21(1) reads

> Every marriage solemnized in Singapore shall be void unless it is solemnized –
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> (a) on the authority of a valid marriage licence issued by the Registrar or a valid special marriage licence granted by the Minister; and
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> (b) by the Registrar or a person who has been granted a licence to solemnize marriages.

The first requirement within section 21(1)(a) is that the two parties intending to marry must obtain either one of the two kinds of marriage licence which authorize the solemnization of a marriage *viz,* a marriage licence which is issued by the Registrar of Marriages or a special marriage licence which is granted by the Minister.[2] The procedure to apply for a marriage licence is more protracted than that for a special marriage licence but success in obtaining either gives the parties the authorization for the solemnization of their marriage.

There is no doubt the parties failed to obtain such authorization. They never, even, gave notice of intention to marry to the Registrar of Marriages. No reasons were suggested as to why they did not do what may be fairly common knowledge. It has been almost two decades since the amendment of 1967[3] which made it compulsory for non-Muslims intending to marry

[2] By s 210/61 Subsidiary Legislation of the Republic of Singapore 1990 Rev ed cap 353 N1 the Minister of Labour had *wef* 15 September 1961 delegated his authority to grant a special marriage licence to the Solicitor-General. Form B of the Schedule to the Women's Charter (Registration of Marriages) Rules Subsidiary Legislation of the Republic of Singapore 1990 Rev ed cap 353 R3 shows that a special marriage licence is issued by the "Permanent Secretary, Ministry of Community Development, or other person authorised to issue the licence".

[3] Women's Charter (Amendment) Act 9 of 1967 *wef* 2 June 1967.

in Singapore to obtain such authorization for the solemnization.[4]

Work permit holder

Two parties who give notice of intention to marry to the Registrar are required by section 16(2) to swear by statutory declaration to a number of material particulars about himself or herself or the other party. Subpart (d) of section 16(2) requires each to swear an all-embracing declaration that "there is no lawful impediment to the marriage." This will, apparently, cover all requirements of a valid marriage which the parties have not specifically been required to swear under other subparts of section 16(2). It will also incorporate all other rules concerning marriage which emanate from outside the Women's Charter. These two parties had not made any such statutory declaration. If they had, there is one rule which would have impeded their marriage.

The respondent was a Malaysian working in Singapore on the authority of a work permit[5] granted by the Controller of Work Permits of the Ministry of Labour. Since 1973, such foreigners are not permitted to marry Singapore citizens or, even, Singapore permanent residents unless the permission of the Controller is sought and is granted. The current penalty, since 1984,[6] for infringing this rule is that the work permit of the offending worker will be cancelled and he or she will be permanently barred from entering Singapore. It is expected that the Registrar will regard this rule among the lawful impediments to marriage.

If the parties had given notice to marry, the Registrar would have sought, from the respondent, the approval of the Controller of Work Permits. It has been announced that "[a]pproval will only be given ... where the work permit holders possess skills and qualifications and whose absorption in

4 Although the Women's Charter was enacted in 1961 the version of s 21 which was in the original Ordinance failed to provide that the failure to obtain such authorization rendered the marriage void and, indeed, in 1975, what is now section 184 was added to declare the validity of marriages solemnized between 1961 and 1967 which were not so authorized. It should also be noted that, until the amendment of 1980 changed the terms, the authorization used to be called 'certificate for marriage' and 'licence' instead of the 'marriage licence' and special 'marriage licence' respectively.

5 Under s 7 of the Employment of Foreign Workers Act Cap 91A of the 1991 Rev Ed of the Statutes of the Republic of Singapore, a work permit must be sought by the employer of a foreign worker. The Employment of Foreign Workers (Definition of Foreign Worker) Notification S534/93 in the Subsidiary Legislation of the Republic of Singapore N3 notifies that the Minister has specified that a foreign worker is any non-citizen offered employment in Singapore, whose monthly basic salary is S$2000 per month or lower and who does not have an employment pass.

6 See Singapore Government Press Release No 11 of July 1984, 12-0/84/07/07.

the permanent workforce would be of value to our nation."[7] His Honour noted that "[a]n application for permit to marry made after [the ceremony of marriage on] 6 March 1992 was rejected."

We may, thus, ask what the consequence of breach of this employment regulation is upon the solemnization. This issue has, in fact, never been posed to the courts. It is submitted that this regulation is likely to be regarded, by the Registrar of Marriages and the courts, as one "lawful impediment to marriage" under section 16(2)(d). If the two parties here had given notice to marry without having obtained the prior approval of the Controller of Work Permits, the Registrar would very likely have refused to issue the marriage licence to them. While this decision of the Registrar is subject to review by the courts and the parties could have applied to court, it is expected that the court would uphold the Registrar's refusal to issue the marriage licence on the ground that he is entitled by section 16 to do so. The sanction against non-compliance with this employment regulation, as far as the solemnization of marriage is concerned, is that the parties will not obtain the authorization necessary for a valid marriage. Where the parties did not, even, seek this authorization, there is no further sanction for non-compliance with this employment regulation or of breach of section 16(2)(d).

B. *The Solemnization*

The second requirement in section 21(1) prescribing the solemnization of marriage is in subpart(b) which provides that "Every marriage solemnized in Singapore shall be void unless it is solemnized by the Registrar or a person who has been granted a licence to solemnize marriages."

Licensed marriage official

This requirement comes within section 8(1) of the Women's Charter which provides that a marriage may be solemnized by the Registrar or any other person to whom a licence to solemnize marriages has been granted. Under section 8(2), licences to solemnize are granted by the Minister of Community Development. This is reported periodically in the Government Gazette. Besides the Registrar's assistants at the Registry of Marriages, persons who have been granted such licences to solemnize marriages include some Christian pastors, some Hindu priests, some Sikh priests, some Jewish priests and, fairly recently, some members of the public who are Justices of the Peace. This section has existed since the enactment of the Women's Charter

[7] *Ibid.*

in 1961. The requirement, however, only assumed its present significance from 1981 when subpart(b) was added to section 21(1).[8]

The failure to comply with this requirement renders the marriage void by section 21(1)(b). Besides, under section 38 any person who, not being authorized, solemnizes or purports to solemnize any marriage has committed a fairly serious offence where, upon conviction, the offender can be imprisoned for a term not exceeding 10 years and a fine not exceeding $15,000. Under section 39, if a person knowingly solemnizes or purports to solemnize or officiate at a marriage without first receiving a marriage licence or a special marriage licence, or otherwise than in the presence of at least two credible witnesses, or after the expiration of the period of validity of the licence, he shall, on conviction, be liable to a fine not exceeding $5000 and to imprisonment for a term not exceeding 3 years or both.[9]

It may be asked whether the Sindhi Hindu priest who conducted the ceremony of marriage between the parties has committed either of these offences. It is submitted that the mere conducting of the ceremony of marriage should not suffice as either of these offences. It should be borne in mind that the Women's Charter, by section 23, allows the performance of religious ceremonies of marriage not amounting to solemnization of marriage. The conduct involved in the offences under sections 38 or 39 should, only, constitute the offence if done with the necessary *mens rea*. The person officiating must be shown to intend a legal solemnization. If this were not shown the performance of religious rites of marriage, in view of section 23, should not be an offence. It is assumed that neither offence was committed in this case.

III. Matrimonial Jurisdiction

The relevant portions of section 86 read

> (1) ... the court shall have jurisdiction to entertain proceedings for ... nullity of marriage only if –
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> (a) the marriage has been registered under this Act, or is deemed to be registered under this Act, or was solemnized under a law which expressly or impliedly provides that the marriage shall be monogamous ...

[8] See Amendment Act 26 of 1981 *wef* 1 June 1981.

[9] There is another possible offence under the Penal Code Cap 224, 1985 Rev Ed of the Statutes of the Republic of Singapore although this offence is, only, committed with fraudulent intent; see s 496 the marginal note of which reads "Marriage ceremony gone through with fraudulent intent without lawful marriage".

(3) For the purposes of proceedings for nullity of marriage, "marriage" includes a marriage which is not valid by virtue of any of the provisions of this Act.

His Honour decided that the marriage, undoubtedly not a valid marriage for breach of both of the requirements of section 21(1), nevertheless failed to attract the matrimonial jurisdiction of the High Court as this is set out in section 86. Section 86 prescribes two requirements; first, the marriage must fit one of four given descriptions and, second, at least one of the parties must possess one of two given connections with the court. It may be assumed that the parties met the second requirement. The issue was whether their marriage fit one, at least, of the four given descriptions. By section 86(1)(a) these are "the marriage has been registered under this Act", "the marriage ... is deemed to be registered under this Act", "the marriage ... was solemnized under a law which expressly ... provides that the marriage shall be monogamous" and "the marriage ... was solemnized under a law which ... impliedly provides that the marriage shall be monogamous". Subsection (3) reminds us that, in a petition for a decree declaring that the marriage is void, our understanding of "marriage" *inter alia* in these phrases must accommodate the invalidity of the marriage which is the very basis of the application.

There was no attempt to argue that either of the first two of these four descriptions availed the petitioner. The ceremony of marriage she and the respondent participated in on 6 March 1992 was neither registered, under either sections 24 or 182 of the Act, nor did it come within the category of marriages "solemnized under any law, religion, custom or usage prior to the commencement of the Act" which section 181 deems to be registered under the Act. The issue of matrimonial jurisdiction, thus, reduced to whether the ceremony of marriage comes within, either, "the marriage ... was solemnized under a law which expressly ... provides that "the marriage shall be monogamous", or, "the marriage ... was solemnized under a law which ... impliedly provides that the marriage shall be monogamous".

A. *Purpose*

It bears noting that the reason to have a provision such as section 86 on the matrimonial jurisdiction of the High Court of Singapore is not to set up barriers to make it hard for our people to invoke the court's jurisdiction. While jurisdictional limits do set up barriers, the purpose must be to keep out only those marriages over which the High Court does not have enough interest. There would be, one would have thought, a heavy foreign element in these marriages over which the High Court does not have sufficient interest. The foreign element is, either, in the form that the marriage was

solemnized in a foreign country and does not meet with our commitment that a marriage should be monogamous,[10] or, the parties are foreigners of a foreign domicile and not, even, habitually resident here.

We may accept the premise that it would, indeed, be an unfortunate lapse in section 86 if it spelt out the High Court's matrimonial jurisdiction to exclude a marriage solemnized here in Singapore between parties one of whom was domiciled in Singapore and the other, at least, habitually resident here. It is fair to suggest that this is one marriage in which the court does have enough interest to decide if it would order what the petitioner sought with regard to the marital relationship.

B. *Hindu Ceremony of Marriage in 1992 in Singapore*

The petitioner sought to bring the ceremony of marriage within, either, the third, or, the fourth of the four descriptions within section 86(1)(a). His Honour decided against her.

(i) *Marriage solemnized under a law which expressly provides that the marriage shall be monogamous*

The Sindhi ceremony of marriage was conducted in Singapore on 6 March 1992. The petitioner argued that this ceremony was a solemnization of marriage under the Women's Charter, and though void for breach of section 21(1), was a solemnization all the same. The Women's Charter is a law which expressly provides for monogamy by its sections 4, 5, 6, and 11. Her marriage was, therefore, a marriage under a law which expressly provides for monogamy thus fitting the third of the four descriptions of marriage in section 86(1)(a).

How could she fail? His Honour took a different view of the ceremony. He began by deciding that the Sindhi Hindu ceremony, as a Hindu marriage, was 'potentially polygamous'. His Honour rejected the credentials of the petitioner's expert witness, the president of the Sindhi Merchants' Asso-

[10] While Chinese customary marriages celebrated in the Straits Settlements and Singapore before the enactment of the Women's Charter (which abolished local Chinese customary marriage law) were polygamous, see *The Six Widows Case* (1908) 11 SSLR 120, there were other marriage laws which were monogamous, *ie,* the Civil Marriage Ordinance, the Christian Marriage Ordinance (at least the version in force from 1941), the common law and, possibly, some branches of the Hindu marriage law. In 1961 the first local Legislative Assembly of Singapore made its choice very clear when, in one of its earliest legislative reforms, it abolished all the existing marriage laws and replaced them with the Women's Charter which part on marriage was modeled on the Civil Marriage Ordinance, a clearly monogamous marriage law. See also Leong Wai Kum, *Family Law in Singapore* (1990), at 8-16.

ciation, who testified that Singapore Sindhis regard a Hindu marriage as monogamous. With the characterisation of the marriage as potentially polygamous, his Honour found assistance in the 1974 High Court decision in *Re the estate of Liu Sinn Min, deceased*[11] where Justice Choor Singh said:

> Whatever may have been the position in Singapore before the coming into force of the Women's Charter on the 15th September 1961 it is clear that after this date, persons ... of all races with the exception of those professing the Muslim faith, are no longer governed by their personal law. All questions relating to their marital status and the legal consequences which flow from that status are now governed by the Women's Charter. It is no longer possible for Chinese or Hindus to contract in Singapore polygamous marriages which they could under their personal law.

His Honour's reasoning was that, since sections 4, 5, 6 and 11 of the Women's Charter prohibit polygamy, a potentially polygamous marriage such as the petitioner's Sindhi Hindu marriage was not permitted by the Act. The real obstacle to matrimonial jurisdiction was that the Sindhi Hindu marriage was not permitted in Singapore. As a Hindu marriage is not permitted by the Act, his Honour suggested he would arrive at the same view even if the Sindhi Hindu marriage was monogamous. His Honour, then, concluded that the marriage which is not permitted in Singapore is excluded from the matrimonial jurisdiction of the High Court.

In deducing that the Women's Charter did not permit such a marriage, his Honour was careful to exclude the performance of such ceremony as an adjunct to the proper solemnization. Section 23 of the Act clearly allows the parties to "read or celebrate the marriage service of the church or temple to which [they] belong" but, as the section goes on to explain, such adjunct ceremony is only to "add to the marriage so contracted" and does not "supersede ... any marriage ... nor shall such ... celebration be entered as a marriage in any register ...." The performance of the ceremony other than on an adjunct basis, as the parties here did, was beyond section 23 and, in his Honour's view, not permitted by the Women's Charter. It follows that the Sindhi ceremony cannot be regarded as a solemnization of marriage under the Women's Charter and, thus, does not come within the third description in section 86(1)(a) of "marriage solemnized under a law which expressly ... provides the marriage shall be monogamous."

[11] [1974] 2 MLJ 9, 13. This judgment, together with that of the Court of Appeal which approved it, has been severely criticised. See subsequent discussion, *infra*, pp 309-311.

Then, his Honour, somewhat gratuitously, added that this phrase

> caters only for foreign monogamous marriages.... It cannot apply to Singapore marriages for the Act cannot stipulate a strict procedure for monogamous marriages between non-Muslims celebrated in Singapore and at the same time provide for and recognise another regime of monogamous marriages celebrated in Singapore outside the requirements of the Act. This would be a preposterous situation and in my judgment it is not permitted by the Act.

This was an *obiter dictum* as the proper breadth of this part of section 86(1)(a) was not necessary for the resolution of the dispute. It is submitted that, perhaps, it would have been better if the statements had not been made.

The statements were made upon the premise that a Women's Charter marriage always fits the first of the four descriptions, *ie,* "the marriage has been registered under the Act" so that there is no reason to require the marriage to, also, come within the third description of "marriage was solemnized under a law which expressly ... provides the marriage shall be monogamous." While it is true that section 27 requires the person who was licensed to solemnize marriages who actually solemnized the marriage to register the solemnization upon its conclusion, it is submitted that this is no reason to exclude the Women's Charter marriage from the third description. After all, section 32 underscores the formal character of registration of marriage by providing that neither registration, nor the lack thereof, has any effect on the validity or otherwise of the marriage. Where the marriage official actually fails to register the marriage, the marriage is still a perfectly valid Women's Charter marriage. There is no good reason why such an unregistered but perfectly valid Women's Charter marriage should not meet with the third description.

Moreover, up till 1 June 1981, there were marriages solemnized under the Women's Charter which were not solemnized by such a licensed marriage official.[12] These solemnizations, valid by the form of section 21(1) if authorized by the issue of a licence, would not have been registered by the person conducting the ceremony. As said this does not affect the validity of the solemnization and would not affect the view of them as valid Women's Charter marriages. These solemnizations would not meet the description of "the marriage has been registered under this Act". It may be suggested that the parties to these marriages can still voluntarily register them under

[12] See discussion in the article on the version of s 21 which applied up to 31 May 1981, below at pp 299-301 [s 21 up to 1981].

section 182 of the Act[13] but there, really, is no reason why all Women's Charter marriages should not come within this description. It might be suggested that Women's Charter marriages should, indeed, form the norm of "marriage ... [that] was solemnized under a law which expressly ... provides that the marriage shall be monogamous".

For the reasons he offered, his Honour decided that "the purported marriage did not come within section 86(1) of the Act."

(ii) *Marriage solemnized under a law which impliedly provides that the marriage shall be monogamous*

The petitioner had a fall-back argument. This was that the Sindhi Hindu ceremony was a solemnization of marriage under the religious Hindu marriage law which, because it encouraged monogamy[14] and because its land of origin had, since 1955, enacted a statute which prescribed monogamy,[15] should be regarded as a marriage under a law which impliedly required monogamy. By this argument the Sindhi Hindu ceremony came within the fourth description in section 86(1)(a).

This argument was more difficult to make than the former. The judge had rejected the testimony of the witness called as an expert and preferred, instead, to find the Hindu marriage, whether Sindhi or otherwise, as potentially polygamous although there was some indication that his Honour might be willing to find otherwise. Since his Honour took the view that a Sindhi Hindu marriage was not permitted by the Women's Charter, it

[13] Although the High Court in *Asha Maudgil* v *Suresh Kumar Gosain* [1994] 2 SLR 709 suggested that s 182 is only available to persons who have been validly married before the enactment of the Women's Charter. It is suggested that this view of s 182 is not necessarily correct both on an interpretation of the provision and because it would be undesirable if Singaporeans who marry outside Singapore today should not be able to come home and have the fact of their marriage formally registered.

[14] There is no unequivocal judicial statement of the characteristic of a Hindu marriage. In Leong Wai Kum, *Family Law in Singapore, supra,* note 10, at 132, NR Raghavachariar *Hindu Law Principles and Precedents* (3rd ed at 1947) was quoted thus: "Though monogamy is recommended by the texts, a Hindu can marry any number of wives ...." The author also noted that there could be local variation of the Hindu religion in a country the size of India and points to *Paramesuari* v *Ayadurai* [1959] MLJ 195, where the High Court of Malaya found a Hindu marriage between two Ceylon Tamil Hindus as monogamous, as one custom varying Hindu law in this regard.

[15] The Hindu Marriage Law 1955 was enacted to govern all Hindus in India and it provided in its s 17 that a polygamous marriage is void. The petitioner's argument was that this requirement of monogamy underscores the Hindu religion's encouragement of monogamy so that in Singapore as well, at least after 1955, a Hindu marriage should be characterised as a monogamous marriage.

would not have helped the petitioner, even, if the character of a Sindhi Hindu marriage was monogamous.

The key to his Honour's decision is that the 1992 Sindhi Hindu marriage (partly because it was, in his Honour's view, potentially polygamous) is not permitted by the Women's Charter. The High Court, therefore, does not have matrimonial jurisdiction over it. It is submitted, with respect, that one can disagree with this view of the law.

It will be argued in this article, first, that the Sindhi Hindu ceremony should be seen as a solemnization under the Women's Charter which is the only non-Muslim marriage law in Singapore today. As such the Sindhi Hindu ceremony formed a Women's Charter marriage which makes it a marriage under a law expressly providing the marriage shall be monogamous so that the High Court does have matrimonial jurisdiction over it. It will further be argued, second, that even if it were not monogamous, a potentially polygamous marriage may well be permitted by the Women's Charter and, third, that even if it were not permitted, this does not necessarily require the court to exclude such marriage from its matrimonial jurisdiction. We shall examine these in turn to lead to the conclusion that the alternative analysis is to be preferred. The Sindhi Hindu ceremony in 1992 was a solemnization of a Women's Charter marriage void by section 21(1) and the High Court did have matrimonial jurisdiction to so declare by decree of nullity.

IV. 1992 Marriage in Singapore Not Polygamous

Neither the petitioner nor the respondent was married on the day of the Sindhi Hindu ceremony of marriage. There is no doubt that the marriage was not polygamous in fact. His Honour characterised it as polygamous in law. By this his Honour meant that the nature of the marriage was such that, during the subsistence of the marriage, the husband can still marry other women. A first marriage is polygamous if the husband were allowed by law to turn this *de facto* monogamous marriage into one *de facto* polygamous. With respect, this characterisation of the 1992 Sindhi Hindu ceremony of marriage performed by the parties may be disagreed with. A Hindu marriage solemnized in Singapore in 1992 is solemnized under the Women's Charter, not under Hindu marriage law, so that it is monogamous. Further, a Hindu marriage between Sindhis is, arguably, monogamous of itself.

A. *Characterisation as Monogamous or Polygamous*

The traditional method followed by the common law courts to characterise a marriage as, either, monogamous or polygamous was to look to the law

under which the marriage was solemnized. Singapore may be said to have adopted this traditional method. Section 86(1)(a) does refer to "marriage ... was solemnized under a law which expressly or impliedly provides that the marriage shall be monogamous." Further, the Interpretation Act[16] in section 2 defines 'monogamous marriage' as "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage." This definition suggests, similarly, that the characterization should be by reference to the law of the place the marriage was solemnized.

This method requires us to ask which marriage law the Sindhi Hindu ceremony of marriage was solemnized under. It is submitted that, while the ceremony of marriage followed that prescribed by the Hindu religion the law under which the marriage was solemnized was not Hindu marriage law. This marriage law was, instead, the Women's Charter, as the petitioner had argued.

Ever since the enactment of the Women's Charter in 1961 there is only one marriage law applying to all non-Muslims in Singapore. The reason for the enactment of the Women's Charter was to create one non-Muslim marriage law in Singapore in place of the various marriage laws then. If there were a non-Muslim marriage formed by way of the Sindhi Hindu ceremony in 1992 it had to be a marriage under the Women's Charter. It cannot, possibly, be any other marriage.

It bears remembering that the Women's Charter has always, even today, permitted the solemnization to follow the dictates of the Hindu, or any other, religion practised in Singapore. Section 22, in particular, allows the marriage official to choose to have the "marriage solemnized ... according to such form and ceremony as ... the person solemnizing the marriage sees fit to adopt ...." The ceremony itself being one in accordance with the Hindu religion as practised by the Sindhi community does not make the solemnization any less one under the Women's Charter.

B. *Women's Charter Characterises Marriage as Monogamous*

The next question is whether the Women's Charter is "a law which expressly ... provides that the marriage shall be monogamous" as required by section 86(1)(a). There is no doubt the answer to this is in the affirmative. There are many express provisions in the Women's Charter on the monogamous character of a marriage solemnized under it.

Its long title reads "An Act to provide for monogamous marriages ...."

[16] Cap 1, 1985 Rev Ed of the Statutes of the Republic of Singapore.

This requirement of capacity to marry is accorded a separate Part II of the Act devoted exclusively to 'Monogamous Marriages'. The requirement is repeated over several provisions *viz*, sections 4, 5, 6 and 11. Section 4, for instance, reads "Every person who on the commencement of this Act is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of that marriage or marriages of contracting a valid marriage under any law, religion, custom or usage with any person other than such spouse or spouses." The net effect of sections 4, 5, 6 and 11 is that the Women's Charter requires that a marriage solemnized under it be monogamous.

A recent application of this requirement is the Court of Appeal's decision in *Moh Ah Kiu* v *Central Provident Fund Board*.[17] In 1975 Moh Ah Kiu, a spinster, married one Choe Inn Hock in Penang according to the Chinese customary rites of marriage. Both Moh and Choe were Singapore citizens and domicilaries at the time. At that time Choe was already a party to a valid subsisting Christian marriage which he had contracted with another woman in Singapore in 1960. Choe's first Christian marriage was terminated by divorce in 1980 but he and Moh did not undergo a marriage solemnization after his divorce. The High Court, and this was approved by the Court of Appeal, granted a declaration that the parties were not validly married because the marriage in 1975 breached the requirement of monogamy. Choe in 1975 was bound by this requirement that, as long as his earlier Christian marriage subsisted, he lacked the capacity to marry any other woman whether the attempt to marry was in Singapore or outside Singapore. This incapacity persisted until he terminated his Christian marriage. After he divorced his first wife he regained capacity to marry but, unfortunately, there was no evidence he ever exercised this capacity after this time to marry Moh.

Hindu marriage law not necessarily polygamous

Even if we regard the Sindhi Hindu ceremony in 1992 as a solemnization under the Hindu marriage law, it is not necessarily correct to characterise it as potentially polygamous for two reasons. First, there is doubt over whether the Hindu marriage law as developed by our courts was a polygamous marriage law and, second, there is an alternative method of characterising a marriage which looks, not to the marriage law itself, but to the antenuptial domicile[18] of the parties.

[17] [1992] 2 SLR 569. For an analysis see Leong Wai Kum "Recent Developments in the Law of Marriage and Divorce" (1993) 5 SAcLJ 290.

[18] The antenuptial domicile is the domicile the person had just before the solemnization of the marriage. Under the common law choice of law rule, called the 'dual domicile' rule, the law of the person's antenuptial domicile regulates his or her capacity to marry.

The petitioner argued that the local Hindu marriage law is not polygamous. Indeed an accepted text has described the Hindu religion as recommending monogamy[19] although polygamy is not against the religion. There is also the case of *Paramesuari* v *Ayadurai*[20] whereby the High Court of Malaya accepted that Sri Lankan Hindus practise a custom of monogamy which they brought with them to Malaya. The expert witness, the president of the Sindhi Merchants' Association, testified for the petitioner that the Sindhis only recognised monogamous marriages. Unfortunately for the petitioner his Honour "rejected him as an expert on Hindu law. He had no qualification to be an expert on Hindu law. His knowledge was confined to the practice of a particular section of a community in Singapore and not Hindu law as such." The petitioner further argued that the enactment of the Indian Hindu Marriage Act in 1955 demonstrated the monogamous character of Hindu marriages. Although his Honour found against the petitioner there does appear to be several reasons upon which to disagree with the finding. His Honour implied he might be prepared to find to the contrary when he continued his judgment on the basis the marriage could have been monogamous instead.

C. *Antenuptial Domicile Characterises Marriage as Monogamous*

The marriage could be characterised as monogamous on an alternative basis. While the traditional method is to look to the marriage law under which the marriage was solemnized to characterise it as monogamous or polygamous, the Court of Appeal of England offered the alternative.

In 1982 in *Hussain* v *Hussain*[21] the court was faced with a Muslim marriage solemnized in Pakistan between a Muslim man domiciled in England and a Muslim woman domiciled in Pakistan. The Muslim law of Pakistan allowed the husband to marry another three women while this marriage subsisted. The marriage, however, was the first marriage for both the husband and the wife. It was, thus, of the characteristic of a potentially polygamous marriage if the characterisation were by way of the traditional method of looking to the marriage law of Pakistan. In the petition by the wife to the High Court of England for a decree of judicial separation, the husband questioned the jurisdiction of the court on the basis there was no valid marriage between them because the marriage was polygamous. Being a domicilary, the (English) Matrimonial Causes Act 1973 prescribed monogamy for him much as the Women's Charter does for Singapore domicilaries.

[19] NR Raghavachariar *Hindu Principles and Precedents* 3rd ed (Madras Law Journal Office, India: 1947).

[20] [1959] MLJ 195.

[21] (1983) 4 FLR 339.

The judge rejected the husband's contention and he appealed. The Court of Appeal also rejected his contention and upheld the validity of the marriage. Lord Justice Ormrod said:[22]

> Counsel for the wife contends that ... a marriage which is not actually polygamous at its inception, and incapable of becoming actually polygamous, by reason of the personal laws of the parties at the time it was entered into, is not void ... [a] marriage can only be potentially polygamous if at least one of the spouses has the capacity to marry a second spouse.... the marriage in this case is monogamous and should be held to be a valid marriage.

The husband's antenuptial domicile would not permit his marriage to a second woman while this first marriage subsisted and, relying on this prohibition, the first marriage was characterised, not as potentially polygamous, but as a monogamous marriage. In other words, a first marriage solemnized between a English domiciled man and a woman under any marriage law, whether or not it allowed polygamy, will be characterised a monogamous marriage and will not run afoul the prohibition in English law against polygamy.

If *Hussain* v *Hussain* were accepted by our courts it will have significant effect on the proper characterisation of the marriage. It would mean, even if we regard the Sindhi Hindu ceremony as solemnized under the Hindu marriage law instead of under the Women's Charter, the marriage between a Malaysian man and the Singapore domiciled woman should be characterised, on the basis of the requirement of monogamy in sections 4, 5, 6, and 11 of the Women's Charter as a monogamous marriage. Her antenuptial domicile provided enough reason, under the *Hussain* v *Hussain* method, to characterise the parties' first marriage as monogamous. What the Malaysian man's domicile was, as of 1992, was never discussed. Even if we assume he had not formed a domicile of choice in Singapore and his domicile remained in Malaysia, the law of Malaysia after 1982 when the (Malaysian) Law Reform (Marriage and Divorce) Act 1976 came into force, would also incapacitate him from marrying again polygamously.[23] By both antenuptial domicile(s) of the two parties, the 1992 Sindhi Hindu marriage can be characterised as monogamous by the *Hussain* v *Hussain* method.

It is submitted that the Sindhi Hindu ceremony of marriage performed in Singapore in 1992 was a solemnization of a monogamous marriage, either, because it was a solemnization of a Women's Charter marriage, or, because

[22] *Ibid,* at 340-343.

[23] See ss 5 and 69 of the (Malaysian) Law Reform (Marriage and Divorce) Act 1976 *wef* 1 March 1982.

by *Hussain* v *Hussain* the Women's Charter and the (Malaysian) Law Reform (Marriage and Divorce) Act applied as the antenuptial domicile to characterise the marriage to similar effect.

V. Women's Charter Permits Hindu Solemnization

Quite apart from the character of the marriage formed by the Sindhi Hindu ceremony, the key to his Honour's reading of section 86(1)(a) to the effect that he lacked matrimonial jurisdiction over it is his view that a Hindu solemnization is not permitted by the Women's Charter. It is necessary to examine this more closely. It is submitted, with respect, that this view may be disagreed with. It will be argued, first, that a Hindu ceremony of marriage is permitted by the Women's Charter and, second, that the formation of a potentially polygamous and, perhaps, even an actually polygamous marriage is also not entirely prohibited by the Women's Charter. There are, in other words, real limits to the extent to which we can pursue our commitment to monogamy and, in view of them, we should proceed to entertain this petition.

A. *Hindu Ceremony is Allowed by the Women's Charter*

The Women's Charter does not prescribe one given method of solemnization of marriage. In not so prescribing, the Act permits the solemnization of marriage according to a variety of methods of marrying. This is underscored by the provision in section 22. Indeed, if the parties had obtained an authorization for the solemnization and the Sindhi Hindu priest who married them had been a licensed marriage official, the 1992 ceremony would have been a perfectly valid solemnization. The Women's Charter does not disallow any particular form of solemnization although it does prescribe that parties must obtain a licence to authorize the solemnization and that the solemnization be performed by a licensed marriage official.

Second, it bears noting that it was only fairly recently that section 21(1) assumed its present form to require the authorization and that the marriage official must be licensed. For a long time before, the Act, in the form of its section 21, did not require, either, one, or, both of these. For this reason as well his Honour's reading of the Act that it does not permit a Hindu ceremony is, somewhat, strong.

(i) *Only since 1980 that marriage official must be licensed*

Before the 1980 amendment, section 21 used to read "Every marriage purported to be solemnized in Singapore shall be void unless a certificate

for marriage [now called, a marriage licence] or a licence [now called, a special marriage licence] authorizing the marriage has been obtained from the Registrar or the Minister, as the case may be." In its original form, before the 1967 amendment, section 21 read "No marriage shall be solemnized unless a certificate for marriage or a licence authorizing the marriage has been delivered to the person solemnizing the marriage." The shortcomings of these predecessors of section 21(1) have been elucidated before[24] and need only be summarised here.

The immediate predecessor section suffered from the absence of the requirement in section 21(1)(b) that the person who solemnizes the marriage must, either, be the Registrar of Marriages or a person who has been granted a licence by the Minister of Community Development to solemnize marriages. In other words, the requirement in section 8(1) was, during that time, not mandatory as breach thereof did not invalidate the solemnization. As the eminent writer[25] rightly suggested, two parties, with a certificate for marriage or licence in hand, may validly proceed to have their marriage solemnized, not by the Registrar or a person licensed to solemnize marriages, but by an unlicensed Hindu priest. They would have failed to meet with section 8(1) but there was no sanction for its breach. Even up to 15 years ago the Women's Charter allowed the solemnization to be performed by an unlicensed marriage official. It was too strong to suggest that the Sindhi Hindu ceremony was not permitted by the Women's Charter.

(ii) *Only since 1967 that authorization of solemnization required*

The original version of section 21 not only failed to provide a sanction for non-compliance with section 8(1), it also failed to provide a sanction for breach of the requirement that a solemnization must be authorized by the issue of a marriage licence. A literal reading of the original version of section 21 leads to the view that persons marrying under the then Women's Charter were free to flout all its requirements on formalities. It must be remembered, though, that from the very enactment of the Women's Charter in 1961 two requirements on capacity to marry *viz,* section 4 on monogamy and section 10 on the parties being not within the prohibited degrees of relationship, applied to any non-Muslim Singapore domicilary who proposed to marry. As long as the parties had capacity to marry by these sections, the solemnization need not have been authorized and the marriage official did not have to be licensed. That this was so has been put beyond doubt

[24] Kenneth Wee "Customary Marriages and the Women's Charter: Lingering Doubts" (1972) 14 MalLR 93, at pp 93-95.

[25] See note above.

by the Singapore Parliament in 1975, when it added the following new provision to the Women's Charter:[26]

> For the avoidance of doubt, it is hereby declared that every marriage contracted or effected on or after 15th September 1961 and before 2nd June 1967 in accordance with the law, religion, custom or usage of the parties or any of the parties thereto shall be valid if the marriage is not contracted or effected in contravention of sections 4 and 10.

The enactment of this declaratory provision only makes clearer the validity of these marriages. It bears repeating that the source of their validity is not this declaratory provision but the state of section 21 of the Women's Charter at the time. These shortcomings in the then section 21 means that, up to 1967, no authorization for the solemnization was necessary and, up to 1981, the marriage official could be an unlicensed marriage official. This history of section 21 does not support the view that the Sindhi Hindu ceremony of marriage was not permitted by the Act.

B. *Singapore Domicilaries May Enter Polygamous Marriages*

Further it is possible that the Women's Charter does not entirely prohibit Singapore domicilaries from entering polygamous marriages. It is possible to argue that a Singapore domicilary can validly enter a polygamous marriage, first, on the basis of the intended matrimonial home choice of law rule and, second, when a non-Muslim marries a Muslim under the Muslim law of Singapore itself. These points were not canvassed before his Honour.

(i) *Intended matrimonial home choice of law rule*

Protracted as sections 4, 5, 6 and 11 of the Women's Charter, undoubtedly, are all they provide for is that a person bound by the Women's Charter may not marry a second time. They do not further provide that the person cannot enter a polygamous marriage. It is conceivable that a non-Muslim Singapore domicilary can become party to a foreign polygamous marriage and may be, even, a polygamous Muslim marriage right here in Singapore itself.

Whether or not this is so depends on what is the Singapore choice of law rule about capacity to marry. The area of law which directs the courts to the law to choose to regulate a party's capacity to marry is complex.[27]

[26] Amendment Act 8 of 1975 *wef* 2 May 1975 added a new s 168 to the Women's Charter. The provision is now, s 184 1985 Rev Ed.

[27] A detailed discussion is beyond this article. See Leong *Family Law in Singapore, supra,*

The traditional choice of law rule directs the choice of the antenuptial domicile of the parties. The dual domicile rule would have the courts choose the law of each party's antenuptial domicile to regulate capacity to marry. Even within this rule, though, it bears noting that the Court of Appeal of England in *Hussain* v *Hussain* relied on the very antenuptial domicile to characterise the Muslim marriage as monogamous and, therefore, not in breach of the English requirement of monogamy.

There is, however, an alternative choice of law rule, *ie,* the intended matrimonial home rule accepted by the High Court of England in 1972 in *Radwan* v *Radwan (No 2)*.[28] The court there chose to test an English domicilary's capacity to enter a polygamous marriage with a Muslim Egyptian man in the Egyptian Consulate-General in Paris by reference to the law of Egypt as the law of their intended matrimonial home rather than by her domicile, *ie,* English law. This decision suggested that, for the matter of capacity to enter a polygamous marriage, at least, there is an alternative to the dual domicile rule of choice of law.

The husband was a party to a valid and subsisting Muslim marriage when he went through the ceremony of marriage with Mary Magson. Before the marriage they had decided to establish their matrimonial home in Egypt and, indeed, they did return to Egypt a couple of months after their marriage. Their daughter was born there. When the British forces attacked the Suez Canal the family moved and, finally, settled in England. They lived together for nearly twenty years and had eight children. The relationship finally soured and the wife sought a decree of divorce. As a preliminary issue, it was asked whether she, of English antenuptial domicile, possessed capacity to enter a *de facto* polygamous marriage. Cumming-Bruce J reinterpreted the classic cases to find the alternative test available. By this marriage law, of Egypt, the English woman who was domiciled in England did not lack capacity to enter an actually polygamous marriage. The intended matrimonial home rule has been accepted by the Court of Appeal of England in 1985 in *Lawrence* v *Lawrence*.[29]

If the intended matrimonial home rule were accepted in Singapore, its effect on the capacity of Singapore domicilaries to enter potentially polygamous and, even, actually polygamous marriages is dramatic. As long as the parties form a mutual intention by the time of their marriage to set up their matrimonial home outside Singapore in a country which allows polygamy the requirement of monogamy in the Women's Charter no longer

note 10, at 44-54. See also Tan Yock Lin *Conflict Issues in Family and Succession Law* (1993).

28 [1973] Fam 24.

29 [1985] 2 All ER 733.

applies to them and this despite their still being Singapore domicilaries at the time.

Further, such potentially polygamous and, even, actually polygamous marriage need not necessarily be solemnized outside Singapore. It may well be entered into right here in Singapore.

(ii) *Inter-religious Muslim marriage in Singapore*

A non-Muslim Singaporean woman may choose to marry a Muslim under the Muslim law of Singapore.[30] Nothing in the Women's Charter or Muslim law disallows such a choice of an inter-religious Muslim marriage. By so doing the non-Muslim woman commits herself to a polygamous marriage as Muslim law allows the Muslim man to marry up to four wives.[31]

The segregation of the Muslim marriage law and the non-Muslim marriage law, within the Women's Charter, is by no means water-tight. The Women's Charter applies by its section 3(1) *inter alia* to "all persons in Singapore" but section 3(2) provides that "all persons" does not include persons who have been married under Muslim law. Section 3(2), thus, exempts most of the Act only from "any person who is married under ... the provisions of the Muslim law or of any written law in Singapore or in Malaysia providing for the registration of Muslim marriages." The provision does not exempt the Women's Charter from a non-Muslim before he or she became married under Muslim law. He or she could, at the time of the Muslim marriage, be governed by the provisions of the Women's Charter. The issue is: does the Women's Charter, or, Muslim law govern the non-Muslim woman's capacity to contract a Muslim marriage?

There are no specific choice of law rules for the resolution of such an internal inter-personal conflict. The best suggestion is that we should draw analogies from the choice of law rules in international conflicts so that the internal conflicts are resolved in the same way as a similar conflict which occurs across legal systems. Where there are no public policy considerations suggesting a particular way of resolving interpersonal conflicts, we can do no better than draw analogies from international conflicts.

[30] She must, however, be a *kitabiah* by Muslim law. On the other hand a non-Muslim man cannot marry under Muslim law. A detailed discussion of these rules of Muslim marriage law is beyond this article but see Leong *Family Law in Singapore, supra*, note 10, at 62-65.

[31] While this continues to apply in Singapore, the Administration of Muslim Law Act, Cap 3, 1985 Rev Ed in s 96(2) & (3) requires the marriage official to hold an inquiry to "satisfy himself ... that there is no lawful obstacle according to the Muslim law or this Act to such marriage." In *Re Salleh bin Suati* [1990] 2 MLJ xxix the Syariah Appeal Board upheld the decision of the official who refused to allow the proposed second marriage of the Muslim man. It is understood that few second, or subsequent, marriages are solemnized.

Drawing analogy from the dual domicile rule, we would say that the Women's Charter incapacity applies to her. If, however, a court were prepared to draw an analogy from the intended matrimonial home rule, her capacity to marry could be regulated by the Muslim law. By choosing a Muslim marriage she and her prospective spouse have evinced a clear intention to have their marriage regulated by the Muslim law and this choice of law rule will choose Muslim law to regulate her capacity to marry as well. By this view, the requirement of monogamy no longer applies to her. The non-Muslim woman can, therefore, validly enter a potentially polygamous marriage and, even, an actually polygamous Muslim marriage in Singapore.

Whether our courts will agree with this is as yet unclear as the issue has never been posed as such. It is submitted the result should be acceptable. There is a basic premise that we should uphold the validity of a marriage whenever it is possible to do so, and another that persons should have as much autonomy of choice of marriage partner as possible. It should be remembered that, on a similar set of facts, the High Court of England upheld the validity of an actually polygamous marriage entered into by an English woman domiciled in England in *Radwan* v *Radwan (No 2)*. In an increasingly interactive world this result should not, any longer, be regarded unacceptable. Where an English court has been prepared to allow an English domicilary to choose to bind herself to an actually polygamous marriage, we should not be any less bold. Ultimately, the right of an adult person to choose who and how to marry and the norm of upholding the validity of a marriage may overtake the desire to hold non-Muslim Singaporeans to monogamy.

It has been argued that nothing in the Women's Charter incapacitates a person regulated by it from entering a polygamous Muslim marriage. This is so whether the Muslim marriage is solemnized in Singapore or outside Singapore. If these points had been canvassed before his Honour, it is possible that he may not have reached the view that the Women's Charter does not permit a non-Muslim Singaporean to solemnize a marriage according to the Hindu ceremony of marriage, partly because Hindu law is polygamous.

VI. Matrimonial Jurisdiction to Declare Marriage Void

It is not necessarily correct to link matrimonial jurisdiction to the kinds of marriages permitted by the law. If it were, there would be no place in the law for decrees of nullity. Such decrees are granted for the very reason of declaring that the particular marriage is seriously flawed. It is possible to regard a marriage which is so seriously flawed as not permitted by the law although the notion of whether a marriage is permitted or not is not particularly helpful to the resolution of the dispute. It bears noting that section

86(3) itself reminds us that our understanding of what is a 'marriage' within petitions for nullity must accommodate the fact that the marriage is not valid.

There are few petitions for a decree of nullity to declare that the marriage was void *ab initio*[32] for breach, either, of the requirements of solemnization or that of capacity to marry but *Lim Ying* v *Hiok Kian Ming Eric*[33] was one. The respondent was a female transsexual who had undergone sex reassignment surgery to align his body, as close as surgery can achieve, with his unshakable conviction that he was a male trapped in a female body. After the surgery was completed successfully, he changed his name. He was then allowed by the National Registration Office to change his National Registration Identity Card so his name reads 'Eric Hiok Kian Ming' and the notation of sex is 'male'. His marriage to Lim Ying came after all this. When Lim Ying petitioned the High Court for a decree of nullity to declare their marriage void on the ground Eric Hiok was still, in law, a female and this marriage being one between two women was void under the Women's Charter, the High Court granted her the decree she sought. While there is much academic criticism of the decision, there was never any doubt that the High Court had properly assumed matrimonial jurisdiction.

Granted the marriage in *Lim Ying* v *Hiok Kian Ming Eric* was void for a different reason *viz,* lack of capacity to marry while it was perfectly valid in its solemnization, it is submitted that it is on all fours with the present petition with regard to the issue of the matrimonial jurisdiction of the High Court. Lim Ying succeeded in obtaining the decree she sought despite this requirement of the two parties being of two different sexes not being specifically written into the Women's Charter and section 99(a), on the grounds upon which a decree may be granted, worded in a style normally regarded as exhaustive not containing such a ground. The High Court found the requirement from the Interpretation Act[34] in its section 2 defining, *inter alia*, a monogamous marriage as "a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage." To read into the Women's Charter a requirement of capacity to marry from a definition of 'monogamous marriage' within a general statute to aid interpretation must, surely, reflect a firm view that such a marriage

[32] A marriage may also be voidable for any of the grounds provided in s 100 of the Women's Charter. A decree of nullity over a voidable marriage, also, declares the marriage to be void but, only, prospectively. For a comparison of the two concepts, see Leong *Family Law in Singapore, supra,* note 10, at 78-80.

[33] [1992] 1 SLR 184. For analyses see Leong "Reform of the Law of Nullity in the Women's Charter" [1992] SJLS 1 and Tan "Transsexuals and the Law of Marriage in Singapore" [1991] SJLS 509.

[34] Cap 1, 1985 Rev Ed of the Statutes of the Republic of Singapore.

has to be condemned. This is not different from a view that such a marriage is not permitted. In the course of reaching his decision that the marriage was void, Judicial Commissioner KS Rajah said:

> The [Women's] Charter introduced the traditional marriage or the voluntary union of one man and one woman for all Singaporeans except Muslims.... The legislature has made it clear that ... the marital contract ... cannot be varied by the parties .... The state determines who may enter an enforceable marriage contract and the legal rights and duties that go with the marital status.

If it were right for the matrimonial jurisdiction of the High Court to attach, in order to grant Lim Ying the decree of nullity she sought, so too should it attach in the present case. It would appear that the relevance of *Lim Ying* v *Hiok Kian Ming Eric* to the proper breadth of the matrimonial jurisdiction of the High Court in relation to petitions seeking a decree of nullity was not argued before his Honour. If it had, there might not have been the view that the matrimonial jurisdiction does not attach where the marriage is one not permitted by the Women's Charter.

VII. Parties Solemnized Women's Charter Marriage

The main issue raised by this petition was whether or not the two parties, in undergoing the Hindu ceremony before a Sindhi priest in 1992 in Singapore, solemnized a marriage under the Women's Charter? This is a fairly involved question. While the Women's Charter does provide the requirements of a valid solemnization in section 21(1) and also provides a definition of solemnization in section 2, the answer cannot be reached on an interpretation of these provisions alone. It is submitted the answer may, only, be reached from thinking of solemnization fundamentally as a concept which conveys the idea of getting married and, then, interpreting these provisions with the concept in mind. The judgment did not suggest that this conceptualization was pursued by either party. His Honour, thus, did not have the benefit of an argument incorporating such conceptualization which might have been the better argument.

A. *The Concept of Solemnization*

How, then, should we understand the concept of solemnization? We must begin by appreciating that solemnization plays one specific role, only, within the law of the formation of marriage *viz,* conveying the forming of the marriage. Parties who have solemnized a marriage have, simply, got married. Solemnization does not play any role beyond this. We should not read into

solemnization other roles, for example, of discouraging parties from getting married by certain methods. This discouragement is performed by section 21(1) striking down the solemnization as void and, to a lesser extent, by the offences to punish gross undesired behaviour.

Where the marriage law, like the Women's Charter, allows a variety of methods of marrying some of which, like those a Justice of the Peace who has been licensed to solemnize marriages may devise,[35] may be fairly simple or unique the concept of solemnization requires us to focus on the formation of marriage as akin to the formation of any other contract. We should ask whether or not the two parties have evinced a mutual intention to marry and put that intention into effect which is the absolute minimum required of the formation of a contract. This should suffice to entitle the two parties to claim to have their marriage solemnised but which solemnization may be void for failure of full compliance with section 21(1). Two parties who convince us they put their mutual intention to marry into effect are, conceptually, persons who have got married.

The section 2 definition of solemnization as the "contracting of a marriage or effecting of a marriage in accordance with the law, religion, custom or usage of the parties or any of the parties" is useful but must be interpreted with the concept of solemnization in mind. Without the concept at the back of our minds, we are just as likely to read it wrongly as correctly. The definition refers us to all the methods of marrying which all the marriage laws we have, or, have ever had, allowed and, rightly, so. To decide whether two parties have solemnized a marriage which is void for failure to comply with section 21(1) we should look to all the methods of marrying our law now allows and has ever allowed. All of these are relevant in judging whether the conduct of the two parties convinces us they had mutual intention to marry and put that into effect.

These marriage laws are the Women's Charter, the statutory marriage laws, local Chinese customary law, local Hindu law, local Sikh law, local Jewish law, the common law and, perhaps, some others as well. Chinese custom, the Hindu religion and the Jewish religion all prescribe some rites which should be performed by parties intending to marry. If we see some of these rites performed by two parties, at least one of whom can claim to be entitled to use the method if not for the enactment of the Women's Charter, we should be convinced that the two parties had put their mutual intention to marry into effect. They have done the "contracting of a marriage ... in accordance with the law, religion, custom or usage of the parties or

[35] The Act empowers the Minister of Community Development to license Christian priests, Hindu priests, Jewish priests and Justice of the Peace to solemnize marriages. Licensed marriage officials are free to devise any ceremony they see fit.

any of the parties." Where these rites fall short of the requirements the Women's Charter prescribes in section 21(1), they are married but their marriage is void because the solemnization is void.

We must also remember that courts in the Straits Settlements accepted far less evidence of what is getting married under local Chinese customary law. It may also be suggested that these liberalisations should extend to getting married under local Hindu law, local Sikh law and local Jewish law inasmuch as the legal basis for raising these rules to law was exactly the same as that for raising Chinese custom to law. The courts accepted proof of long cohabitation with the repute of marriage to raise the presumption that there must have been proper solemnization of marriage[36] and, later, simply evidence of the barest minimum requirement of the formation of the contract of marriage, *ie,* any evidence of the parties' mutual intention to marry and the effecting of that intention,[37] as enough evidence of the solemnization of a marriage under Chinese custom. This has been a part of Singapore law for a very long time. On the other hand, as was said earlier, it was only from the amendment of 1967 that the requirement of an authorization of the solemnization became necessary, and only from the amendment of 1980 that, in addition, the requirement that the marriage official must be a licensed marriage official became necessary.

It is fair to suggest that we have been led to regard getting married as, simply, putting our mutual intention to marry into effect. Solemnization should require no more than any credible evidence of two persons effecting a mutual intention to marry. This, as low a requirement as it is, properly separates the tenable claims of void solemnization from the untenable ones where, really, there has been no solemnization at all. The only limit, as section 2 suggests, is that because these marriage laws were developed on the basis that the Second Charter of Justice required the common law of marriage to be modified to avoid causing oppression to local inhabitants,[38] at least one of the two persons should be entitled to claim that, if not for the enactment of the Women's Charter, he or she would have been able to marry under any of these local marriage laws.

B. *What is not Solemnization*

It should be appreciated that the concept of solemnization may, also, be understood from the other side, *ie,* from those cases which must properly be excluded. Suppose a total stranger petitions the High Court today seeking

[36] *Ngai Lau Shia alias Low Hong Sian* v *Low Chee Neo* (1921) 14 SSLR 35.
[37] *Re Lee Gee Chong, deceased*; *Tay Geok Yap & Ors* v *Tan Lian Cheow* [1965] MLJ 102.
[38] See Leong *Family Law in Singapore, supra,* note 10, at 95-101.

a decree of nullity to declare that his 'marriage' with me was void in its solemnization inasmuch as it did not comply with section 21(1) of the Women's Charter. This petition should be dismissed on the basis there was not, even, a solemnization and, therefore, no marriage whatsoever. Total strangers are the paradigm of persons who must be excluded from the concept of solemnization. They have not got married and should never be able to claim to have solemnized a marriage, not even, a void solemnization.

Similarly, persons who cohabited outside of marriage without ever having evinced a mutual intention to marry have, also, not solemnized a marriage, not even, a void solemnization. If we should wish to extend some of the protections the law offers to married persons to them, we should do so as such and not on the inappropriate view that they are parties to a void solemnization. They have chosen to remain outside of the law of marriage and have no claim to having solemnized a marriage. The key, though, is that these are people whom we are convinced decided to cohabit outside marriage. Given our history, where the courts accepted long cohabitation with the repute of marriage as good enough evidence of the formation of a marriage under local Chinese customary law, we must distinguish clearly between the two. Was there a mutual intention to marry or not during the cohabitation? If so, it conforms to solemnization by the local Chinese customary law; if not there was no solemnization of any marriage.

Persons who thought they can solemnize a marriage by simply drawing up a contract of marriage and who proceed to do so are harder to categorise. The issue of whether they have solemnized a marriage should, however, be resolved in the same way as the others. We should ask whether they convince us that, by their conduct, they have evinced a mutual intention to marry and put that intention into effect. The strangeness of their conduct may, legitimately, allow us to be skeptical that such conduct amounts to good evidence of putting a mutual intention to marry into effect. This difficulty, in itself, does not change the proper way to resolve the issue. They must prove a solemnization and the question is whether they are able to.

A marriage which is void for breach of the requirements of solemnization should, therefore, be determined from this discussion of the concept of solemnization as it has been encapsulated in sections 2 and 21(1). It is unfortunate that this was not argued before his Honour.

VIII. Void Marriage and Non-Marriage

His Honour was not well served by the only precedent referred to *viz, Re*

the estate of Liu Sinn Min, deceased. In *Re the estate of Liu Sinn Min, deceased* both the High Court[39] and the Court of Appeal[40] decided that a Chinese man, who was already a party to a valid monogamous civil marriage, who attempted to marry another woman under Chinese custom had thereby not even become party to a marriage void for breach of the monogamy requirement. This decision was reached, despite sections 4, 5, 6 and 11 clearly prohibiting the attempted second marriage during the subsistence of the first, and condemning the attempt as leading to a 'void' marriage. The decision that it was not a void marriage, which the High Court and Court of Appeal reached on different reasons, has been roundly criticised and the eminent writer's arguments need not be repeated here.[41]

In deciding that the attempted Chinese customary marriage was not a void marriage, the courts have implied that it was a non-marriage, instead, although the term was never mentioned. If this were right, the 1992 Sindhi Hindu ceremony can, also, be a non-marriage instead of a void marriage. It is submitted that *Re the estate of Liu Sinn Min, deceased* was wrong and that it was unfortunate that it was referred to at all.

A. *What is a Non-marriage*

A non-marriage refers, as the term implies, to a relationship which is more flawed than a relationship of a void marriage. It refers to a claim which is a non-starter where the 'marriage' is a complete nonentity. A marriage void in its solemnization, on the other hand, refers to a marital relationship which has been formed but which formation was flawed by failure to comply with the requirements of the law. Where there has been an utter failure of solemnization of marriage (where the two persons never intended to marry or never acted upon an intention to marry) we should never regard them as parties to a void marriage. They are in a completely different category from two other persons who acted on their mutual intention to marry but fell short of the requirements of solemnization. We need to be able to distinguish the two situations rationally and, only, conceptualization can contribute to such rational distinction. Conceptually, we reserve the status of void marriage for two parties who have actually married while those who never married should be described by a different term which conveys this fact.

Was the implication in *Re the estate of Liu Sinn Min, deceased* that his attempted Chinese customary marriage was a non-marriage because it breached

[39] [1974] 2 MLJ 9.
[40] [1975] 1 MLJ 145.
[41] Kenneth Wee KS "The Law of Legitimacy in Singapore" (1976) 18 Mal LR 1.
[42] S 4, Straits Settlements Civil Marriage Ordinance 9 of 1940.

the monogamy requirement in the Civil Marriage Ordinance[42] sound? It should be noted that both courts had, as an alternative reason for their decision, found no sufficient evidence of the solemnization of a Chinese customary marriage by Liu Sinn Min.[43] If this were true, there was no solemnization at all and, thus, no void marriage. This part of the decision of the courts has, also, been convincingly criticised by the eminent writer and we need not concern ourselves with it.

Assuming for the moment that Liu Sinn Min had solemnized a Chinese customary marriage, were the courts right in suggesting that breach of the requirement of monogamy resulted in the attempt being a non-marriage instead of a void marriage? It is submitted that breach of any requirement of capacity to marry ought always to result in a void marriage. The concept of a non-marriage should be reserved for a total failure of solemnization. Where there has been a solemnization of marriage there is a marriage formed which is void, either, because the solemnization is flawed by way of section 21(1) or because the parties lack the capacity to marry each other.

B. *Concepts of Void Marriage and Non-marriage*

Restricted to the situation of a total failure of solemnization of marriage, the concept of a non-marriage usefully helps to identify the non-starter claims from those where the parties have got married but which solemnization is flawed by section 21(1) so that the marriage is void. If we were to use the concept in relation to requirements of capacity to marry we are no longer referring to non-starters but, instead, are, either, picking from among the requirements of capacity to marry those which are extra-important breach of which result in a non-marriage, or, reviewing the extent or manner of failure of personal capacity to marry to pick out the more gross failures.

There are two weaknesses in so doing. First, it makes the concept of non-marriage serve more than one purpose. The concept is difficult enough to grasp when restricted to the one purpose of identifying non-starters. It would become even more perplexing if made to serve yet another purpose. Second, the soundness of the idea that some requirements of capacity to marry are more important than others, or, that some failures of personal capacity to marry are more gross than others is questionable. Under the Women's Charter the requirements of capacity to marry are sections 4, 5, 6 and 11 on monogamy, section 9 on minimum age, section 10 on the prohibited degrees of relationship, *Lim Ying* v *Hiok Kian Ming Eric*[44] on the two parties being of different sexes, and section 3(3) on one party only

[43] See [1974] 2 MLJ 9 at p 12 & [1975] 1 MLJ 145 at p 146.
[44] *Supra*, note 33.

being a Muslim. How should we pick which is more important than the others? *Re the estate of Liu Sinn Min, deceased* suggested that the requirement of monogamy was more important because a major reason for the enactment of the Women's Charter was to impose monogamy on all non-Muslim Singaporeans. Is this a good enough reason to emphasize it over the other requirements? The Women's Charter was enacted as the only marriage law for all non-Muslim Singapore domicilaries; does this single out the provision in section 3(3) so that breach of this deserves added condemnation?

A distinguished academic has suggested that because "it remains true that 'marriage' in English law means the 'union of one man and one woman' [i]f the parties are clearly, demonstrably, and known by each other not to be male and female it is difficult to see how a court could hold that there was a marriage, even a void one."[45] It is submitted that this view which relies on a qualitative assessment of the parties' state of mind to make this particular failure of personal capacity to marry more gross than others is not sound. Why should the knowing breach of this, or any other, requirement of capacity to marry make such a difference? Surely, in one sense, the union of two persons who know the sexual inclinations of each other is less contemptible than where one misrepresents his or her sexual inclination or, even, defrauds the other? The couple who form their void marriage knowingly is, in regard to the proper description to put on their relationship, not to be preferred nor condemned over another couple who do so in ignorance. If a knowing breach of this particular requirement marks it out for special condemnation, would the knowing breach of the other requirements, eg, the minimum age, also mark that breach out as well? How should we judge whether there was enough information to constitute knowing breach? It is submitted that we ought not engage in such deliberation. No one requirement on capacity to marry is superior to another and no one mental state of the parties deserves added condemnation. The non-marriage concept should be reserved for non-starters to differentiate them from persons who have got married and the way to differentiate them is, simply, by whether the parties have done enough to constitute a solemnization of marriage.[46]

C. *Solemnization Leads to Void Marriage not Non-marriage*

The High Court and Court of Appeal suggested in *Re the estate of Liu Sinn Min, deceased* that a marriage which, by the application of sections 4, 5, 6 and 11, is a void marriage may, nevertheless, be a non-marriage

[45] Cretney and Masson in the latest edition of the very highly regarded text *Principles of Family Law* (5th ed, 1990) at 70.

[46] Professor Cretney had queried whether two immigrants who *bona fide* believed that they

because of the need to pursue the objective of prohibiting polygamy. It is submitted that this suggestion was wrong. As this suggestion was, only, implied by the courts' decisions and was not part of their *ratio decidendi*, it may be ignored by the High Court. The condemnation of the marriage as a void marriage adequately pursues this objective. It was unnecessarily harsh to have gone further to describe the parties' status as an utter non-entity. Liu Sinn Min and the mother of some of his children cohabited with the repute of marriage for many years. They deserved the status of parties to a void marriage in order to bestow the status of legitimacy upon their children.

It was unfortunate that *Re the estate of Liu Sinn Min, deceased* was referred to in this petition. Its implication that the polygamous marriage was a non-marriage because of the objective behind sections 4, 5, 6 and 11 suggests it might also be proper to describe the case at hand as less than a marriage void for invalid solemnization because of the objective of discouraging a solemnization not permitted by section 21(1). *Re estate of Liu Sinn Min, deceased* has been convincingly demonstrated to be wrong. It is submitted that its implication was also wrong. Accordingly, the analagous suggestion that the performance of the Sindhi Hindu ceremony of marriage was a nonentity, instead of a void solemnization, is wrong. These results, reached on statutory interpretation *simpliciter* were weak for lack of attention to the concepts of solemnization, void marriage and non-marriage when interpreting provisions of the Women's Charter on the formation of marriage.

IX. Conclusion

It is submitted that the present case could have been analysed differently if the underlying concepts had been borne in mind. The case posed the issue whether the 1992 Sindhi Hindu ceremony of marriage was a void solemnization under section 21(1). The crux of this issue is whether or not there was a solemnization at all as this concept should be understood within the provisions in sections 2 and 21(1). If the parties had solemnized a marriage, this solemnization was void under section 21(1). It was also a marriage "under a law which expressly ... provides that the marriage shall be monogamous" so that the High Court does have matrimonial jurisdiction

could contract a marriage in Muslim form in England without complying with the forms of English law could claim to have a void solemnization: see *Principles of Family Law, ibid*, at 70. It is submitted that the issue would be whether an English court is prepared to accept that Muslim form of solemnization as a solemnization. If it were, the parties have solemnized a marriage and thus ought to be able to obtain a decree of nullity on the ground their marriage was invalid in its solemnization.

over it.

Had the case been analysed with the concepts in mind, the court would have proceeded to hear the petition and declare the marriage void under section 21(1) for invalid solemnization. It was indicated that the petitioner sought ancillary orders. As his Honour dismissed the petition for lack of jurisdiction, there was no discussion of this application. Where there was a marriage void in its solemnization, the application for ancillary orders was proper and should have proceeded.

Two persons who go through a solemn ceremony of marriage in a Hindu temple before their priest and who subsequently live together for more than two years deserve the status of being parties to a marriage albeit one void for invalid solemnization. They should not be treated as if they never got married. The proper way to express our displeasure at their non-compliance with the Women's Charter requirements on solemnization of marriage is to condemn their marriage as a void marriage. Doing more than this was unnecessary and confuses the legal effect of non-compliance with not marrying at all. At the end of the day the case may be better appreciated from these basic propositions.

LEONG WAI KUM*

Postscript

While the above article was in press, the decision in *Soniya Chataram Aswani* v *Haresh Jaikishin Buxani* was reported in [1995] 3 SLR 627.

* LLB (Hons) (Malaya); LLM (Harvard); Associate Professor, Faculty of Law, National University of Singapore.