

THE RATIONALITY OF LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976 TO THE SENSITIVITY OF THE MULTI-RELIGIOUS COMMUNITY IN MALAYSIA

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ABSTRACT

This paper is to discuss about to what extent does the Law Reform (Marriage and Divorce) Act 1976 adapt to the sensitivity of the multi-religious community in Malaysia. As Malaysians are of different races, there is a multi-faith society in this country. The Law Reform (Marriage and Divorce) Act is enacted to deal with the non-Muslims marriages while the Muslims' are administered by the Islamic family law. So, whether or not the application of the Law Reform (Marriage and Divorce) Act 1976 can adapt well to the sensitivity of the multi-religious society is very important in order to preserve the peace in this country. The Act of 1976 can be said as assimilating well in the implication of sections 3, 5, 6, 7, 11, 22(1)(c), 24, 51, 69(a), 69(d) in the respects of monogamous marriage, same sex marriage, conversion to Islam by one spouse during the period of a marriage, prohibited relationship, solemnisation of marriage etc as the Act has included the religious practice in the provisions concerned. However, there are some issues which have been arose and should be resolved: the section 51 is difficult to apply and has created much confusion; there is no provision stated regarding universal conversion of a child's religion after one of the spouse converts to Islam. The issues of

section 51 including the converted spouse cannot apply to petition for divorce in civil court, the rights of non-convert spouse if he or she refuses to petition for divorce, and whether the converted party will be guilty of an offence in civil courts if she marries again after the Shariah Court has declared that the marriage concerned is dissolved. The issues have caused much problems, confusion and conflict of interest between the spouses concerned. These issues are to be identified and discussed with some suggestions given in order to rectify it.

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INTRODUCTION

The Law Reform (Marriage and Divorce) Act 1976 had enacted on 1st March 1982 to govern all the marriages of non-Muslims. Before the Act was enacted, the marriages of non-Muslims were governed by their own customary laws and also several civil marriages laws such as Civil Marriage Ordinance 1952, Christian Marriage Ordinance 1956, Sarawak Chinese Marriage Ordinance 1948 and others.

The Civil Marriage Ordinance 1952 had administered most of the civil marriages which it could also apply to the marriages even though one party was a Christian. However, this Ordinance did not apply to the marriages where one of the parties was Muslim due to Muslims were strictly governed by their own Islamic Law. The marriages which were solemnized and registered under the Ordinance were lawful if the listed requirements were all fulfilled. First of all, the male party and the female party must not be below 16 and 14 years old respectively. Consent of the parent or guardian had to be attained if one of the parties to enter the marriage was a minor unless the minor had married before. Besides, the parties were not allowed to marry if they were found to be within the prohibited degrees of kindred or affinity. The marriages solemnized under this Ordinance were all strictly to be monogamous and both parties had to give their own consent freely to the marriage. The required process and formalities laid down in the Ordinance must also be followed by the parties.

Likewise, the Christian Marriage Ordinance 1956 governed the Christian marriages before the Law Reform (Marriage and Divorce) Act 1976 was enacted. Every marriage where one of the parties was a

Christian must solemnize his or her marriage under this Ordinance or the Civil Marriage Ordinance 1952. The requirements needed under this Ordinance were almost the same as in the Civil Marriage Ordinance 1952 which were: age of parties, consent of the parent or guardian if the party happened to be a minor, not within the prohibited degrees of kindred or affinity, the marriage must be monogamous, consent of both parties to the marriage and the process and formalities required by the Ordinance must be followed.

However, after the Law Reform (Marriage and Divorce) Act 1976 was introduced, those laws which could be enforced previously such as the Civil Marriage Ordinance 1952, Christian Marriage Ordinance 1956 and the other Ordinance as well were repealed by S.109 of the Law Reform (Marriage and Divorce) Act 1976. Anyhow, the marriages which were solemnized according to any of the Ordinances or customs before the Act was enacted were valid and had to be registered under the current Act. After the Act was introduced, all the civil marriages where the parties are non-Muslims are governed by this Act. Nevertheless, this Act does not apply to Muslims and the natives in Malaysia. Yet, there are arguments whether this Act has adapted the sensitivity of multi religious community in Malaysia.

SECTION 3 OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

The Law Reform (Marriage and Divorce) Act 1976 was enacted to govern the marriages of the non-Muslims. In this Act, it is clearly stated that it does not apply to Muslims, the natives in Sabah and Sarawak and also the aborigines in Peninsular Malaysia. In s.3 (3) of the Law Reform (Marriage and Divorce) Act 1976, it mentions that this Act shall not apply to Muslims or where the parties are married under Islamic law or even when only one of the parties is a Muslim except for s. 51 of this Act. This is an absolute exception to the Muslims. In Malaysia, dual legal systems are practised where the Muslims are governed by their own Syariah Law regarding personal law matters whereas the others are governed by the civil law. Therefore, when it comes to the matters about marriages, the Muslims are also governed by the Syariah Law. Besides, it would be unfair to Muslims if the Law Reform (Marriage and Divorce) Act 1976 could be applied on them as in this Act marriages are monogamous but male Muslims are allowed by the Islamic law to marry four wives.

Before the Law Reform (Marriage and Divorce) Act 1976 was enacted, the matters on marriages of Muslims were already governed by the Syariah law. However, there was a case where the civil court had jurisdiction on the marriages of Muslims. In the case of *Nafsiah v Abdul Majid*, the plaintiff intended to claim damages from the defendant on the ground that the defendant had breached the contract to marry where both

parties in this case were Muslims. The High Court in this case allowed the claim for damages. Yet, it has to be noted during that time, Article 121 (1A) of the Federal Constitution was not amended. For now, after the amendment of Article 121 (1A) of the Federal Constitution, the civil court no longer has the jurisdiction in the matters within the jurisdictions of the Syariah Court. Thus, the civil court now has no jurisdiction on the marriages of Muslims as stated in the Law Reform (Marriage and Divorce) Act 1976 where it does not apply to Muslims at all due to the Muslims are governed by their own Islamic Law.

Besides, in s 3(4) of the Law Reform (Marriage and Divorce) Act 1976, the natives in Sabah and Sarawak or the aborigines of Peninsular Malaysia are not subject to this Act where their marriages are governed by their own native customary laws unless if he elects to marry under this act, his marriage is contracted under the Christian Marriage Ordinance Sabah or the Church and Civil Marriage Ordinance Sarawak. This section is an optional exception to the natives unlike s 3(3) of the Act. In the case of Nancy Kual v Ho Than On, the plaintiff was a Kadazan Tatana while the defendant was a Chinese. Their marriage underwent the ceremony of both Chinese and Native customs but was not registered under the Law Reform (Marriage and Divorce) Act 1976. The court in this case held that the marriage was valid due to it was solemnized according to the native customary laws which such marriage is valid under s 3(4) of the Act as the Act does not apply to the natives. Therefore, it is clear that the marriages of the natives are governed by the native customary laws and it is valid under the Law Reform (Marriage and Divorce) Act 1976.

Hence, ss 3(3) and 3(4) of the Law Reform (Marriage and Divorce) Act 1976 have adapted the sensitivity of the multi religious community as the Muslims, the natives of Sabah and Sarawak and the aborigines of Peninsular Malaysia are governed by their own law as the provisions in the Law Reform (Marriage and Divorce) Act 1976 do not fit their religious and customary practices.

SS 5, 6, 7 AND 69(a) OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Before the Law Reform (Marriage and Divorce) Act 1976 was enacted, polygamous marriages were practiced by the Chinese and Hindus as their customary laws allowed polygamous marriages. For Hindus, most of them practiced polygamous marriages but the Ceylon and Tamil Hindus. The ceremony of a marriage was not that important under Chinese Customary laws but it was very important for the Hindus.

In the case of *Chu Geok Keow v Chong Meng Sze*, the requirement for a valid marriage with a *tsip* (secondary wife) under the Chinese customary laws was simply a consensual marriage where the ceremony

and formalities were not necessary but evidentiary only. Nonetheless, in this case, neither the photography nor the adoption children were evidentiary to prove the marriage was valid thus it was held that no mutual consent was given to the marriage and the appellant was not the secondary wife. On the other hand, in the case of *Paramesuari v Ayadurai*, the marriage was solemnized according to the customs of the Ceylon Tamil Hindu custom and there were expert witness and the priest who had performed the marriage ceremony which these were recognized as a valid marriage. The marriage in this case was in the nature of monogamous therefore the petitioner was entitled to dissolve the marriage due to the respondent later married another woman. Whilst in the case of *Chua Mui Nee v Palaniappan*, the second marriage of the deceased was held lawful as the marriage was held according to the Hindu customs even though the ceremony was not perfect.

However, there were problems arose on the validity of the subsequent marriage when one marriage was solemnized under customary laws whereas another was under the civil marriages laws. Since the Chinese and Hindu were and are free to practice any religions, there were also issues arose on whether the personal law or the civil marriages law prevailed. The marriages solemnized under the civil marriages laws such as the Civil Marriage Ordinance 1952 and the Christian Marriage Ordinance 1956 were all monogamous while the customary laws allowed polygamous. Therefore, it was argued whether the subsequent marriage solemnized under the customary law was valid if the party had solemnized a marriage under the civil marriages laws before. Or vice versa, whether the subsequent marriage solemnized under the civil marriages laws was valid as the party had a marriage solemnized under the customary law before.

In the case of *Re Loh Toh Met* deceased, there was an argument on the deceased was a Christian therefore he could not conduct three polygamous marriages. The court in this case held that the polygamous marriages were valid as the personal law of the deceased prevailed. Besides, in the case of *Re Ding Do Ca* deceased, the first marriage was solemnized under the Christian Marriage Enactment while the second marriage was solemnized under the Chinese customary law where there was argument on the validity of the second marriage as the Christian Marriage Enactment prohibited polygamous marriage. Like in *Re Loh Toh Met* deceased, the court held that the personal law prevailed therefore the Christian Marriage Enactment could not prevent a party from practicing the polygamous marriage that was allowed by his customary laws.

There were too many conflicts arose on the polygamous marriages of the non-Muslims under the customary laws. Therefore, the Law Reform (Marriage and Divorce) Act 1976 was enacted to provide consistency on the marriages of the non-Muslims. Under this Act, polygamous marriages

are totally prohibited thus the non-Muslims can only conduct monogamous marriages. It has swept away the customary laws that had been practiced by the non-Muslims as well as eliminated the practice of polygamous marriages. S 5 of the Law Reform (Marriage and Divorce) Act 1976 has stated that where a person has his marriages lawfully solemnized under any laws or customs on the appointed date, or where his marriages are valid on the appointed date but he later terminates the marriage with his spouse or spouses and then marries again, or when he is unmarried on the appointed date or marries under any laws or customs after the appointed date, shall not conduct another marriage under any laws or customs when the current marriage is still valid.

The Law Reform (Marriage and Divorce) Act 1976 has solved those problems of the polygamous marriages that might arise from the enactment of new Act. All the polygamous marriages that had been conducted before the Act are valid and are deemed to be registered under the Act as stated in s 4 of the Act. It has to be noted that the Chinese custom where the statuses of the wives in a polygamous marriage are different has been abolished by the introduction of this Act. The status of all the wives in a polygamous marriage after the enactment of this Act is the same. In addition, s 6 of the Act has mentioned that the marriages that contradict with section 5 are held to be void. Whilst s 7 of the same Act states that a person who has already married conducts a marriage again under any laws or customs which contradicts with section 5 of the Act is said to commit an offence under s 494 of the Penal Code.

Thus, it can be seen that the Law Reform (Marriage and Divorce) Act 1976 strictly prohibits the practice of polygamous marriages by the non-Muslims. In s 69(a) of the Law Reform (Marriage and Divorce) Act 1976, the marriage is said to be void where one of the parties is already married at the time of marriage. In the case of *PP v Rajappan*, the respondent was said to commit an offence under s 494 of the Penal Code as he conducted a second marriage in India while the first marriage was still valid. However, the court held that it did not have the jurisdiction as the second marriage took place in India.

Hence, the enactment of the Law Reform (Marriage and Divorce) Act 1976 has abolished the customary law of the non-Muslims which is the polygamous marriage. There were too many problems arose from the practice of polygamous marriage by the non-Muslims as non-Muslims are free to embrace any religions thus there may be conflicts between their personal law and the religious practices. The issue can be clearly seen in the cases of *Re Loh Toh Met deceased* and *Re Ding Do Ca deceased*. Some may argue that abolishing the customary practice of polygamous marriage of the non-Muslims by the introduction of the Law Reform (Marriage and Divorce) Act 1976 has not adapted the sensitivity of the multi religious community in our country. However, it should be noted

that before the Act was enacted, the marriages of the non-Muslims were a mess and many problems and conflicts arose on the polygamous marriages of the non-Muslims. Unlike Muslims, they are allowed to have four wives which are provided under their Islamic Law. Therefore, by the enactment of the Law Reform (Marriage and Divorce) Act 1976, the marriages of the non-Muslims are said to be uniform and have adapted the sensitivity of the multi religious community in Malaysia as the religious practices for the Buddhists, Christians and Hindus prevail due to the customary laws have been abolished.

SECTION 11 OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Prohibited relationships are mentioned under Section 11 of the Law Reform (Marriage and Divorce) Act 1976 where it is stated that one who is subjected to this Act must not marry his grandparent, parent, child or grandchild, brother or sister, great-uncle or great-aunt, uncle or aunt, nephew or niece, great-nephew or great-niece. However, there is an exception provided by section 11 that one who professes Hinduism is allowed to marry his niece or her uncle. This is because Hindu law and custom recognised avunculate marriage. The Law Reform Act 1976 does not prohibit the Hindus to follow their religion and customs by giving them the freedom to marry their niece or uncle if they choose to do so. Hence, it can be said that the Act has adapted to the sensitivity of the multi religious community in Malaysia.

SECTION 22(1)(c) AND SECTION 24 OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Section 22(1)(c) and Section 24 of the Law Reform (Marriage and Divorce) Act are the features of the Act that showed that the Act has adapted to the sensitivity of the multi religious community in Malaysia. Section 22(1)(c) of the Act stated that marriages can be solemnised at any time in a temple or church or at any place of marriage according to Section 24 as long as the religion, usage or custom of the parties or either of them professed does not prohibit them to do so whereas Section 24 of the Act illustrated the solemnization of a marriage in Malaysia through religious ceremonies, custom and usage. It is expressed under Section 24(1) of the Act that a Minister could appoint any priest of temple or church to act as Assistant Registrar of Marriage where the priest is allow to solemnize marriages of the parties or one of the parties who profess the religion to which the church or temple belong. The definition of priest of a temple and priest of a church is provided under Section 24(4) of the Act. A priest of a temple could be any member of a management or committee or body that governs the temple and any religious association committee member whereas a priest of a church can be any elder or officer of the church. The Hindus, Buddhist or Christians can marry by carrying out their religious

ceremonies of marriage at the temple or church and at the end of the day, they will be given a marriage certificate. Their marriage is said to be valid once the certificate of marriage is issued to them. As an example, the Chinese couple would go through a solemn tea ceremony at the bride's and bridegroom's parents' house during the wedding day. This tea ceremony is to pay respects to the elders and is an official rite to introduce the couple to each other's family. According to the Chinese custom, a marriage is not considered as official unless the tea ceremony is being carried out on the wedding day. However, after the appointed date, the court will not recognize the marriage of the couple who had only undergone the customary ritual. This is expressed under Section 5(4) of the Act where a marriage under any religion or custom would only be solemnized as provided in Part III of the Act. This means that the newlyweds must at least solemnize and register the marriage at a temple or a clan association premise if not the registrar's office according to Section 22(1)(c) and Section 24 of the Act so that their marriage would be 'official' in the eyes of the law. An example of a clan association where newlyweds could register their marriage is the Heng Ann Association at Bukit Cina, Melaka. One can see that the Law Reform (Marriage and Divorce) Act 1976 has enough tolerance to provide and protect the freedom of worship of the citizens of Malaysia.

However, in order for the Assistant Registrar to solemnize a marriage under Section 24, he must be satisfied with the statutory declaration mentioned under Section 22 (3) of the Act. For example, the parties must be above 21 years old and consent of relevant person must be provided if the party is a minor as well as the parties is not married to another person as polygamous marriage is unlawful if the parties are not Muslims. A marriage cannot be solemnised if the marrying parties did not fulfil the prerequisites expressed under Section 22(3) of the Act. The Assistant Registrar also has a duty to remind the parties that they must not enter into another marriage before the marriage is being dissolved or declared void during the religious ceremony. If the parties or one of the Parties fail to do so, they could be charged under Section 494 of the Penal Code and can be said to have committed a crime. This is clearly mentioned under Section 24(3) of the Act. Thus, Section 22(3) must be read together with Section 24 of the Law Reform (Marriage and Divorce) Act 1976.

In the case of *Yeoh v Chew*, the wife applied for a divorce, but the parties did not register their marriage and there was no proof provided that they had solemnized the marriage under Section 24 of the Law Reform (Marriage and Divorce) Act 1976. Only a mere dinner function was held at a temple on the day of marriage. The question before the court is whether a declaration of divorce could be granted even the marriage was not performed according to the Act. The court dismissed the divorce petition and held that the parties did not register and solemnized their marriage, according to Section 5(4) of the Act, which stated that no

marriage under any religion, custom or usage could be solemnized unless as expressed in Part III of the Act after the appointed date. Therefore, the court has no jurisdictions as it was a non-marriage. Hence, a religious marriage can be solemnized if an assistant registrar where he could be a priest of a church or temple appointed by the Minister is the one who solemnized the marriage and that he had obtained the statutory declaration mentioned under Section 24(1) of the Act. It can be concluded that the citizens' right to freedom of worship is protected as they are given a choice to solemnize their marriage through religious ceremonies provided that they fulfill the prerequisites illustrated under Section 22(1)(c) and Section 24 of the Law Reform (Marriage and Divorce) Act 1976.

SECTION 51 OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

On the other hand, the application of section 51 of the Law Reform Act has also adapted to the sensitivity of multi-religious community in this country to some extent. Section 51 provides a ground for the non-convert spouse to petition for divorce where the other spouse has converted to Islam for a period of more than three months. It should be noted that only the non-convert spouse can apply for breakdown of marriage under this ground. In other words, the converted spouse is not entitled to petition for dissolution of marriage or seek any relief under the section 51.

Although section 3 of the Act has also mentioned that this Act is not applicable to a Muslim or to any person who is married under the Islamic Law and marriage of Islam can be neither solemnised or registered under this Act, but it is also stated that a court cannot be prevented from granting a decree of divorce under the section 51 which involving the petition of one party to a marriage where the other party has converted to Islam and such decree shall be valid against the converted party. It should be noted that in the case of *Nur Aisyah Tey bt Abdullah v Teo Eng Hua*, the court had interpreted the work "Muslim" in the section 3(3) of the Act as one who at the time of the marriage instead of one who at the time of the contract of marriage. So, the convert spouse was held to be governed by the Law Reform (Marriage and Divorce) Act 1976.

Besides, the courts have the power to make provision for the wife or husband regarding the support, care and custody of the children of the marriage upon granting the decree of divorce. There may be some conditions attached by the courts to the decree of the dissolution if the courts think fit. In accordance to section 51(3) of the Act, section 50 which imposes restrictions on petitions within two years of marriage is not relevant to any petition for divorce under this section.

The provisions of section 51 can be said as adapting to the sensitivity of multi-religious community in Malaysia by complying with the Islamic

law which has prohibited the marriage between a Muslim and a non-Muslim. As what mentioned in the section 51(1) of the Act, the non-convert spouse has given a ground to petition for divorce after three months the other spouse has embraced Islam. According to Islamic law, if the husband of a marriage has changed his religion to Islam, the wife is given a period of three months in order to follow her husband embracing Islam and their marriage will be broken down if the wife does not do so. It is adapted well in the Law Reform (Marriage and Divorce) Act 1976 where the section 51(1) has emphasized that no petition shall be presented by the non-convert spouse within three months from the date of the conversion. However, the marriage cannot be said as being dissolved automatically simply because the non-convert spouse does not agree to follow the converted spouse in embracing Islam.

In the case of *Pedley v Majlis Agama Islam Pulau Pinang and Anor*, it is decided that a non-Muslim marriage is not broken down upon one of the spouses converting to Islam as section 51 of the Law Reform (Marriage and Divorce) Act 1976 only provides a ground for the spouse who has not converted to make a petition for divorce in the Civil courts. In the case, a Roman Catholic had married a Roman Catholic woman according to Catholic rites and then his wife had converted to Islam unknowingly to the plaintiff and she had also assumed a Muslim name. The plaintiff then made an application for a proclamation that his wife's conversion had not determined his marriage to her according to Catholic rites. It was then held by the court that the marriage was not being dissolved which means it was valid despite the fact that the wife had already embraced Islam. Therefore, it should be noted that the marriage which has been registered under the Law Reform (Marriage and Divorce) Act 1976 does not come to an end automatically upon one of the spouses converting to religion of Islam which is contravened to the Islamic law in this country which has stipulated that a marriage would be terminated automatically if the husband or wife embraces Islam and the other spouse does not follow. Despite that, there is an enactment under Islamic law, namely section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 clearly stated that the conversion to Islam by either party to a non-Muslim marriage should not by itself operate to dissolve the marriage unless and until the courts have so confirmed it.

Other than that, there was a principle laid down by the courts that the non-convert spouses can only apply for ancillary claims such as maintenance and division of property under the Law Reform (Marriage and Divorce) Act 1976 on the ground of conversion to Islam by virtue of section 51 of the Act. In *Lecthumy v Ramadasan*, the petitioner was granted a decree nisi of divorce and the High Court had also given the maintenance order. The respondent, nevertheless, had changed his religion to Islam and applied to set aside the maintenance order. The court had given a judgment that application of the respondent to set aside the

maintenance order was allowed because the marriage was dissolved on the ground of desertion instead of on the ground of conversion to Islam under section 51. The court had no the authority to order maintenance under section 51(2) of the Act and section 77 which confers power for the courts to order maintenance of spouse is not applicable to respondent since he was a Muslim.

The decision held by the court in the Lecthumy's case was criticized in the then case of Tang Sung Mooi v Too Miew Kim. In Tang Sung Mooi's case, the appellant had applied to dissolve her marriage with the respondent on the ground that their marriage had irretrievably broken down and the court had granted her the decree of divorce. Before the decree nisi being made absolute, the appellant had applied to claim for an order of division of matrimonial property and maintenance under the sections 76 and 77 of the Act. The application opposed by the respondent and he contended that the High Court had no jurisdiction in ordering ancillary relief against him as he already embraced Islam. The Supreme Court then held that the High Court had the jurisdiction to hear and decide the application for ancillary reliefs against the respondent as the wording of section 51(2) of the Law Reform (Marriage and Divorce) Act was clearly intended to provide ancillary reliefs for non-Muslims spouses and children. It would result in grave inequity to non-Muslim spouses and children if the High Court had no jurisdiction to determine the issue where they could only get their remedies in the civil courts, since the Syariah Courts had no jurisdiction over non-Muslims.

So, it can be said that the section 51 of the Act has achieved something in balancing the rights between Muslims and non-Muslims and adapted to sensitivity of multi-religious community in this country by taking into consideration of both parties' religious or customary law although its provisions are not absolutely effective and there are some issues which should be resolved.

SECTION 69(d) OF THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

In Malaysia, other than the age of the parties, consent of the parent or guardian, not within prohibited relationship, must be monogamous marriage and the consent of the parties, one more requirement needed for a valid marriage is the parties must be female and male respectively. Same sex marriage is not allowed in Malaysia as it contradicts the religious views in Malaysia.

For Islam, same sex marriage is strongly prohibited among the Muslims as it contradicts with their religious practices and the Islamic views on marriage. Whilst for other religions such as Hinduism, Buddhism, Christian and others, it cannot tell whether the religion itself

has prohibited same sex marriage as there are conservative and liberal views among themselves. For example, there are liberal views among the Buddhist where they neither support nor oppose same sex marriage. However, Theravada Buddhists which is the most popular Buddhism in South East Asian area do not support same sex marriage. The same thing applies to other religions where there are conservative and liberal views among themselves on supporting same sex marriage.

S 69(d) of the Law Reform (Marriage and Divorce) Act 1976 has stated that the marriage is declared void where the parties are not male and female respectively. There are 4 factors: chromosomal factors, gonadal factors, genital factors and psychological factors, which are needed to evaluate the sexual condition of a person. In the case of *Corbett v Corbett*, the petitioner knew that the respondent had undergone sex-change operation at the time of marriage. The court held that the marriage was void as the respondent's sex was male at birth.

In another case, *Lim Ying v Hiok Kian Ming Eric*, the petitioner did not know the respondent was a female at birth and had gone through sex-change operation earlier at the time of marriage. The court did not have to determine whether there was a valid marriage as it was solemnized between a male and female due to the respondent was regarded as male and female on the identity card and birth certificate. The marriage was declared void as the petitioner's consent was not freely given due to if she knew that the respondent had undergone the sex-change operation she would not have married the respondent.

Therefore, as provided in s 69(d) of the Law Reform (Marriage and Divorce) Act 1976, the parties to marriage must be male and female respectively so that the marriage is valid in Malaysia. This provision can be said to have adapted the sensitivity of the multi religious community in Malaysia due to the community itself in Malaysia still cannot accept same sex marriage from their own religious aspects.

PROBLEMS AND SOLUTIONS

Although the Law Reform (Marriage and Divorce) Act 1976 seems to have adapted to the sensitivity of the multi religious and multiracial community in Malaysia, there are still some shortfalls that need to be improved. First and foremost, the Act does not mention about the rights of a non-Muslim mother or spouse when it comes to the child's conversion to the religion of Islam by the converted spouse who professes Islam after the marriage. This means that the Muslim spouse could convert the religion of the child to Islam as he wishes without the consent of the non-converted spouse even if they are not yet divorced. The Law Reform (Marriage and Divorce) Act is not applicable to Muslims unless when the non-Muslim spouse filed a petition of divorce against the Muslims spouse under

Section 51 of the Act on the ground of conversion to Islam and this is expressed under Section 3(3) of the Act. Many state enactments has a provision stating that a child would automatically become a Muslim if he is born after one of his parents embraces Islam. One example is Section 2 of the Administration of the Religion of Islam (State of Malacca) Enactment 2002. It can be said that the non-converted parent is not given a choice as the law has distinguished their parental rights over the religion of their child according to the parents' religion.

Not only that, as the rights of the non-converted parent on child's conversion to Islam was not mentioned in the Act, problems with the conversion of the child's religion also arise if the child is born before one of the parent professes Islam. There are a few cases showed that the non-Muslim spouse or mother of the child is not being consulted regarding the conversion of the child's religion to Islam when the child is born before the Muslim spouse embraces Islam. An example of the case is *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*. The husband, Saravanan was not a Muslim at the time of marriage but later, he professed Islam and converted his eldest son without the consent of his wife, Subashini. The wife filed to dissolve the marriage under Section 51 of the Law Reform (Marriage and Divorce) Act and also applied for an injunction so that Saravanan would not obtain a relief from the Syariah Court. The judge dismissed Subashini's application for an injunction and upheld that one of the parents can convert the child's religion to Islam without the knowledge of another spouse. From this case, the right of the non-converted spouse on the child's conversion is being ignored and entrenched as there is no provisions under the Law Reform (Marriage and Divorce) Act that require the consent of the non-Muslim spouse to be consulted.

One can see that the Act is not sensitive enough to uphold the rights of non-converting parent or spouse on the conversion of a child's religion. Therefore, relevant parties, for example, the state religious authorities should suggest to amend or enact the Law Reform (Marriage and Divorce) Act in order to preserve the right of non-Muslim spouse on matters of their child's religion conversion. This is because the unilateral conversion of a child's religion to Islam would definitely cause negative impacts and disrupt the social harmony of the Malaysia's multi religious community. The non-Muslim party should be at least given a choice to object the conversion of the child's religion to Islam by including the rights of non-Muslim parent under the provisions in the Act. Protecting and preserving parental rights over a child's religion is crucial and important as the multi religious community of Malaysia is formed from the very basic family units.

Furthermore, there are some issues which should be settled in the application of section 51 of the Law Reform (Marriage and Divorce) Act 1976 too. One of it is that there is no specific provision in the section

concerned stated whether the converted wife would be guilty of any offence if she relies on the declaration of the Shariah Court that she cannot remain her marriage with a non-Muslim and she marries again. This would bring much confusion and problem as the convert parties cannot apply for divorce in civil court and they can only seek for relief under the jurisdiction of the Shariah Court. Another issue is that the provision of the non-convert party's rights against the convert party when the non-convert party refuses to petition for divorce are not clearly stipulated in the section too. As mentioned, the convert party cannot apply for dissolution of marriage so what would be the rights of the non-convert and convert parties if the non-convert party refuses to petition for divorce in civil court?

All these issues have brought much uncertainties in which what law should be applied and which court can make decision regarding the issues. Therefore, legal reforms are needed in order to address these issues. For instance, there should be only one forum provided by relevant authorities for the spouses to go and seek their rights. It can simplify the complex questions which arose regarding which court has the jurisdiction to adjudicate and which law should be applied when either spouse has converted to Islam. Besides, the section 51 should be amended to allow the convert spouse to apply for divorce at civil court after three months he or she has professed Islam. According to section 51 of the Law Reform (Marriage and Divorce) Act 1976, the converted spouse can only respond in civil court when the non-convert party has filed a petition for divorce in the court. The convert party are not allowed to seek for dissolution of marriage in civil court on his or her own initiative. In order to ensure and preserve harmony in this country which is of multi-religious and multiracial, legal reforms should be made to determine and clarify the issues arose.

CONCLUSION

In a nutshell, the application of the provisions in the Law Reform (Marriage and Divorce) Act 1976 has adapted to the sensitivity of multi-religious society in Malaysia to some extent. The provisions are sections 3, 5, 6, 7, 11, 22(1)(c), 24, 51, 69(a), and 69(d) in which section 3 mentions about the application of the Act to only non-Muslims and the Act is not applicable to Muslims, the natives in Sabah and Sarawak and also the aborigines in Peninsular Malaysia; sections 5, 6, 7 and 69(a) which prohibits polygamous marriage; section 11 which provides prohibited relationship and also exceptions for Hindus who can marry his niece or her uncle; section 22(1)(c) which states that a marriage can be solemnised at any time in a temple or church or at any place of marriage according to section 24 as long as the religion, usage or custom of the parties or either of them professed does not prohibit them to do so; section 24 has stipulated that the solemnisation of a marriage can be done through

religious ceremonies, custom and usage; section 51 provides a ground for a non-convert party to petition for divorce in civil court when the convert party has embraced Islam for more than three months; section 69(d) which states that the parties in a valid marriage must be a male and a female respectively. In other words, same sex marriage is not allowed in this country.

These provisions are said to have adapted the sensitivity of multi-religious community in Malaysia because the provisions are accommodated to the religious practices and views. Section 3 of the Act can be considered as adaptive to the multi-faith society as it is only applicable to non-Muslims in which its provisions are in consistent to their religious practice and the rest religions are governed by their own law. As for section 69(d), its application is adapted to the sensitivity of multi-religious because it prohibits same sex marriage in which consistent with almost all of the religious practices in this country. While for the section 51, the provision is well adapted to the sensitivity of the multi religious as it is not contravened with the Islamic law. The Hindu religious practice has also taken into account which can be seen in the exception under the section 11 where the Hindus are not prohibited from marrying niece or uncle.

However, there are still some issues with the application of the Law Reform (Marriage and Divorce) Act 1976 which should be resolved. The issues regarding the application of the section 51 is the most significant one as it involved complex questions where it is not certain that which law to be applied and which courts do have the jurisdiction to adjudicate. When there is one party converts to Muslim and the other refuses to do so, which law is to be applied in order to dissolve their marriage? Whether Shariah Court or Civil Court has the jurisdiction to decide their cases? Other than that, the issue of unilateral conversion of children religion should be highlighted too. The rights of the non-convert spouse in deciding children religion are not provided under the Law Reform (Marriage and Divorce) Act 1976. There are several cases where the convert spouse had converted their children religion without the knowledge and consent of the non-convert spouse. All these issues and problems should be rectified in order to improve the Law Reform Act to adapt the sensitivity of multi-religious community better.

TABLE OF CASES

- 1) Chu Geok Keow v Chong Meng Sze [1961] MLJ 10
- 2) Chua Mui Nee v Palaniappan [1967] 1 MLJ 270
- 3) Corbett v Corbett [1970] 2 AII ER 33, [1970] 2 WLR 1306
- 4) Lecthumy v Ramadasan [1984] 1 MLJ 143
- 5) Lim Ying v Hiok Kian Ming Eric [1992] 1 SLR 184
- 6) Nafsiah v Abdul Majid (No. 2) [1969] 2 MLJ 175
- 7) Nancy Kual v Ho Than On [1994] 1 MLJ 545
- 8) Nur Aisyah Tey bt Abdullah v Teo Eng Hua [1999] 3 AMR 2779
- 9) Paramesuari v Ayadurai [1959] MLJ 195
- 10) Pedley v Majlis Agama Islam Pulau Pinang and Anor [1900] 2 MLJ 307
- 11) PP v Rajappan [1985] 2 MLJ 231
- 12) Re Ding Do Ca deceased [1966] 2 MLJ 220
- 13) Re Loh Toh Met deceased [1961] MLJ 234
- 14) Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147
- 15) Tang Sung Mooi v Too Miew Kim [1994] 3 MLJ 117
- 16) Yeoh v Chew [2001] 4 MLJ 373

REFERENCES

Civil Marriage Ordinance 1952

Federal Constitution

INSIGHTS INTO THE INTER-RELATIONSHIP AND THE ASSOCIATED TENSION BETWEEN SHARIAH AND CIVIL FAMILY LAW IN MALAYSIA. (2008), 6.

Law Reform (Marriage and Divorce) Act 1976

Malaysia, T. (1983). marriage. CLJ, 1, 220. Retrieved from <http://www.cljlaw.com.proxyvlib.mmu.edu.my/Members/DisplayArticle.aspx?ArticleId=129957897&SearchId=0mmu1>

Malaysianbar.org.my,. (2006). The Malaysian Bar - Marriage. Retrieved from <http://www.malaysianbar.org.my/marriage.html>