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Reconciliation and Conciliation in Malaysia: A Review of the Relevant Provisions of the Law Reform (Marriage and Divorce) Act, 1976; and their practice

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Introduction

The principle of irretrievable breakdown of marriage is a basis of the law of divorce of the Law Reform Act (Marriage and Divorce), 1976[1] of Malaysia. The Act places emphasis on the possibility of reconciliation of the spouses that may save the marriage. The provisions on reconciliation and conciliation despite criticisms remain the same until today. Thus, the aim of this paper is to review these relevant provisions and their practice in Malaysia.

Definition

There is no definition of conciliation and reconciliation under the LRA, 1976. However, the Malaysian divorce court is required by law 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."[2]

In England, conciliation is defined as "assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consent or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees and every other matter arising from the breakdown which calls for a decision on future arrangements."[3] The Finer Committee distinguished reconciliation, "the action of reuniting persons who are estranged" from

[1] The Law Reform (Marriage and Divorce) Act 1976 will be abbreviated as the LRA, 1976.
[2] Section 47 of the LRA, 1976.
[3] Report of the Committee on One-Parent Families, 1974, Cmnd. 5629, vol. 1, para. 4.288.

conciliation "the process of engendering common sense, reasonableness and agreement in dealing with the consequences of estrangement."[4]

Provisions that encourage reconciliation under the LRA, 1976

Section 55 of the LRA, 1976

As an effort to encourage reconciliation between the parties the LRA, 1976 provides that provisions may be made by rules of court for requiring that before a petition for divorce may be presented, the petitioner shall have recourse to the assistance and advice of persons or bodies for the purpose of reconciling the estranged parties to the marriage.[5] However, in practice there are no rules of practice and procedures to be observed during the conduct of the hearings and inquiries, and members of the conciliatory bodies conduct the reconciliation efforts at their own discretion according to what is considered best for the particular case.[6]

It is within the intention of the above subsection that attempts made by relatives to reconcile the parties should also be accepted other than the official conciliatory bodies as specified under s 106 (3) of the LRA, 1976.[7] Shanker J., in the case of ***In re Divorce Petitions Nos. 18, 20 & 24 of 1983***[8] agrees that:

> "As to the steps to be taken to effect a reconciliation referred to by section 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."

The extent to which the LRA, 1976 encourages reconciliation can be seen further in subsection (2) of s 55 where it states:

> "If 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."

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[4] *Ibid*., vol. 1, para. 4.305.

[5] The LRA, 1976, s 55 (1).

[6] Noor Faridah, *Reform of Law Reform (Marriage and Divorce) Act, 1976*, [1984] 1 ***CLJ***, at p. 138; see also, the Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws which contains the recommendations from the Federal of Women Lawyers that there should be a rule governing the practice of the conciliatory bodies in this country.

[7] See, ***C v A*** [1998] 6 MLJ p. 229. In this case the judge suggested that section 55 is to be read together with proviso (vi) of section 106. The judge is also of the opinion that by accepting attempts made by the relatives to reconcile the parties can prevent injustice to the parties.

[8] [1984] 2 MLJ 158.

In compliance with the provision, it is the duty of the judge that he has to enquire in every case petitioned under s 53 whether reconciliation efforts have been attempted by the parties.

In relation to s 55 (1) the Royal Commission in its Report[9] stated "this section has to be read with s 106 of the LRA, 1976 in providing for attempts to be made to reconcile the estranged spouses before a petition for divorce may be presented."[10]

Section 57 of the LRA, 1976

Another section of the LRA, 1976 that encourages reconciliation of the parties is s 57 (2) which provides that:

> "Every petition for a divorce shall state what steps had been taken to effect a reconciliation."

This section requires that the parties who intend to apply for divorce must first make an effort to reconcile their marital problem, as they need to state it in the divorce petition.[11] For example, in the case of ***Joseph Jeganathan v Rosaline Joseph***,[12] the High Court had granted divorce to the petitioner after being satisfied that all efforts at reconciliation had been unsuccessful. This section however does not apply to a mutual divorce under s 52 of the LRA, 1976 as in the case of mutual consent the parties are required only to prove that they both freely agree and consent to end their marriage and there must be proper provisions for the wife and children.[13] It has been suggested by the Federation of Women Lawyers that an exception to this requirement needs also to be made for cases of presumed death or desertion where the respondent's whereabouts is unknown.[14]

Section 106 of the LRA, 1976

In the case of petitions for divorce based on the irretrievable breakdown of marriage, s 106 (1) makes it mandatory that all petitioners have to obtain a certificate from the conciliatory body testifying that it has failed to reconcile the parties before filing their petitions. This mandatory requirement of a reconciliation attempt by the parties takes place prior to the filing of the petition for divorce and it is conducted by out of court reconciliation bodies as specified under the LRA, 1976.[15] Thus, reconciliation is mandatory in the following contested divorce cases;

1) adultery;
2) unreasonable behaviour;
3) desertion for a period of two years; and

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[9]The Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws, 15th November, 1971, p. 58.
[10]*Ibid.,* p. 58.
[11]See, Form 2 of the Divorce and Matrimonial Proceedings Rules, 1980.
[12][1989] 3 MLJ, p. 109.
[13]*Ibid*., p. 402.
[14]The Federation of women Lawyers, in the Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws, 15th November, 1971, p. 215.
[15]See, s 106 (2) of the LRA.

4) separation for a period of two years.

This compulsory reconciliation has been criticized, as reconciliation does not seem to work in the Malaysian society the moment a party decides to petition for divorce.[16]

Anantham[17] contended that this compulsory reference does not serve the intended purpose, as very often, it is the party who wants divorce who applies to the conciliatory body with the intention of obtaining the certificate required. Dhillon[18] in his letter to the Law Commission felt that if the ground for divorce is adultery, it is surely difficult for the petitioner to take any steps to reconcile the marriage.

The Bar Council[19] suggested that reconciliation should not be a condition precedent to the filing of a petition for divorce, as it creates a situation whereby interim orders if required are not immediately available. As a result the legal practitioners have to look to other sources of law and procedure to protect the parties and children.[20]

Composition of the Conciliatory Body

Section 106 (3) provides a conciliatory body, which means:

> `(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion , community, clan or association; or
> (b) a marriage tribunal; or
> (c) any other body approved as such by the Minister[21] by notice in the Gazette.`
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> **[Footnote added]**

As of date, no conciliatory body has been set up under subsection (3) (c) of the LRA, 1976.[22] In the case of subsection (3) (a) each Assistant Registrar of Marriages appointed for a church, temple or association is required to set up a conciliatory body comprising of members of the organisation, which he represents. Subsection (3) (b) provides for a "marriage tribunal" located in each of the offices of the National Registration Department where it operates.[23]

Membership of a marriage tribunal is prescribed under s 106 (4) consisting of a chairman and two to four other members nominated by the minister or by such officer to whom the Minister may have delegated his powers. The Registrar of Marriages of the district or

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[16]Mimi Kamariah, *Family Law in Malaysia*, Malayan Law Journal, 1999, p. 188.
[17]Anantham, K, "*Reform of the Law Reform (Marriage and Divorce) Act, 1976*," Seminar on Family Law, Faculty of law, University of Malaya, 1990.
[18]The Report of the Royal Commission, *op. cit*., p. 74.
[19]The Bar Council meeting, which was held in April 1982.
[20]*Ibid*.
[21]The Minister is defined in s 2 as the Minister charged with responsibility for the registration of marriages, determines the specific areas or districts for which marriage tribunals shall be set up.
[22]Ahmad Awang, *op. cit*., p. 2.
[23]*Ibid*.

division is normally appointed as chairman. Other members are appointed from the public on the recommendation of the State Governments, and/or from government officials, particularly social welfare officers. As observed from the practice of the Marriage Tribunal at the Head Office, officers of the NRD (National Registration Department) are appointed to conduct the session with the Assistant Registrar acting as chairman. [24]

The composition of the conciliatory bodies for the various churches, temples and associations is not prescribed, but administratively it is fixed to comprise a chairman, who is an Assistant Registrar of Marriages and four other members nominated by their organisations.[25] These bodies are appointed on voluntary bases and members are not paid remuneration for their services.[26]

Qualification of the Conciliatory Body

The LRA, 1976 does not state the qualification required of the members of the conciliatory bodies. It only provides that all members shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers.[27] In practice most members of the conciliatory bodies are composed of laymen.[28] They are not equipped with appropriate training and experience in this noble role of reconciliation, neither are there any guidelines as to how to approach their task.[29] Mimi[30] stated that "the members of the body are invariably strangers, some are judgmental whilst others are prejudiced, biased or hostile." As a consequence, "the parties are normally inhibitive and hesitant in disclosing the private details of their marriage difficulties before strangers."[31] Rita,[32] suggested that there should be a proper full time appointment of a team of specialists trained in marriage counselling to be in the conciliatory bodies. 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 at all material times as well as carry on the reconciliatory functions at other times. Hence, there should be a detailed provision concerning the qualification of the members and also guidelines as to how to carry out the reconciliation and conciliation process.

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[24] *Ibid*.

[25] Formal interview with Pastor Stanley Lim of the Glad Tiding Church in Petaling Jaya, Selangor in November 1999.

[26] Noor Farida, *Reform of the Law Reform (Marriage and Divorce) Act,* 7th Malaysian Law Conference, Kuala Lumpur, 1983, p. 139; Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia,* International Islamic University Malaysia, 1998, p. 135; Ahmad Awang, 'Reconciliation and Family Courts', Conference on *the Reform of Law Reform (Marriage and Divorce) Act 1976*, organised by Kulliyyah of Laws of the International Islamic University Malaysia, 1992, p. 3.

[27] The LRA, 1976, s 106 (4).

[28] Awang Yaacob, *op. cit*., p. 9.

[29] *Ibid*., p. 9.

[30] Mimi Kamariah, *Family Law in Malaysia*, Malayan Law Journal Sdn. Bhd., 1999, p. 188

[31] *Ibid*., p. 188.

[32] Rita Reddy, *Reconciliation and Family Court*, Paper presented in the Conference in the Reform of Law Reform (Marriage and Divorce) Act, 1976, organised by IIUM, 1992, p. 21.

Duration of the reconciliation process

Section 106 (5) (a) states:

> "A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers necessary, adjourn its proceedings from time to time."

Thus, an attempt at reconciliation must be done within a six-month period. The provision allows if considered necessary, adjournment of the proceedings from time to time. There has been suggestion that the above subsection should be amended and to include a discretionary clause under it. This is to allow the members of conciliatory bodies to use their discretion in individual cases. 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. The Federation of Women Lawyers suggested a three-month period for attempts at reconciliation.[33]

According to Ahmad Awang[34] the main objection to the present marriage tribunal is that it delays the process for the party to get a divorce. However, in practice he said, "The delay, if any, cannot exceed a period of six months". He then said, "It is difficult to see the reason for anyone not able to wait a few more months for a divorce unless the petitioner is desperately wanting to get rid of his/her spouse in order to remarry someone else and in fact the delay is a way of cooling down the heat of the matrimonial difficulty."[35]

The function of the conciliatory bodies

The main function of the conciliatory bodies is to reconcile matrimonial disputes of the parties with the aim that they will resume cohabitation. However, subsection (5) (b) of s 106 provides:

> "If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage."

This subsection confers power on the conciliatory body to make recommendations in matters of division of property, custody and maintenance if it thinks necessary to do so.

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[33]Report of the Royal Commission on Non-Muslim marriage and Divorce Laws, *op. cit*., p. 219.
[34]Ahmad Awang, *op. cit*., p. 15.
[35]*Ibid*.

There are opinions to the contrary that the body should not make recommendations on the above matters.[36]

However, it has been argued that by taking away such power from the conciliatory body would restrict the scope and meaning of reconciliation. Reconciliation does not only mean reuniting partners or preventing separation.[37] Reconciliation also means that it reconciles individuals to the necessity of divorce and their lonely future. Furthermore the divorce court is not the most congenial place to 'bargain' for children and property, a less adversarial surrounding like the conciliation bodies might be able to achieve better result. The recommendations of the Marriage Tribunal are, as the name suggests merely recommendations. It is at the judge's discretion that he may either adopt them with or without modification or choose to ignore them altogether.

Some issues in practice

Popularity of the Conciliation Institutions

Notwithstanding the mandatory legal requirement, these bodies/tribunals are unpopular. This is attributed to the cultural background of the couple themselves.[38] Among the non-Muslims in Malaysia, reconciliation efforts, prior to the LRA, 1976, were mainly undertaken by family elders and friends in the event of any estrangement between the parties.[39] In some cases, religious institutions assumed important roles in reconciliation. However, there were no formal structures as at present.[40] Mimi Kamariah[41] said, "In Malaysia where familial ties are still fairly strong, parties whose marriages are facing difficulties would invariably seek help from members within the family circle." She further said, "Only if that fails, a party would consult a lawyer and be advised on the procedures, requirements, and implications relevant to a divorce proceeding."[42]

In a traditional Chinese society, couples prefer to settle their disputes amicably using a third party as mediator. They were influenced by Confucian thought, which valued moral principles and had little regard for legal measures.[43] It was said that:

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[36]Mary Nesarajam, *op. cit*., 1983; The Bar Council Meeting in April 1982; Interview with Kanamah, a chairman of the Marriage Tribunal at the Head Office. See also, C. H. Liew, *Reform of the Law Reform (Marriage and Divorce) Act, 1976*, Seventh Malaysian Law Conference, Kuala Lumpur, From October 31 to November 2, 1983.

[37]See, Mary Nesarajam, *Conciliatory Bodies in Klang and Petaling Jaya*, Academic Exercise, University Malaya, 1983.

[38]See, Sitravelu, Mary Nesarajam, *Conciliatory Bodies in Klang and Petaling Jaya*, Academic Exercise, Faculty of Law, Unversity of Malaya, Kuala Lumpur, 1983.

[39]Rita Reddy, *op. cit*., 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.

[40]Rita Reddy, *op. cit*., p. 4-5.

[41]Mimi Kamariah, *op. cit*., p. 188.

[42]*Ibid*.

[43]Goh Bee Chen, *op. cit*., p. 204; see also James A Wall et al., 'Malaysian Community Mediation', ***Journal of Conflict Resolution***, Beverly Hill, 1999.

> "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…."[44]

Goh Bee Chen[45] found that it is a shame for a Chinese family if the couple takes their marital problems to court for settlement. Most Chinese families 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. Newman,[46] discussing the emergence of ADR in his book, stated that, Donahey in his writing '*Seeking Harmony*'[47] has identified the Chinese approach of preferring mediation to adjudication as being in keeping with traditional Confucianism. He also found out that a similar situation exists under other Asian legal systems, including the Korean.[48]

As for the Indians in Malaysia, before the enactment of the LRA, 1976 there are no specific rules governing the grounds and forms of Hindu customary divorce. They practise their own religious usages and rites, which originated from homeland India.[49] Like the Chinese, Indians too prefer to settle the disputes without going to court.[50] The Indians 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.[51] Thus, they also prefer the assistance of informal third party to resolve intra-familial problems of the couple.

Mary[52] in her research pointed at the reasons for the lack of popularity of the conciliatory councils set up under s 106 (3) (a). Among the reasons is that the couple feels uncomfortable divulging their marital problem to the members of the religious groups. As the religious councils are very close-knit groups, couples feel ashamed 'to wash their dirty linen' in front of righteous and upright members of the community. She also stated that couples are cautious of the religious bodies and organisations whose members might be religious fundamentalists who will try to save the marriage at all cost.

Attendance of the parties

It is the general complaint of the members of the marriage tribunal that the respondent wilfully refuses to attend the session although a notice letter has been served.[53] There is a very high incidence of non-attendance by the respondent and sometimes even the

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[44]*Ibid*.
[45]*Ibid*.
[46]Newman, Paul, *Alternative Dispute Resolution*, CLT Professional Publishing Ltd, 1999, p. 27.
[47][1995] 61 **JCI Arb 4**, p. 279.
[48]See, James A Wall et al, 'Malaysian Community Mediation', ***Journal of Conflict Resolution***, Beverly Hill, 1999.
[49]Zaleha Kamaruddin, *op. cit*., p. 78.
[50]Zaleha, Kamaruddin, *Isu-Isu Kekeluargaan dan Undang-undang*, ABIM, Kuala Lumpur, 1997, p. 194.
[51]*Ibid*.
[52]Sitravelu, Mary Nesarajam, *op. cit*., 1983.
[53]Formal interview with member of the Marriage Tribunal of the Head Quarters in November, 1999.

petitioner himself fails to attend the session.[54] Mimi,[55] pointed at the difficulties in securing attendance of all members of the conciliatory body on the appointed dates. As a result there have been frequent postponements of the hearings. This, according to Mimi, would certainly aggravate the already tensed and unfortunate situation of the spouses themselves.[56]

Another problem in the law as regards to non-attendance is that irrespective of whether the couple attends or not the chairman has to issue a certificate at the end of a six-month period, as required under the law. There is no discretion for the marriage tribunal to withhold issuing a certificate for wilful non-attendance.

Absence of a provision for secrecy

Unlike the law in Australia, there is no provision for secrecy of information given during the reconciliation session under the LRA, 1976. Noor Farida[57] criticised that "although there are directives from relevant authorities as to the necessity for secrecy, beyond a reprimand there is no further sanction for this provision." She felt that conciliatory bodies should draw up their own Code of Ethics and suggested an amendment in this aspect of the law.[58]

Poor publicity

The lack of publicity of the existence of the conciliatory bodies particularly the ones under religious organisations might explain the poor attendance to these bodies. Awang[59] found out that no case has been reported to have been referred to a conciliatory body of a church, temple or association for the whole of 1991. He stated the reasons for this situation might be that the public were unaware of the conciliatory body's existence or that they are reluctant to let their peers know of their marital problems.[60] Stanley Lim[61] explained that churches do carry out reconciliation efforts. He pointed out that low publicity resulted in low cases being referred to it. Thus, adequate publicity on the conciliatory bodies should be provided so that the public and those involved in the marital conflicts are informed of their existence and functions.

Administrative difficulties

It is observed that the conciliatory councils appointed under s 106 (3) (a) of the LRA, 1976 are scattered all over the Federal Territory of Kuala Lumpur and Petaling Jaya, with no central location or landmark, which makes these bodies less easily accessible to the public as compared to the marriage tribunals.

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[54]*Ibid*.
[55]Mimi Kamariah, *op. cit*., p. 188.
[56]*Ibid*.
[57]Noor Farida, *op. cit*., p. 137.
[58]*Ibid.*
[59]Awang, *op. cit*., pp. 3-4.
[60]*Ibid*.
[61]Interview with Pastor Stanley Lim of Glade Tiding Church, Petaling Jaya, Selangor in November, 1999.

The Federation of Women Lawyers recommended that the administration of the conciliatory bodies should be removed from the National Registration Department, as they claimed their ordinary functions do not normally include such type of welfare activities.[62] They suggested for the setting up of a Family Court in Malaysia and advocated that the whole system of counselling, and other welfare services, which are essential in family matters, should become part and parcel of the Family Court infrastructures.[63] Awang[64] in his paper welcomes the suggestion for the establishment of the family court, which handles all matrimonial cases including the existing function of the Marriage Tribunal. Australia, I understand, has a family court and I am keen to know more about it.

Conclusion

As discussed, the practice of reconciliation and conciliation among the non-Muslims in Malaysia has been confronted with many problems and weaknesses. It has been said that the overall weakness of the conciliatory bodies including the Marriage Tribunal is that it lacks direction, co-ordination and uniformity. Generally the blame is pointed at the reconciliation provisions in the LRA, 1976, which are said to be insufficient to effectively reconcile the couple. Hence, very few cases of reconciliation have been successful. It is therefore 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 or as suggested above, a family court be set up. This will have the responsibility of implementing the relevant provisions of the LRA, 1976; and having under its roof, the ADR mechanisms such as mediation, their management and development. The unit should offer mediation, counselling or other related services to married couples. In the context of family mediation, development will include aspects such as, information dissemination, promotion of mediation, code of practice, training, qualification, standards and interdisciplinary programs. It is suggested that a review is required to the mandatory requisite for attending reconciliation sessions at the conciliatory body as the chances of reconciliation is very little once the parties have made up their mind of getting divorce. As discussed earlier, other relevant provisions of reconciliation and conciliation also need to be reviewed which may lead to having new provisions replacing the existing ones. The stability and integrity of the family in Malaysia is definitely of fundamental importance as it provides the basis for the socio-economic and political development of Malaysia.

[62]Noor Farida, *op. cit*., p. 139.
[63]Noor Farida, *op. cit*., p. 139.
[64]Ahmad Awang, *op. cit.,* p. 14.