

Reconciliation Provision under English and Malaysian Family Law: A Comparative Overview

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Introduction

The principle of irretrievable breakdown of marriage is the basis of the law of divorce of Law Reform (Marriage and Divorce) Act 1976 (“LRA”) of Malaysia and Divorce Reform Act 1969/Matrimonial Causes Act 1973 (“MCA”) of England and Wales. In England and Wales, this is the sole ground for divorce. Malaysian law has, in addition, made conversion of one of the parties to Islam (s 51) and mutual consent (s 52) as grounds for divorce. Both jurisdictions emphasise the possibility of reconciliation between the spouses that may save the marriage. In England, the application of the provisions concerning reconciliation and conciliation under the MCA had faced difficulty since it came into force. This led to the reformation of the MCA into Family Law Act 1996 (“FLA”) especially provisions relating to the practice of reconciliation and conciliation, where mediation takes centre stage. The LRA however, remains the same today as it was introduced in 1976. Thus, the aim of this article is to review this aspect of the law, as the LRA of Malaysia is based, with some modifications, on the MCA of England. It is hoped that this article will highlight the strengths and weaknesses of the reconciliation provisions of both countries, i.e. Malaysia and England, with a view towards a better legal provision on reconciliation in the future.

Background to the Divorce Acts of Malaysia and England

In England, there were two important Acts on dissolution of marriage and its reconciliation prior to the enactment of the current FLA, i.e. the Divorce Reform Act 1969 (“DRA”) and the MCA. The DRA, which came into force on January 1, 1971, was the outcome of a compromise between a group established by the Archbishop of Canterbury and the Law Commission.¹ The

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1 The Law Commission was established by the Law Commissions Act 1965 which requires the Commission, consisting of five lawyer Commissioners and assisted by a support staff, to take and keep the law under review, to see to its “systematic development and reform” and to work towards the simplification and modernisation of the law. It is said that for nearly 30 years family law was one of the most important and productive areas of the Commission’s work and the Commission could justly regard its record of achievement in this area as a “formidable success story”. See, Cretney, S, *Law, Law Reform and the Family*, Clarendon Press, Oxford, 1998, p 1.

Group recommended the abolition of all existing grounds for divorce and their replacement by a single ground i.e. breakdown of marriage.² The court would be charged with conducting an investigation of the current marital circumstances in order to discover whether the marriage was still viable and fault as the basis for divorce was to be abandoned.³ The Law Commission agreed that reform of the law was desirable, but it rejected the view that the court should carry out a full inquest into the alleged breakdown because it was thought that a detailed inquiry would inevitably cause humiliation and distress.⁴

After discussion, the Archbishop's group and the Law Commission agreed that all the old grounds for divorce should be abolished and be replaced by one ground, which was: the marriage had irretrievably broken down. This, however, could only be established by proof of one or more of five facts⁵ set out in the Act (s 2(1)). As the result of both reports, a number of alternatives were submitted based on the assumption that a good divorce law should seek to achieve two aims:

- (i) To buttress, rather than to undermine, the stability of marriage; and
- (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell be destroyed with maximum fairness, and minimum bitterness, distress and humiliation.⁶

Passingham in his book *The Divorce Reform Act 1969* states that, "the first objective of the DRA required that divorce should not be so easy that the parties should have no incentive to make a success of their marriage to overcome temporary difficulties". He then said, "it also required that everything possible should be done to encourage reconciliation".⁷

The DRA as set out in its Long Title was "to facilitate reconciliation in matrimonial causes".⁸ Thus it contains a number of provisions aimed at

2 The Archbishop's group in the report described the fault-based principle as "quite simply, inept": it failed to either uphold the sanctity of marriage or to offer a humane system for its termination. See, "Putting Asunder", *A Divorce Law for Contemporary Society*, London: SPCK, 1966, para 45.

3 See, "Putting Asunder", *A Divorce Law for Contemporary Society*, London: SPCK, 1966, para 84.

4 See, Lord Chancellor, *Reform of the Grounds of Divorce, the Field of Choice*, 1966, Cmnd No 3123; See also, Roger, B and Cretney, S, *Divorce—the New Law, Family Law*, Bristol, 1996, p 1; Cretney, S, *Family Law*, London: Sweet & Maxwell, 4th edn, 2000, p 51.

5 Three of the facts are akin to the matrimonial offences of adultery, cruelty and desertion. The other two are proof that the parties had been separated for five years, but two years if they agreed to a divorce.

6 Lord Chancellor, *Reform of the Grounds of Divorce, the Field of Choice*, Cmnd No 3123, para 15.

7 Passingham, B, *The Divorce Reform Act 1969*, Butterworths, London, 1970, p iii.

8 See, DRA.

ensuring that the parties shall not be deterred from attempts at reconciliation by the fear that, should these attempts fail, they will be fatal to the chances of a subsequent petition for divorce.⁹ However, there were opinions expressing reservations on the applicability of the provisions for example, EJ Griew in his article, “Marital Reconciliation—Contexts and Meanings” states s 3 of the DRA “as an inadequate instrument for giving effect to it”.¹⁰

The provisions designed to promote reconciliation as contained in the DRA were later consolidated into the MCA. It was said that although the MCA brought extensive reforms to the law governing matrimonial causes, it was unfortunate that the first objective of the Law Commission that was to buttress, rather than to undermine, the stability of marriage, had not been realised.¹¹ This is partly due to the almost complete failure of procedure designed to encourage reconciliation.¹²

In Malaysia, divorce for the non-Muslims was, before the passing of the LRA, regulated and conditioned by the philosophy of the religion of the spouses and the customary law that governed them. In the case *Re Ding Do Ca*,¹³ Thomson CJ expressed the hope that questions relating to the family law:

... be settled beyond doubt by legislation which will clearly express the modern *mores* of the classes of persons concerned and put the rights of the individuals beyond the chances of the litigation.

Due to the unsatisfactory state of affairs¹⁴ in the law concerning marriage and divorce and the need to review the laws in this area,¹⁵ in 1970, the Yang di-

9 DRA, ss 3(3)–(6).

10 Griew, E J, “Marital Reconciliation—Context of Meanings” [1972A] CLJ 294.

11 Passingham, B, *Law and Practice in Matrimonial Causes*, Butterworth & Co Ltd, 3rd edn, 1979, p 3–6.

12 Ibid.

13 [1966] 2 MLJ 220.

14 Examples of dissatisfaction are, among others, the registration of marriage was not compulsory under the old laws; there were no statutory provisions for reconciliation and conciliation, and polygamous marriage was still recognised although it had long been abolished in the countries where it originated. In the case of *Re Loh Toh Met* [1961] MLJ 234, it was held that a Chinese Christian could elect as a Christian whether to contract a monogamous marriage or to form a valid polygamous marriage union or unions in accordance with his personal law. See, for further details Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, International Islamic University Malaysia Cooperative Ltd, 1998, pp 83–87; Ahmad Ibrahim, *Family Law in Malaysia*, Malayan Law Journal Sdn Bhd, 1997, pp 1–5; Mehrun Siraj, “Conciliation Procedures in Divorce Proceedings” [1965] MLJ 7, No 2, p 317.

15 See, Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, International Islamic University Malaysia Cooperative Ltd, 1998, pp 83–87; Ahmad Ibrahim, *Family Law in Malaysia*, Malayan Law Journal Sdn Bhd, 1997, pp 1–8; Liew, CH, “Reform of the Law Reform (Marriage and Divorce) Act 1976”, 7th Malaysian Law Conference, Kuala Lumpur, October 31 to November 2, 1983, pp 386–9.

Pertuan Agong appointed five persons¹⁶ as members of the Royal Commission on Non-Muslim Marriage and Divorce laws.¹⁷ In 1975, the Bill went through the tortuous stages of Parliamentary debates and became law in 1976. Subsequent to that date, the LRA was amended on several occasions.¹⁸ It was only in March 1982 that the LRA came into force.¹⁹ It has included the provisions on reconciliation and conciliation in Parts VI and IX and these provisions are based on the reconciliation provisions in the English MCA.

Comparative overview of the reconciliation provisions of LRA and MCA

(i) Definition

In England, Report of the Committee on One-Parent Families 1974 has defined reconciliation as “the reuniting of the spouses”. The Finer Committee distinguishes reconciliation, “the action of reuniting persons who are estranged” from conciliation, “the process of engendering common sense, reasonableness and agreement in dealing with the consequences of estrangement”.²⁰ Nicholas Tyndall, the Chief Officer of the National Marriage Guidance Council, wrote in an article in the *Law Society’s Gazette*:

Reconciliation is a far wider process than merely the uniting of estranged partners. Clearly it is successful if it reunites partners or prevents separation. But it is also successful if it reconciles individuals to the necessity of divorce and their lonely future, if it removes stress or panic at the moment of decision-making, if it assists estranged couples in making more satisfactory arrangements for children and if it helps confused individuals through the break-up of their marriage.

There is no definition of reconciliation under the LRA of Malaysia. However, since the Malaysian divorce court is required under s 47 of the Act to “act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of England acts and gives relief in matrimonial proceedings”,²¹ it is presumed that the same definition of reconciliation is utilised.

16 The members appointed were Miss PG Lim, Mr Justice M Shanker, Puan Sri Rosalind YC Foo and Datin Janaki Athi Nahappan with the late Tan Sri Ong Hock the then Chief Justice as the chairman.

17 [1970] 1 MLJ xxxvii.

18 The original Bill was redrafted to take account of the recommendations of the Joint Select Committee and at this stage the latest English law on divorce was referred to, i.e. MCA.

19 See, Ahmad Ibrahim, *Family Law in Malaysia*, Malayan Law Journal Sdn Bhd, 1997, p 6.

20 *Report of the Committee on One-Parent Families*, 1974, Cmnd No 5629, vol 1, para 4.288.

21 LRA, s 47; unlike under the Civil Law Act 1956, where specific dates have been given, s 47 does not identify a date at which principles enunciated by the High Court of Justice in England would apply in Malaysia. In the case of *Re Divorce Petition Nos 18, 20 & 24 of 1983* [1984] 2 MLJ 158, Shankar J opined that s 47 must be read, “in a contemporaneous context and if applied must refer to the corresponding position in England today”. See, Mimi Kamariah, *Family Law in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1999, pp 148–149.

(ii) Adjournment of proceedings

Both LRA and MCA have identical provision for the adjournment of proceedings for divorce.

The provisions of both Acts state:

[I]f at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.

The provision as set out clearly aimed at saving marriages, however small the possibility it may seem to be. On this provision, Bromley in his book *The Family Law* commented, "it is of no practical importance at all".²² According to him this is simply because if the case is undefended, the court will not have the opportunity to know whether reconciliation is possible. A defended case would be very unlikely to have a successful reconciliation except in the most exceptional circumstances.²³

Bromley's statement is true as far as undefended cases are concerned. In defended cases the provision clearly states that adjournment should take place only if the court considers there is possibility of reconciliation and not in all contested cases. Thus, this section is still useful and practical particularly in cases with chances of reconciliation.

In Malaysia, where the divorce is on the grounds of irretrievable breakdown there is a compulsory reference of matrimonial problem to a conciliatory body appointed under s 106 of LRA where the parties attend without their lawyers.²⁴ This mandatory requirement of reconciliation takes place prior to the filing of a petition for divorce. This has been severely criticised. The Bar Council in its meeting in 1982 suggested that reconciliation should not be a condition precedent to the filing of a petition for divorce.²⁵ It is claimed that this compulsory reference has created a situation where interim orders are not immediately available because one is barred from petitioning for a divorce without the conciliatory body's certificate and interim proceedings are an important part of divorce proceedings. As a result, the legal practitioners have to look to other sources of law and procedure to protect the parties and children involved.²⁶

22 Bromley, PM and Lowe, NV, *Family Law*, 7th edn, Butterworths, 1998, p 210.

23 Ibid.

24 LRA, s 106.

25 The Bar Council Meeting, April 1982.

26 Ibid.

(iii) *Solicitor's certificate*

Section 6(1) of the MCA states:

Provision shall be made by rules of court for requiring the solicitor acting for a petitioner for divorce certificate *whether* he has discussed with the petitioner the possibility of a reconciliation and given him the names and addresses of persons qualified to help effect a reconciliation between parties to a marriage who have become estranged.

However, s 55(1) of the LRA has different wording:

Provision may be made by rules of court for requiring *that* before the presentation of a petition for divorce the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged.

The English law requires that the certificate filed by the solicitor for the petitioner to state whether he has, or has not, discussed with the petitioner the possibility of a reconciliation and has, or has not, given him the names and addresses of persons qualified to help to effect a reconciliation.²⁷ The object of this provision is to ensure that the parties know where to seek guidance when there is a sincere desire for a reconciliation.²⁸ However, it was said that in England the provision was generally regarded as serving little purpose as many applicants for a divorce do not instruct their solicitors to do so as it was not compulsory. It had therefore been suggested that s 6(1) should be repealed.²⁹

O'Donovan comments that the choice of the word "*whether*" in the English legislation, rather than the word "*that*" was a crucial one, which leaves reconciliation to the discretion of the solicitor, rather than as a duty on the court, as in Malaysian legislation.³⁰

In promoting reconciliation, the Malaysian Act requires an active role of the court to compel the petitioner to have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation.³¹ It is within the intention of this section that attempts by relatives to reconcile the parties should also be accepted other than the official

27 The Matrimonial Causes Rule 1977, r 12(3).

28 *Practice Direction* [1975] 2 All ER 384; [1975] 1 WLR 787; see also, Passingham, B, *The Divorce Reform Act 1969*, Butterworths, 1970, pp 279–280.

29 *The Booth Report*, HMSO, 1985, paras 4.42–4.43.

30 O'Donovan, K, "Conciliation and Reconciliation on Divorce in Hooker" MB (ed), *Malaysian Legal Essays in Honour of Professor Emeritus Datuk Ahmad Ibrahim*, Malayan Law Journal Sdn Bhd, 1986, p 43.

31 LRA, s 55 (1).

conciliatory bodies as specified under s 106(3) of the Act. Shanker J, in the case of *In re Divorce Petitions Nos 18, 20 & 24 of 1983*³² agrees that:

As to the steps to be taken to effect a reconciliation referred to by s 57(2) surely reference to a conciliatory body is not the only way to effect a reconciliation. The in-laws and near relatives, dependants, friends and solicitors themselves could have tried to effect a rapprochement.

It was held in the case of *C v A*³³ that:

[T]o prevent injustice it is appropriate for this court to hold that attempts by relatives to reconcile the parties ought to be accepted and read together with s 55 and proviso (vi) to s 106 of the Act.

It is not clear to what extent English law recognises the efforts of the relatives in the reconciliation process. Unlike the provision in the Malaysian law, there is no provision for recourse to the assistance and advice of such persons or bodies for the purpose of effecting a reconciliation in the English law. There was also no reported case, to the knowledge of the author, where the court recognises the involvement of relatives in reconciliation effort.

(iv) Cohabitation

Under the MCA, there are certain provisions, which are designed to enable the parties to try to effect a reconciliation by resuming cohabitation for a limited period without prejudicing their right to petition for divorce if the attempt fails. These provisions are provided for under ss 2(1) to (5) of the MCA. It had been criticised that these provisions were not adequate to effect a reconciliation between the couple. However, the Malaysian Act does not have similar provisions concerning cohabitation of the parties with a view of possibility of a reconciliation.

Divorce reform in England

As a result of the dissatisfaction over the practice of reconciliation provisions and grounds for divorce, various reports and reviews such as the Finer Report 1974 and the Booth Committee 1985 were made with suggestions for improvement. This has taken place especially in the seventies and eighties, which led to the Law Commission's decision to review the current divorce law and published its discussion paper. In 1995, based on the discussion paper, the Government published the Consultation paper entitled *Looking to the Future, Mediation and Grounds for Divorce*. A key aspect of the Government's proposal is that they will introduce comprehensive mediation as part of the

³² [1984] 2 MLJ 158.

³³ [1998] 6 MLJ 222.

divorce process.³⁴ Among the benefits of these proposals are that they will introduce a system which is better in identifying saveable marriages, making available every opportunity to explore reconciliation even after the divorce process has started and allowing couples to make workable arrangements through family mediation in respect of their children, home and other matters following a separation or divorce. This has finally resulted in the enactment of the FLA.

Section 1(b) of the FLA states:

[T]hat the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or other, to save the marriage.

According to Brown in *ADR Principles and Practice*, there is a duty to keep the possibility of reconciliation under review throughout mediation. However, this does not create an obligation to use the mediation to try to achieve reconciliation. He said that if the mediator considers that possibilities of reconciliation exist, this should be explored.³⁵

On a similar note, in Malaysia, reconciliation provisions were enacted in the LRA and came into force in 1982. Since then the provisions concerning reconciliation have been the subject of concerns and complaints. There has been a public outcry over the requirement that the parties must go through conciliatory proceeding before they can file a petition for divorce. Mimi Kamariah in *Family Law in Malaysia* pointed out that although the intention behind the reconciliation requirement in the LRA is noble and worthy, there are problems and difficulties related to this requirement. She argues that in the Malaysian society, where familial ties are still fairly strong, parties whose marriages are facing difficulties would invariably seek help from members within the family circle. Only when that fails, the parties would consult a lawyer to get advice on the next step. Thus, the final decision of the parties to go ahead with the petition for divorce usually signals the absence of any likelihood of a reconciliation.

34 This *White Paper* abolishes "fault" in divorce itself. Under the new law, divorce will be granted after one or both parties had attended a group information session and had indicated an intention to divorce. They must wait for a year before they can file the divorce petition. During this period the parties are expected to reconsider whether their marriage can be saved and if not, they should face the consequences of their decision to divorce and make arrangements for their future apart. See, Sclater, Shelley Day, "A Critical Approach to the White paper on Divorce Reform" [1995] Web JCLI 2.

35 Brown, H and Marriot, A, *ADR Principles and Practice*, London: Sweet and Maxwell, 1993, p 238.

Some issues in the reconciliation practice in Malaysia

The success or failure of reconciliation practices in Malaysia can only be judged after all the necessary problems related to it are identified and resolved as far as possible. There are certain issues concerning the practice of reconciliation that need to be examined. These are issues of practice of the reconciliatory/conciliatory bodies such as the lack of popularity of the reconciliation and conciliation institutions; wilful non-attendance by the spouse to the reconciliation meeting; ambiguities and defects in the law; absence of a provision for secrecy; lack of publicity; and administrative problem. These issues are discussed below.

(i) *Lack of popularity of the conciliation institutions*

It has been said that the lack of popularity of the conciliation institutions is attributed to the cultural background of the couple themselves.³⁶ Among the non-Muslims in Malaysia, reconciliation effort, prior to the LRA, was mainly undertaken by family elders and friends in the event of any estrangement between the parties.³⁷ In some cases, religious institutions also assume an important role in reconciliation. However, there is no formal structure as at present.³⁸ In traditional Chinese society, they prefer to settle their disputes by an amicable settlement using a third party as the mediator. They were influenced by Confucian thought, which values moral principles and has little regard for legal measures.³⁹ It was said that:

Culturally the common law justice system runs counter to the rural Chinese Malaysian beliefs. The English judicial process requires of a judge a verdict rather than a compromise solution. This necessarily excludes the Confucian concept of yielding and compromise ...⁴⁰

Goh Bee Chen⁴¹ found that it is a shame for a Chinese family if the couple takes their marital problems to the court for settlement. Most Chinese families

36 See, Sitaravelu, Mary Nesarajam, "Conciliatory Bodies in Klang and Petaling Jaya", *Academic Exercise*, Faculty of Law, University of Malaya, Kuala Lumpur, 1983.

37 Reddy, Rita, "Reconciliation and Family Court", a paper presented at the Conference on the Reform of Law Reform (Marriage and Divorce) Act 1976, IIUM, 1992, p 4; see also, Goh Bee Chen, "The Traditional Chinese Concept of Law, Justice and Dispute Settlement", *Academic Exercise*, Faculty of Law, University of Malaya, Kuala Lumpur, 1983.

38 Reddy, Rita, "Reconciliation and Family Court", a paper presented at the Conference on the Reform of Law Reform (Marriage and Divorce) Act 1976, IIUM, 1992, pp 4-5; Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, International Islamic University Malaysia Cooperative Ltd, 1998, p 143.

39 Goh Bee Chen, "The Traditional Chinese Concept of Law, Justice and Dispute Settlement", *Academic Exercise*, Faculty of Law, University of Malaya, Kuala Lumpur, 1983, p 204; see also James A Wall et al, "Malaysian Community Mediation", *Journal of Conflict Resolution*, Beverly Hill, 1999.

40 Ibid.

41 Ibid.

adhere to the concept of “kang-ching” (good relationship), thus they will try their best to resolve the problem among themselves within the family without seeking outside assistance.⁴²

As for the Indians in Malaysia, before the enactment of the LRA, there were no specific rules governing the grounds and forms of Hindu customary divorce. Thus, in this matter they practised their own religious usages and rites, which originated from their homeland India.⁴³ It is observed that the same culture that prevails among the Chinese is also practised among the Indian community in Malaysia. Like the Chinese, Indians, too, prefer to settle the dispute without going to the court.⁴⁴ The Indian couple who is in dispute normally approaches the elders in the family or in the community such as the local religious head or community leader for the settlement of their dispute.⁴⁵ Thus, they also prefer the assistance of an informal third party to resolve intra-familial problems.

Perhaps it is relevant to look into the similar practice of marital dispute resolution among the Malay community in Malaysia. According to Sharifah Zaleha,⁴⁶ the Malay couple prefers the assistance of informal mediators who are their own relatives to resolve the family disputes between them. She finds that other than a relative, a disputing party might approach the local *imam* (leader in the prayer), the *ketua kampung* (village leader), the *penghulu* (district head) or other community leaders such as the members of the village committee and the local politicians to help solve their difficulties.⁴⁷ This process is done privately in which the third party will approach one of the parties to discuss the problems in a more neutral way. Sharifah Zaleha⁴⁸ in her research also discovers that direct confrontation between the two dissenting parties was rare.

42 Sharifah Zaleha, et al, *Managing Marital Disputes in Malaysia-Islamic Mediators and Conflict Resolution in the Shariah Courts*, Curzon Press Ltd, p 61, observes that the similar situation also prevails in the Malay society in Malaysia. She states:

Malays, as previously stated, ideally want to keep the occurrence of a conflict in the family a secret or at least limit knowledge of the state of things to just a few people. However, going to the official channels to settle a dispute implies that the party who does so is nevertheless willing to bring the dispute to public attention. Thereby his opponent is brought to shame and therefore eventually does not pursue the dispute any longer.

43 Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, International Islamic University Malaysia Cooperative Ltd, 1998, p 78.

44 Zaleha Kamaruddin, *Isu-Isu Kekeluargaan dan Undang-undang*, ABIM, Kuala Lumpur, 1997, p 194.

45 *Ibid.*

46 Sharifah Zaleha, et al, *Managing Marital Disputes in Malaysia-Islamic Mediators and Conflict Resolution in the Shariah Courts*, Curzon Press Ltd, p 60.

47 *Ibid.*; Wall, James A, et al, in their study on the “Malaysian Community Mediation”, *Journal of Conflict Resolution*, Beverly Hill, 1999, find the combination of civil and religious leaders in mediation in Malaysia a unique and interesting characteristic.

48 *Ibid.*

Mary Nesarajam⁴⁹ in her research points at the reasons for the lack of popularity of the conciliatory councils set up under s 106(3)(a) of the LRA. According to her, among the reasons is that the couple feels uncomfortable divulging their marital problem to members of religious groups. She states that as religious councils are very close-knit groups, the couple may feel ashamed “to wash their dirty linen” in front of righteous and upright members of the community. She also states that the couple may be afraid that the religious bodies and organisations are religious fundamentalists who will try to save a marriage at all cost.

(ii) Non-attendance of the parties

It is observed that the general complaint of the members of the marriage tribunal is that the respondent wilfully refuses to attend the session although a notice has been served.⁵⁰ There is a very high incidence of non-attendance by the respondent and sometimes even the petitioner himself fails to attend the session.⁵¹ The practice is that when the respondent refuses to attend, the Marriage Tribunal sends as many as three to four letters calling the respondent to the hearing.⁵² Some members of the Tribunal said that they suspect the petitioner is giving a false address to them.⁵³ Mimi Kamariah,⁵⁴ on the other hand, points at the difficulties in securing the attendance of all members of the conciliatory body on the appointed dates. As a result, there have been frequent postponements of the hearing session.

Another problem in the law as regards non-attendance is that irrespective of whether or not the couple attends the session, the chairman has to issue a certificate at the end of the six-month period, as it is required under the law. There is no discretion for the marriage tribunal to withhold a certificate for wilful non-attendance. Mary Nesarajam⁵⁵ in her research finds that the parties may come to a conciliatory body and give their respective version of the marital story. However, she doubts the authenticity of the information given by the parties in the session, which the members of the conciliatory bodies can neither confirm nor refute. She comments that it is beyond the power of the members to hold the parties to their words, as at present they can only trust that the parties are telling the truth. Thus, she suggests that to

49 Sitaravelu, Mary Nesarajam, “Conciliatory Bodies in Klang and Petaling Jaya”, *Academic Exercise*, Faculty of Law, University of Malaya, Kuala Lumpur, 1983.

50 Formal interview with members of the Marriage Tribunal, Headquarters (former NRD head quarters at Bangunan Persekutuan, Persiaran Barat, Jalan Sultan, 46551 Petaling Jaya, Selangor), November 1999.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 Mimi Kamariah, *Family Law in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1999, p 188.

55 Sitaravelu, Mary Nesarajam, “Conciliatory Bodies in Klang and Petaling Jaya”, *Academic Exercise*, Faculty of Law, University of Malaya, Kuala Lumpur, 1983.

ensure that the parties are truthful in their stories the LRA should be amended to make false declarations during reconciliation an offence similar in nature and punishment to that of making false oaths for procuring marriage under s 38 of the LRA.⁵⁶

(iii) Absence of a provision for secrecy

There is no provision for secrecy of the information given during the reconciliation session provided for under the LRA. In Singapore and Australia for example, the law has legislated on the issue of the duty of secrecy in relation to the admissibility of evidence of anything said in the course of reconciliation. Section 85(4) of the Singapore's Women's Charter 1961 states that evidence of anything said or any admission made in the course of an endeavour to effect a reconciliation under this section, shall not be admissible in any Court.⁵⁷

Noor Farida⁵⁸ criticises that "although there are directives from the relevant authorities as to the necessity for secrecy, beyond a reprimand there is no further sanction for this provision." She argues that the imposition of a penalty on members for a breach is inappropriate, the reason being the difficulty of enforcement. She feels that a better solution would be for the conciliatory bodies to draw up their own Code of Ethics and thus, suggests amendment in this aspect of the law.⁵⁹

(iv) Lack of publicity

The lack of publicity of the existence of the conciliatory bodies particularly those under the religious organisations might explain the poor attendance. Awang⁶⁰ finds that there was no report of any case which had been referred to a conciliatory body of a church, temple or association for the whole of 1991. He states the reason for this situation might be that the public were unaware of the conciliatory body's existence or that they were reluctant to let their peers know of their marital problems.⁶¹ Stanley Lim⁶² explains that churches do carry out reconciliation efforts for their members. He points out

56 LRA, s 38 states:

Any person who for the purpose of procuring any marriage under this Act intentionally makes any false declaration or signs any false notice or certificate required by this Act shall be guilty of an offence and shall be liable in conviction to imprisonment for a term not exceeding three years or to a fine not exceeding RM3,000 or to both.

57 In Australia, s 12(1) of the Australian Matrimonial Causes Act 1959 provides that a marriage guidance counsellor is neither competent nor compellable as a witness in respect of any communication made to him in that capacity.

58 Noor Farida, "Reform of Law Reform (Marriage and Divorce) Act 1976" [1984] 1 CLJ 137.

59 Ibid.

60 Awang, "Reconciliation and Family Courts", a paper presented at the Conference on Reform of the Law Reform (Marriage and Divorce) Act 1976, IIUM, 1992, pp 3-4.

61 Ibid.

62 Interview with Pastor Stanley Lim of Glad Tiding Church, Petaling Jaya, Selangor in November 1999.

that due to low publicity, low number of cases were being referred to the churches for reconciliation. It is thus suggested that adequate publicity of the conciliatory bodies be provided so that the public and those involved in the marital conflicts are informed of their existence and functions.

(v) Administrative problems

It is observed that the conciliatory councils appointed under s 106(3)(a) of the LRA are scattered all over the Federal Territory of Kuala Lumpur and Petaling Jaya. There is no central location or landmark to make these bodies easily accessible to the public as compared to the marriage tribunals, which occupy permanent and centrally located buildings such as the Marriage Tribunal situated in the Headquarters (former NRD head quarters at Bangunan Persekutuan, Persiaran Barat, Jalan Sultan, 46551 Petaling Jaya, Selangor) and Kuala Lumpur. It is to note that the Marriage Tribunals established under s 106(3)(b) of the LRA is administered by the National Registration Department.

With the above facts, the Federation of Women Lawyers recommends that the administration of the conciliatory bodies should therefore, be removed from the National Registration Department, where their ordinary functions do not normally include the type of welfare activities undertaken by the conciliatory bodies.⁶³ They suggest the setting up of a Family Court in Malaysia and advocate that the whole system of counselling and other welfare services, which are essential to family matters, to become part and parcel of the Family Court infrastructure.⁶⁴

Recommendations and suggestions

It is proposed that the marriage tribunal in the National Registration Department be abolished and a new unit be established in the Family Division of the High Court. In the United Kingdom, ministerial responsibility for marriage support services has been transferred from the Home Office to the Lord Chancellor's Department. The proposed new unit will have the responsibility of implementing the relevant provisions, and having under its roof, the Alternative Dispute Resolution ("ADR") mechanisms, their management and development. It can be called "Alternative Family Dispute Resolution Unit", where mediation, counselling and other ADR mechanisms can be offered.

It is expected that the new unit, properly placed, will be able to formulate new provisions more relevant to the needs of the families and marriages in

63 Noor Farida, "Reform of Law Reform (Marriage and Divorce) Act 1976" [1984] 1 CLJ 137 at 139.

64 Ibid. This proposal for the establishment of Family Court has been supported by many, for example, the Federation of Women Lawyers.

conflict. It can also be expected to have appropriate facilities and mechanisms to resolve marriage conflict early with the intention of saving marriages as well as managing conciliatory divorce, with special attention given to the welfare of children. It is also expected to address the difficulties related to the current reconciliation provisions. This unit will be better able to plan for expansion and improvement of the services offered. More significantly, it will be able to study new ideas and innovations available worldwide should they be considered appropriate and relevant for incorporation into its services, bearing in mind that mediation concepts and practices are continuously changing in the Western world.

According to s 106(5) of the LRA, a conciliatory body to which a matrimonial difficulty has been referred shall resolve it within a period of six months. Although an attempt at reconciliation must be done within this six-month period, the provision allows, if it considers necessary, to adjourn the proceedings from time to time. There has been a suggestion that the above subsection should be amended and a discretionary clause included under it. This is to allow members of the institutions to use their discretion in individual cases. It is suggested that once it has been determined that there is no possibility of reconciliation between the parties the certificate should be issued at the earliest possible date. There is no point keeping the marriage if both parties have made up their minds to dissolve it.

The LRA does not state the qualification required of the members of the conciliatory bodies. Thus, there should be detailed provision included concerning the qualification of the members and also guidelines as to how to carry out the reconciliation and conciliation process. This is important, as the task of reconciling the disputes between the estranged couple should be handled by trained and experienced persons, as it involves counselling, skills, patience and knowledge. It is suggested that a team of specialists trained in marriage counselling be appointed. The team may include a clinical psychologist and a social worker and should be attached to and become permanent employees of the Family Division of the High Court and be available at all times to assist the judge of the Family Division.

Concerning the idea to establish the Family Court, perhaps, first of all, we should learn from the experience of those countries which have already established a "one-stop" centre that deals with all matrimonial proceedings and other services related to matrimonial causes such as counselling and mediation. It is interesting to note that our neighbouring country, Singapore, has set up its Family Court on March 1, 1995. This Family Court, in order to minimise the acrimony between the parties and in the interest of their children, has integrated mediation and counselling into the case process. Tan Puay Boon⁶⁵

65 Tan Puay Boon, "Alternative Dispute Resolution in the Singapore Family Court System" (1999) XXVIII No 3, INSAF, p 166.

finds that since the setting up of the Family Court, it has been conducting mediation for cases involving spousal and child maintenance, enforcement of maintenance orders and family violence. She considers the court's experience with family mediation very encouraging and in 1996, she says, 89.7% of the cases were settled after mediation.⁶⁶

Conclusion

O'Donovan,⁶⁷ while indicating that the English practice over the decade had been a failure, expresses hope that Malaysia would be more successful than England had been! However, Rita Reddy,⁶⁸ criticising the reconciliation provisions of the LRA as "dead provisions", says, "the assessment after ten years had shown that there has to be major changes in the reconciliatory provisions for them to be effective". As great effort has been made in England to improve this aspect of law, it is my opinion that Malaysia needs to do the same or even more.

66 Ibid. Mediation is one of the services offered by the Family Court as an alternative to litigation and it is offered at no cost to the parties. If the Court considers that there is a possibility of an amicable resolution of the matter, it may, with the consent of the parties, refer the parties for mediation. A trained mediator facilitates the discussion between the parties and assists them to generate options. But the parties make their own decision. The resulting settlement is recorded before a judge, who ensures that the parties understand the effect of the order and are prepared to abide by it. See, Tan Puay Boon, "Alternative Dispute Resolution in the Singapore Family Court System" (1999) XXVIII No 3, INSAF, p 167.

67 O'Donovan, K, "Conciliation and Reconciliation on Divorce in Hooker" MB (ed), *Malaysian Legal Essays in Honour of Professor Emeritus Datuk Ahmad Ibrahim*, Malayan Law Journal Sdn Bhd, 1986.

68 Reddy, Rita, "Reconciliation and Family Court", a paper presented at the Conference on the Reform of Law Reform (Marriage and Divorce) Act 1976, IIUM, 1992.