

## The Social Justice Ramifications of Narrowing the Legal Definition of “Wife” in Malaysian Civil Law

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### Abstract

The status of “wife” confers on a woman a legal standing in relation to her husband which accords on her certain legal rights. In the context of Malaysian civil law this includes the right to initiate a claim in tort for any injuries or loss suffered by her deceased husband arising from the negligence of another. Such a right is conferred under s.7 of the Civil Law Act 1956. The Court of Appeal in a recent unanimous decision in *Tan Siew Sen & Others v Nick Abu Dusuki Bin Hj Abu Hassan [Civil Appeal No.B-04-249-09/2014]* has ruled, that in the context of Non-Muslim marriages, only registration will confer the status of “wife” for the purpose all civil actions and thereby has narrowed the legal definition of the term “wife” in Malaysian civil law. The ruling of the court has the effect extending the application and scope of the Law Reform (Marriage & Divorce) Act 1976 beyond the parameters. Objectives: The objective of this paper is to assess the social justice ramifications of narrowing the legal definition of “wife” for civil actions in Malaysia, with particular reference to the interpretation of s.7 of the Civil Law Act 1956 which is a statutory provision applicable to both Muslims and Non –Muslims alike. Methodology: Doctrinal legal research/qualitative. Conclusion: The narrow interpretation is contrary to legislative intent and will result in social injustice of its preamble and thereby judicially transforming the definition of the term “wife” in Malaysia.

Keywords: *Legal definition, wife, social justice.*

### 1. Introduction

Section 7(1) of the Civil Law Act 1956<sup>1</sup> provides for the continuation of civil liability for damages whenever the death of a person is caused by the wrongful act, neglect or default of another and thereby allowing the survival of the right of legal action for the benefit of the deceased victim’s next of kin. Section 7(2) of the Civil Law Act 1956 goes on to identify those next of kin for whose benefit such a claim may be brought as follows:

Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased<sup>2</sup>

The spouse of the deceased whether husband or wife would fall within the class of person[s] for the benefit of whom a claim under section 7(1) of the Civil Law Act 1956 may accrue. The

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Civil Law Act 1956 does not however provide any definition of the term “wife” or “husband” for that matter, and herein is the lacuna which has raised much debate. It may well be that at the time the Civil Law Act 1956 was enacted the term “wife” was clear and in no need of any legal or statutory definition. Thus it was probably best left undefined following the principle of *absoluta sententia expositore non indiget* (it is not allowable to interpret what has no need of interpretation ) as the meaning of term the “wife” was so plain and obvious that it was not necessary to go beyond the ordinary dictionary meaning<sup>3</sup>.

Sadly this is no longer the case and the legal definition of the term “wife” is in a state of flux and this is largely due to conflicting statutory provisions and judicial interpretations which have resulted in the narrowing of the legal definition of the term “wife” under Malaysian civil laws. Since 1956 several legislative attempts have been made to define the term “wife” and these definitions have largely been inconsistent. The interpretation section of the Income Tax Act 1967<sup>4</sup> for example defines “wife” as follows: “means a woman who (whether or not she has gone through any religious or other ceremony) is regarded by virtue of any law or custom as the wife of a man or as one of his wives”

The interpretation sections in the Real Property Gains Tax Act 1976<sup>5</sup> and Share (Land Based Company) Transfer Tax Act 1984<sup>6</sup> are *in pari materia* with the above definition which recognises as wife any woman who is regarded by virtue of any law or custom as the wife of a man. It should be noted that the above statutory definitions do not exclusively confine the term “wife” to a woman whose marriage has been registered or deemed registered under the provisions of the Law Reform (Marriage and Divorce) Act 1976<sup>7</sup> and includes in the definition of wife a woman who is regarded by custom as the wife of a man.

A definition of the term “married woman” is also of significance in this context as the very dictionary meaning of the term “wife” refers to a married woman.<sup>8</sup> From a statutory perspective the definition of a “married woman” has been expressly provided for in section 2(1) the Married Women Act 1957 as follows: “In this Act "married woman" includes any woman married in accordance with the rites and ceremonies required by her religion, manners or customs”<sup>9</sup>

The above definition is clearly inclusive of a woman who has married in accordance with the rites and ceremonies required by her religion or customs and does not confine the term “wife” to a woman whose marriage has been registered or deemed registered under the provisions of the Law Reform (Marriage and Divorce) Act 1976. Although it may be argued that the words and terminology employed in the definition of a "married woman" under the

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Married Women Act 1957 is not identical to the terminology utilised in the definition of “wife” in the Income Tax Act 1967 and the other two Acts which are in pari materia<sup>10</sup> it is clear that the definitions in all of these Acts are inclusive and have not by any stretch of the imagination confined it to a woman whose marriage has been registered or deemed registered under the provisions of the Law Reform (Marriage and Divorce) Act 1976.

The Married Women Act 1957 had undergone substantial amendments vide the Married Women (Amendment) Act 1994<sup>11</sup> it should be pointed out however that no amendments were in fact made to the definition of the term "married woman". This suggests that Parliament clearly wished to continue with the inclusive original definition of the term “married woman” and by implied extension “wife” and did not intend these terms to be limited by the new regime of so called compulsory registration as advocated by the Law Reform (Marriage and Divorce) Act 1976. If indeed it was the intention of Parliament to extend the application of the Law Reform (Marriage and Divorce) Act 1976 with regards to the definition of “wife” to only those women whose marriage has been registered or deemed registered to all statutory provisions the opportunity had clearly presented itself during the amendment Married Women Act in 1994. Parliament would most certainly have made the necessary express amendments to facilitate the narrowing of the definition. The fact that Parliament did not chose to do so is clear irrefutable evidence that it was never the intention of the Parliament to narrow the definition of “wife” to only those women whose marriage has been registered under the Law Reform (Marriage and Divorce) Act 1976 or to dispense with the inclusive definitions as provided for by the earlier statutory provisions.

Further evidence of Parliamentary intent not to disturb the inclusive definition can be gleaned from the fact that the amendments introduced to the relevant provisions of the Married Women Act 1957 vide Married Women (Amendment) Act 1994 dealt with the issue of civil tortious liability.<sup>12</sup> Thus it can be argued that the term “wife” under section 7(2) of the Civil Law Act 1956 for the purpose of perusing a tort claim under section 7(1) of the same Act should be interpreted based on the inclusive definition as expressly provided for under the provisions of the Married Women Act 1957 or even the Real Property Gains Tax Act 1976 and will therefore include a woman whose marriage has not been registered or deemed registered under Law Reform (Marriage and Divorce) Act 1976. Such an inclusive interpretation was clearly intended by Parliament as reflected by its decision not to make any amendments to the definition of “married women” to only those registered under the under Law Reform (Marriage

and Divorce) Act 1976 even though the legislative opportunity to do so presented itself in 1994. By omission Parliament has in fact expressed its clear intention.

## 2. Findings and Discussion

### *Law Reform (Marriage and Divorce) Act 1976 and Judicial Interpretation*

The catalyst for the argument that only a woman whose marriage is registered or deemed registered would fall within the definition of “wife” is the Law Reform (Marriage and Divorce) Act 1976 which was brought into effect from the from 1st March 1982(the appointed date). The preamble of this Act states as follows:“An Act to provide for monogamous marriages and the solemnisation and registration of such marriages, to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.”<sup>13</sup>

The Act appears to introduce a regime of compulsory registration with regards all Non-Muslim marriages in Malaysia from the appointed date as reflected in section 5(4)<sup>14</sup> when read together with section 9<sup>15</sup>. Further section 22 (4) of the Law Reform (Marriage and Divorce) Act 1976 provides as follows:

Every marriage purported to be solemnised in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as the case may be.

Thus if these three sections are read together it would suggest that a Non -Muslim marriage solemnised after the appointed date must be registered in accordance with the Law Reform (Marriage and Divorce) Act 1976 and any marriage solemnised without compliance of these requirements is therefore void. This in turn raises questions as to the definition of the term “wife” in civil law after the commencement of the Law Reform (Marriage and Divorce) Act 1976. If the definition of the term “wife” is now to be read subject to the compulsory registrations requirements as set forth by Law Reform Act 1976 its parameters will narrow and the inclusive approach as set forth in the previous statutory provisions as discussed above must be discarded. It would mean that only a woman whose marriage is registered or deemed registered under the by Law Reform Act 1976 will now fall within the definition of the term “wife” for the purpose of section 7(2) Civil Law Act 1956.

It should be noted that there is nothing in the Law Reform Act 1976 sections identified above to suggest that the definition of the term “wife” for all other statutory provisions must

now be read subject to its prevailing requirement. In fact the preamble suggests that the application of the Law Reform Act 1976 is confined to matters concerning the formation marriage, divorce and other matters incidental thereto only. Thus the requirement of compulsory registration was never intended to limit the definition of the term “wife” in the context of a civil action in tort under Section 7 of the Civil Law Act 1956. This has been the prevailing judicial interpretation of s.7 (2) of the Civil Law Act 1956 as illustrated in *Chong Sin Sen v Janaki Chellamuthu*(1997)<sup>16</sup> and *Joremi Kimin & Anor v. Tan Sai Hong*(2001)<sup>17</sup> where the courts have taken the inclusive approach to the definition of the term “wife” and allowed the civil claim of a woman whose marriage was unregistered. The Court of Appeal in its recent decision in *Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor*(2016)<sup>18</sup> however has ruled that for the purposes of section 7(2) of the *Civil Law Act 1956* the definition of the term “wife” must now be read subject to the compulsory registration requirements as set under the Law Reform Act 1976. His Lordship Abdul Rahman Sebli JCA delivering the judgment of the court stated as follows:

After the coming into force of the LRA, it is the LRA and not the CLA, the Married Women Act 1957 or any statute of general application, nor any legal doctrine or custom that determines the legal status of a marriage between two non-Muslims. It is therefore in the LRA and not elsewhere that we should look for the answer to the question who is a "wife" under s. 7(2) of the CLA. The spirit of the LRA dictates that before a woman can be recognised as a wife, she must undergo a marriage that is solemnised in accordance with Part III of the LRA. That is a prerequisite for a woman to acquire the status of a wife (and a man the status of a husband) after the coming into force of the LRA.<sup>19</sup>

The social justice ramifications of the Court of Appeal’s decision to invoke the registration requirements in the *Law Reform Act 1976* on the interpretation of the Civil Law Act 1956 may be far reaching as it has extended the application of the Law Reform Act 1976 beyond the parameters of civil marriage laws and may even encroach upon the recognition of other types of marriages in Malaysia.<sup>20</sup>

### 3. Conclusion

The ruling of the court in *Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor* has the effect extending the application and scope of the Law Reform (Marriage & Divorce) Act 1976 beyond the parameters of its preamble and thereby judicially transforming the

definition of the term “wife” in Malaysia. In doing so it has sacrificed a social justice inspired inclusive definition aimed at providing a cause of action for the “wife” to claim damages arising from the death of her husband due to negligent conduct of another at the altar of registration of marriages. It also appears to have stretched the application registration of marriages beyond what was intended by the legislature. We must also keep in mind that Section 7 of the Civil Law Act 1956 applies to Muslims as well and this gives rise to the question as to whether the current interpretation on compulsory registration of marriage will also render an unregistered Muslim marriage which has been validly contracted under Islamic Law principles unrecognised for the purposes of a civil action.

#### 4. References

<sup>1</sup>Section 7(1) Civil Law Act 1956 (ACT 67) provides as follows: Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.

<sup>2</sup>Section 7(2) of the Civil Law Act 1956 (ACT 67).

<sup>3</sup>The Merriam Webster Online Dictionary defines wife as :“ a married woman : the woman someone is married to (<http://www.merriam-webster.com/dictionary/wife> retrieved on October 21, 2016)

<sup>4</sup>See section 2 Income Tax Act 1967 (Act 53)

<sup>5</sup>Section 2 Real Property Gains Tax Act 1976(ACT 16) provides that “wife” means a woman who (whether or not she has gone through any religious or other ceremony) is regarded by virtue of any law or custom as the wife of a man or as one of his wives.

<sup>6</sup>Section 2 Share (Land Based Company) Transfer Tax Act 1984 (Repealed By The Finance Act 1988 [Act 364]) Act 310 provides that provides that “wife” means a woman who, whether or not she has gone through any religious or other ceremony, is regarded by virtue of any law or custom as the wife of a man or as one of his wives.

<sup>7</sup>See s.3 (1) Law Reform (Marriage and Divorce) Act 1976 (Act 164) date of enforcement from 1st March 1982.

<sup>8</sup>Ibid no.4.

<sup>9</sup>See s.2(1)Married Women Act 1957 (Revised 1990) Act 450 .

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<sup>10</sup>Ibid no. 5 – 7.

<sup>11</sup>See Married Women (Amendment) Act 1994 (ACT A893)

<sup>12</sup>See sections 2 & 3 Married Women (Amendment) Act 1994 (ACT A893).

<sup>13</sup>Preamble, Law Reform (Marriage and Divorce) Act 1976 (Act 164).

<sup>14</sup>section 5(4) of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) : After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III.

<sup>15</sup>section 9 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) : A marriage under this Act may be solemnised only by a Registrar.

<sup>16</sup>Chong Sin Sen v Janaki Chellamuthu [1997] 2 [Malaysian] Current Law Journal 699

<sup>17</sup>Joremi Kimin & Anor v. Tan Sai Hong [2001] 1 [Malaysian] Current Law Journal 526

<sup>18</sup>Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Ano [2016] 6 [Malaysian] Current Law Journal 18

<sup>19</sup>Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor [2016] 6 [Malaysian] Current Law Journal 18 at paras 40 - 41.

<sup>20</sup>Muslim Marriages.