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Research paper



Application of Private International Law Instruments in the Recognition of Marriages by Shariah Court in Malaysia

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Abstract

In recent years, the phenomenon of cross-border marriage has provoked an increase of international disputes in family relationship. In Malaysia, due to growing cross-border marriage, the Shariah Court in Malaysia cannot avoid and they have been forced to react to this situation. Patterns and characteristics of cross-border marriage have varied widely among world regions and races and therefore need theoretical enlightenments. The ideals of marriage which may reflect in husbands and wives thinking of living happily ever after may easily be stumped by the realities of life when problems arise. Due to the increasing number of cross-border marriage and very limited research on the international dimensions of the law regulating peculiar aspects of marriages, this paper aims to discuss the application of rules of private international law in the Malaysian Shariah courts affecting recognition of cross-border marriage. In this study, data was obtained from materials consisting of textbooks, legal cases, legislation, journals, magazines, newsletters, newspapers, seminar and conference papers and unpublished writings (dissertations and theses). This paper involves investigation and analysis of the materials available in the library. Hence, it uses the historical, analytical and comparative methods. This article is a preamble to a more detailed study of the International marriages which the result will be useful for further improvement of the existing legal provisions in Malaysia.

Keywords: *Private International Law, Islamic Family Law and Shariah Court.*

1. Introduction

Malaysia has two legal systems that administer family matters namely the civil courts and the Shariah courts. Generally, jurisdiction for recognition of marriages that are solemnised abroad lies with the Civil High Court for non-Muslims and with the Shariah court for Muslims. Since this paper studies the application of private international law to Shariah courts, it will only discuss the issue of recognition of cross-border marriages as it affects Muslim marriages only.

In Malaysia, Islam is governed by the Ruler of each states which has a Sultan or Raja (for the state of Perlis) and by the Yang Dipertuan Agong (YDPA) for States without a Sultan (i.e. Federal Territories, Penang, Malacca, Sabah and Sarawak). Rulers are the head of Islamic Religion and since administration of Islamic is under the states, each state has its own set of family law in the form of state legislation known as "Enactment", except the Federal Territories which is known as "Act". Most of the states' enactments have provisions very similar to Law Reform (Marriage and Divorce) Act 1976 with respect to registration of foreign marriage and recognition of foreign marriage. The 1976 Act only applies to non-Muslims instead.

The objective of this article is to examine the application of private international law rules to circumstances that substantively fall within the ambit of Islamic family law i.e. cross border marriages involving Muslim couples from Malaysia and beyond who solemnized their marriages abroad without the permission from the relevant authorities in Malaysia. To make the discussion easier, this article will refer to the legal provisions in Islamic Family Law (Federal Territories) Act 1984 [1], whose provisions are mostly in pari materia with other states' Islamic family law enactments. This legal research relies more on library search because most of the study involves investigation and analysis of the materials available in the library. Hence, it uses historical, analytical and comparative methods.

2. The Concept of Private International Law

Basically private international law consists of rules applied by domestic courts to determine which laws apply to cases that involve people in different countries or of different nationalities, or transactions which cross international boundaries [2]. Private international law is also known as conflict of laws whose rules set the conditions under which the national courts may apply foreign laws [3]. Why the term "conflict of laws" is known as such is because the laws of different countries are in conflict with each other. It can be that the object, transaction or legal relationship is governed by laws of at least two countries or that it involves a system which addresses the effect of the application of more than one law to a transaction or legal relationship. Private international law deals with foreign elements in local litigation which can involve any areas of law including contracts, torts, family law, banking etc. At the same time, "foreign element" refers to any fact, connection or consideration which may raise the issues of foreign law, foreign jurisdiction and international treaty. When there is a foreign element, court will decide whether it has jurisdiction or whether local law, foreign law, international treaty or foreign judgment should be taken into account when settling a dispute.

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With respect to family law, the application of conflict of law rules is relevant when the validity of a marriage with a foreign element is questioned in a court of law. It must be noted that conflict of laws rules are derived from the domestic law being applied in a particular jurisdiction hence English law (which includes common law) being the source of such rules. Various concepts of law determining the appropriate jurisdiction can be found in common law including *lex domicilii, lex fori and lex loci celebrationis.* On the issue of marriage, the application of these concepts can influence the determination of invalidity of marriage with a foreign element, which is an issue to be addressed specifically by English law or perhaps Islamic law as well. Under English law, the degree of invalidity of such a marriage depends on whether it is formal invalidity or essential invalidity [4]. Formal validity means that we are only concerned with the law that governs the ceremony or other procedures for a valid celebration of a marriage including the requirements of notices and witnesses. The notion of formal validity applies to both civil and religious marriages. English law can recognize a marriage as valid if performed according to *lex loci celebrationis* even the marriage would have been invalid under English law. Essential validity on the other hand refers to all questions of validity other than formal validity such as the capacity to marry and other matters which are essential to the maintenance of the institution of marriage in the society. They are governed by the personal law of the parties to the marriage. To determine which personal law applies, various doctrines have been developed under English private international law rules namely: the dual domicile doctrine, the intended matrimonial home doctrine, the real and substantial connection doctrine, validity by either party's domiciliary law, alternative reference test and the variable rule [4].

The question now is whether similar conflict of law rules exist in Islamic family law in Malaysia? When studying conflict of laws in Malaysia, it is amazing that Malaysian conflict of laws especially in Islamic Family Law is based on Islamic Law not the Common Law. This is despite the fact that Malaysian conflict of laws still applies common law in matters not related to Islamic (family) law. Therefore, a brief summary about the basic principles of Islamic Conflict of Law and historical development of conflict of laws in Malaysian perspective will be discussed in this article.

There is a thin line between personal and territorial assumptions of legal rights and obligations in Islamic international law where the extent of such rights and obligations depends more on a person's faith rather than a his or her territorial affiliation. The division between private and public international law under the traditional Islamic international law is also blurred. Thus the issue of 'cross-border' marriages, or those taking place in a 'territory of war' (*dār al-ḥarb*), is also found in Al-Shaybani's treaties on *siyar* [5, 6]. Islamic conflict of laws does not emphasize on state borders and concepts such as nationality or domicile in ascertaining the applicable law to a marriage and the court that has jurisdiction thereupon [3]. It only accepts two categories of people, Muslims and non-Muslims [3]. Non-Muslims are categorized into three types of people. Firstly, the *harbi* are those who reside outside the Islamic territories. Second type of people is the *dhimmi.* They are those who reside within the Islamic territories, and lastly, *musta'min* those are foreign residents or visitors [3]. For Muslims, Islamic law is the personal law being enforceable on them regardless whether they are outside or reside within an Islamic State. However for non-Muslims, the scope of application of Islamic law is rather territorial as the law is enforceable to anyone traveling or residing in Islamic country only [3].

The question now is how did the doctrine of Islamic conflict of laws evolve in Malaysia? Before the coming of the British, the law which was applied in the Malay States was Islamic Law with certain modifications from the Malay custom. For example, in Johore, the Majallat al Ahkam, a set of the civil law from the Ottoman Empire was translated into Malay Language and was accepted as law in Johore [7].

From the earliest period of colonial occupation, English Law has been the law of general application in Malaysia [8]. Though the Charters of Justice were introduced to the Strait Settlements allowing the importation of English law there, certain adaptations and modifications of English Law taking into account personal law had been made throughout the years [8]. The first Charter of Justice was granted to the British East Indian Company in March 1807 and set up the judicial administration in the Presidency of Penang. The second Charter was granted to the East Indian Company in November 1826 and extended the jurisdiction of the English courts to Singapore and Malacca. The third charter was granted in August 1855 [8]. All three Charters had to be applied only in so far as the religions, manners and customs of the inhabitants would permit.

English Law was later introduced in the Malay States. The British had adopted the laws enacted in India including the Penal Code, the Evidence Act etc [7]. The effect of the introduction of English Law in the Malay States was that Islamic law was no longer used and became irrelevant in all fields of laws except in personal law matters including matrimonial matters and Malay custom.

The courts were established and presided by judges from England or English trained judges among the locals who were trained in England [7]. These so called English trained judges would administer English common law and apply it whenever there was a dispute [7]

As the Malay States (as well as the Straits Settlements) prepared themselves towards independence, the Civil Law Act of 1956 [9] was enacted enabling the continued application of English common law there (as well as Sabah and Sarawak, which occurred later) but only up to 7 April 1956 for West Malaysia, 1st December 1951 for Sabah and 12 December 1949 for Sarawak (Section 3 of Civil Law Act). The effect of this law is that English law will be applied automatically and has become the law of the land in Malaysia with the exception of Islamic law and Malay custom.

3. Recognition of Cross-Border Marriages in the Shariah Courts in Malaysia

Generally, the term "*Kahwin Luar Sempadan*" or cross border marriages refers to an act of marriage that is not recognized by customs or law and is viewed unfavorably by religion [10]. Basically, most of the State Enactments provide that Muslim couples whose marriage is solemnized in foreign country can be recognized as valid in the country but their marriage must be registered in accordance with the law. There is also a requirement similar to that in civil law that such a marriage has to be registered at the Malaysian Embassy in the country where the marriage is celebrated or alternatively within 6 months after the couples return to Malaysia. If they fail to register, penalties will be imposed upon them, but this does not mean the marriage cannot be registered (Section 35 of Islamic Family Law (Federal Territory) Act 1984).

It can be highlighted that recognition of marriages is very important and a useful instrument for couples because they will know whether their marriage is valid as provided under the Islamic family law or not. Secondly, if those marriages have been recognized legally by law, it will be easier for him or her to claim their divorce rights. If they are not recognized locally, there will be little opportunity for the Shariah Court to adjudicate divorce and matters incidental to it. Apart from that, one of the significance of the recognition of marriage is for determining the legitimacy of children and their rights in inheritance matters.

There is a need to examine the possibility of different approaches taken by Civil Law (which is rather based on common law) and Islamic law to the regulation of cross-border marriages. As discussed in the previous section of this article, the validity of a cross-border marriage under (Civil Law) conflict of laws rules is based on two aspects: formal validity and essential validity. Formal validity makes a marriage to form by the law of the place where the marriage is celebrated while essential validity concerns

the capacity of the parties to the marriage which is regulated by the law of the parties' domicile [11]. Meanwhile, according to Islamic Law, marriage is contracted to the full effect once the offer has been agreed and accepted either orally or in any other ways understood by both parties [12]. Marriage is also a religious sacrament and may be constituted without any official ceremonial [7]. In addition, this contract is fundamentally based on consent and consists of a long lasting legitimate union between a man and a woman where the mutual objectives are purity, chastity and the establishment of a happy family, to be achieved through the observance of the provisions laid out in the Act or Enactment in the State. Thus, the implementation of Islamic Family Law (Federal Territories) Act 1984 therefore is the Act which regulates the Muslims in their marriage contracts and the dissolution of the marriages. For a marriage to be valid, specific requirements are needed and express consent must be given, consistent to the needs of both parties through their *Wali* or the Shariah judge having jurisdiction in the place where the woman resides (Section 13 of Islamic Family Law Act (Federal Territories) 1984).

Thus, to be a valid marriage. its essential elements must be fulfilled. As such, the law clearly states that a marriage shall be void unless all conditions necessary, according to Hukum Syarak, for the validity are satisfied (Section 11 of Islamic Family Law Act (Federal Territories) 1984). A marriage by a Muslim contracting in Malaysia or foreign country must fullfil the essential conditions prescribed by Hukum Syarak as decided in the case of *Md Ghani Bin Abd Rashid v Sulaini Bt Mat Hassan* (2013, 1 SHLR 20) [13]. This case was to affirm the marriage between the applicant and the respondent which was alleged to have been solemnised on 10 June 2011. The marriage solemnisation took place at Masjid Bandar Sungai Golok, Narathiwat Thailand and solemnised by a *wali hakim/raja* by the name of Hj Mustafa bin Abdullah. The applicant already had an existing wife by the name of Wan Faridah binti Wan Ibrahim and subsequently married the respondent without the knowledge of his existing wife. The issue in this case whether the second marriage between the applicant and respondent is valid according to Hukum Syarak? The court held that the solemnization of their marriage was valid according to Hukum Syarak, thus their marriage was ordered to be registered.

The secondary consideration that must be observed is the formality of the marriage. This relates to the performance of the marriage according to the formalities prescribed in the place where the marriage is celebrated [14]. Section 25 of Islamic Family Law (Federal Territories) Act 1984, clearly states that every person resident in the Federal Territory and of every person living abroad who is resident in the Federal Territory shall be registered in accordance with this Act. This section shows that it is mandatory for Muslim parties to register their marriage accordingly.

However, the validity or invalidity of the marriage does not depend in any way on the performance or non-performance of the forms and ceremonies that have been performed on Muslims [14]. Thus, as long as the essential validity of the marriage is fulfilled, the marriage is valid (Section 11 of Islamic Family Law Act (Federal Territories) 1984). Prior to 9th September 1994, there was one provision in the Islamic Family Law (Federal Territory) Act 1984 that deals specifically with the rules of Private International Law. This section had a great impact to that person who solemnized the marriage which involve with the foreign element. According Section 122 of Islamic Family Law Act (Federal Territories) 1984:

"Where, apart from this Act, any matter affecting the validity of a marriage would fail to be determined in accordance with the rules of Private International Law, by reference to the law of a foreign country, the Court shall refer the matter to the High Court".

From the abovementioned section, it can be pointed out that, any issue with regards to Muslim marriages involving the validity of marriages, must be referred to the rules of private international law but if it fails to solve it, the issue shall be referred the High Court of Malaysia. However, on 9th September 1994, this section has been deleted officially, and all matters relates to foreign elements must be referred to Shariah Court (Islamic Family Law Act (Federal Territories) 1984). It can be argued that the deletion of Section 122 of the 1984 Act does not preclude the application of private international law by the Shariah Courts on matters over which they have jurisdiction. The possible purpose of the deletion is to prevent matters from being referred to the Civil High Courts in the event that the Shariah courts fail to apply private international law rules in Muslim matrimonial cases involving a foreign element. Such cases will now be heard by Shariah courts using Islamic private international law rules.

4. Some Related International Treaty Provisions on Recognition of Marriages in Shariah Court and their Limited Applications

There are several international instruments which are relevant for the recognition of marriage generally and they have received widespread acceptance globally. One of the instruments is the Convention on Celebration and Recognition of the Validity of Marriages which entered into foyge on 14 March 1978 and applicable to those states which are members under the convention [15].

Article 9 of the Convention states that marriage that is validly entered into under the law of the State of celebration *(lex loci celebrationis)* or which subsequently becomes valid under the law shall be considered as such in all Contracting States, subject to the articles of this convention. Meanwhile, Article 10 of the same treaty clearly mentions that where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established. This indicates that certificate of marriage is a proof of a valid marriage giving rise to mutual recognition of marriages solemnized in each Contracting States. However they may still refuse to recognize the marriages. In Article 11, a Contracting State may refuse to recognise the validity of marriage only where, at the time of the marriage, under the law of that state:

(1) One of the spouses are already married;
(2) The spouses were related to one another, by blood or by adoption, in the direct line as brother or sister; or
(3) One of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or
(4) One of the spouses did not have the mental capacity to consent; or
(5) One of the spouses did not freely consent to the marriage

Still, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

Since Malaysia is not a Contracting Party, this convention is not binding on Malaysia and even if Malaysia is already a Contracting Party, the Convention can only be applied in the Malaysian (Shariah) Courts if the convention has been transformed into a domestic law via legislation. This can give rise to federalism issues as such legislation may have to be passed by the federal legislature whereas it is the state governments which will administer Islamic Family law (as said, the Malaysian Shariah Courts is a state, not federal entity). Be that as it may, for Muslims in Malaysia, the Islamic Family Law in each state will govern matters related to the validity of marriages with a foreign element.

5. How (Malaysian) Islamic Family Laws Treat the Validity of Marriages with a Foreign Element?

In Malaysia, a Muslim marriage contracted outside Malaysia shall be recognized as valid for all purposes in this Act if it fulfills the

requirements prescribed by the law (Section 108 of Islamic Family Law (Federal Territories) Act 1984). However, the marriage must be contracted in a form required or permitted by the law of the place where it was contracted (Section 108 (1) (a) of Islamic Family Law (Federal Territories) Act 1984). This appears to represent the formal validity notion, and in a way indicates a certain degree of similarity with the notion of formal validity under English conflict of laws which requires reference to *lex loci celebrationis.*

Second, each of the parties must have at the time of the marriage the capacity to marry under the law of the place of his or her residence (Section 108 (1) (b) of Islamic Family Law (Federal Territories) Act 1984) and where either of the parties is a resident of the Federal Territory, both parties had capacity to marry according to the Act (Islamic Family Law Act) (Section 108 (1) (c) of Islamic Family Law (Federal Territories) Act 1984). This appears to represent the notion of essential validity but where the focus on residence rather than domicile is concerned, chances are that Islamic family law takes a different approach from English law.

In the case of *Aidel Daina bte Mohd Jonid v Abdel Haq Abdulla Yaqqub* (2008 1 SHLR 98) [16], the court clearly differentiated between foreign domicile and resident in section 4, section 45 and section 108 of Selangor Islamic Family Act 1984. In this case, the appellant, a resident of the State of Negeri Sembilan but currently living in the State of Selangor, was married to the respondent in the United States. Their marriage which was solemnised at the Islamic Centre, Washington was not registered in Malaysia. The respondent had made an application in the Shariah Subordinate Court for an order of *nusyuz* against the appellant. The appellant had made a preliminary objection against the respondent due to the lack of locus standi. The appellant argued that since the respondent had a foreign domicile and could not be registered by virtue of section 108, he could not bring any suit against her in court. However, the learned trial Judge of the Gombak Timur Shariah Subordinate Court held that the Court had jurisdiction to hear and determine the said application. The appellant appealed to the Shariah High Court against the said decision. The court held that the Shariah Lower Court of Gombak Timur did not have a jurisdiction to hear and determine the case. The appeal was allowed with cost. In this situation, the learned judge has made a comparison between the section 108 and section 45 of the said enactment. Section 108 is meant for person who has domicile in Selangor. The respondent's domicile was irrelevant in this case because he has a foreign domicile that is United States of America. Furthermore, the appellant did not have a domicile in Selangor, as her domicile is in State of Negeri Sembilan. Therefore, the respondent could not proceed with the case in the lower court due to lack of jurisdiction.

Thus, it is submitted that if the marriage had been registered by virtue of the enactment, the decision would be contrary with and against the spirit of section 45 of Islamic Family Law 1984.

In the case of *Muhammad Faizz Amin bin Roslee v Maidatul Sarah bt Mior Rosli* (2013 2 SHLR 98) [17] the applicant was married to the respondent on 12 July 2010 at the house of Hj Shafie Kayem bin Hj Manaf, the *jurunikah* (person who solemnised the marriage) of the District of Songkhla, Thailand who also acted as *wali hakim*. Hj Shafie Kayem bin Hj Manaf was the Assistant Syarie Qadhi in the district of Songkhla. He was a qualified *jurunikah* and had the power to act as *wali hakim* for the district of Songkhla, Thailand. The parties herein had freely consented to the said marriage with the help of an agent, Pak Wan, who had brought them to Thailand for the said purpose. After the solemnisation of their marriage, the *jurunikah* issued notes containing evidence of the marriage. Thereupon, Pak Wan took the parties to the office of the Songkhla Islamic Religious Council where the latter issued the parties a letter of declaration of the legality of their marriage. After that, Pak Wan took the parties to the Malaysian Consulate General, who upon verifying the certificate of the Songkhla Islamic Religious Council, issued a certificate affirming their marriage in Southern Thailand. The issues in this case were:

i. whether the marriage between the applicant and the respondent in Songkhla, Thailand was valid according to Islamic Law;
ii. whether the marriage could be valid for all purposes pursuant to the Administration of the Islamic Family Law (Terengganu) Enactment 1985 ('Enactment').

The court in this case held that the marriage between applicant and respondent was valid according to Islamic law. Based on the evidence of the applicant and the respondent, and the documents tendered, the court was satisfied that a valid marriage had taken place between the applicant and the respondent on 12 July 2010 at the house of Hj Shafie Kayem bin Hj Manaf, the *jurunikah* of the district of Songkhla, Thailand. As the marriage was valid according to Islamic law, it had to be declared as valid in accordance with the provisions of Section 107(1) of the Enactment. In this case, the parties had solemnized their marriage in Southern Thailand without the permission of the Registrar of the Marriages. They were said as practicing a cross border marriage. After solemnizing the marriage, they wanted to register their marriage in Malaysia. The registration of the marriage is needed due to the recognition of their marriage in Malaysia. Thus, it is submitted that every order of the marriage that has been solemnized abroad can be accepted in Malaysia if it fulfills all conditions prescribed by the law and Hukum Syarak.

6. Procedures for Registration of Foreign Marriage of a Person Resident in the Federal Territory

There are certain procedures of registration of the marriage that must be followed by any person who is a resident of the Federal Territory that has contracted a valid marriage according to Hukum Syarak in foreign country. Firstly the marriage must not be a marriage registered under Section 24. Secondly the person shall, within six months after the date of the marriage, appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorces, and Ruju' at foreign country in order to register the marriage. After the registration, their marriage can be considered as registered in the Act (Section 31(1) of Islamic Family Law Act (Federal Territories) 1984).

However, before the expiry of the period of six months, the return of either or both parties to the Federal Territory is intended and the marriage has not been registered in foreign country, registration of the marriage must be made within six months of their arrival and either or both of the parties must appear before any Registrar in the Federal Territory and must produce several documents before the Registrar (Section 31(2) of Islamic Family Law Act (Federal Territories) 1984). The documents are as follows;

1. the certificate of marriage or such evidence, either oral or documentary, as may satisfy the Registrar that the marriage did take place (Section 31(2) (a) of Islamic Family Law Act (Federal Territories) 1984).
2. furnishing such particulars as may be required by the Registrar for the due registration of the marriage; and(Section 31(2)(b) of Islamic Family Law Act(Federal Territories) 1984).
3. applying in the prescribed form for the registration of the marriage and subscribing the declaration therein(Section 31(2) (c) of Islamic Family Law Act(Federal Territories) 1984).

The Registrar may dispense with the appearance of one of the parties if he is satisfied that there exists a good and sufficient reason for the absence of the party and in that case the entry in the Marriage Register shall include a statement of the reason for the absence (Section 31(3) of Islamic Family Law Act (Federal Territories) 1984). Upon the registration of a marriage, a certified copy of the entry in the Marriage Register signed by the Registrar shall

be delivered or sent to the husband and another copy to the wife, and another certified copy shall be sent, within such period as may be prescribed, to the Chief Registrar who shall cause all such certified copies to be bound together to constitute the Foreign Muslim Marriages Register (Section 31(4) of Islamic Family Law Act (Federal Territories) 1984). However, if the parties to a marriage have not appeared before a Registrar within the specified period as prescribed by the law, they will be subject to the penalty prescribed by the law (Section 31(5) of Islamic Family Law Act (Federal Territories) 1984).

7. Conclusion

It is submitted that deletion of the Section 122 of the Islamic Family Law Act (Federal Territories) 1984 on 9th September 1994 has caused many problems especially in international marriages. This kind of marriages has involved foreign elements. This section of the Act 1984 (ACT 303) should not be deleted but certain amendments must be made. For example, the reference by the High Court should be replaced by reference to the Shariah court. Furthermore, the increase of international marriages which involves Muslim Marriages has caused many conflicts and disputes that need a special court.

It is also observed that the Syariah court in Malaysia clearly has the jurisdiction to deal with all family matters that involve Muslim parties relating to marriage, divorce, custody, maintenance and matrimonial property. Moreover, the amendment of Article 121 of the Federal Constitution gives more values for the judgment or order issued by the court. This amendment enhances the effectiveness of the power and jurisdiction of the Syariah court. Apart from that, the introduction of the new Islamic family laws in the mid-1980s has changed the atmosphere of Islamic family law in Malaysia and has enhanced the development of the area of law. This means Syariah court rulings in any matter ought to be respected and accepted in other countries as well.

On top of that, with the modern telecommunication and transportation, it is believed that enforcement of judgment or order from the Syariah court should be acceptable in foreign countries. In addition, all the Syariah cases that involve family matters will have connecting factors with another country.

It is hoped that, the Islamic Family Law in Malaysia will regain their status in dealing with private international matters by introducing new section or amendment of the law to handle problems that relates with recognition of the marriage such as abduction case and ancillary claims case.

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