

## Section 106 of the Law Reform (Marriage and Divorce) Act 1976 of Malaysia: Issues and Suggestions

<sup>1</sup>Noraini Md. Hashim, <sup>2</sup>Nora Abdul Hak and <sup>3</sup>Nur Ezan Rahmat

<sup>1</sup>Assistant Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

<sup>2</sup>Associate Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

<sup>3</sup>Ph. D student, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

---

**Abstract:** Dispute resolution outside the court is not new in human interactions. Different societies across the world have long used non-judicial indigenous methods to resolve conflicts. Family disputes, more often than not, are rarely concerned with matters of fact but are almost invariably complicated by the intense and intimate emotions of the parties in conflict. Therefore, the utilization of other processes, such as conciliation and mediation, will lead to a more satisfactory resolution of disputes rather than the prevailing practice of litigation. Section 55(2) of the Law Reform (Marriage and Divorce) Act 1976 (LRA1976) provides that even when the parties have presented a petition for divorce, if it appears to the court at any stage of the proceedings that there is a reasonable possibility of a reconciliation between them, the court may adjourn the proceedings for such period as deems fit to enable attempts to be made to effect such a reconciliation. In the case of a petition for divorce based on the irretrievable breakdown of the marriage, the petitioner must first refer the matrimonial difficulty to a conciliatory body before filing the petition in accordance with sections 51 and 52 of LRA. Practitioners of family law are of the view that the conciliation process in Malaysia has not been very successful in helping disputing couples resolve their problems and this is supported by statistics, which shows that the success rate recorded at the statutorily mandated reconciliation sessions is very low. This article examines some emerging issues relating to the effectiveness of conciliatory bodies appointed under section 106 of LRA 1976, especially the effectiveness of the marriage tribunal under the National Registration Department. It highlights the problems and constraints faced by the conciliatory bodies, and suggests some law and policy reforms.

**Key words:** Family law, conciliation, divorce

---

### INTRODUCTION

A family is defined as a set of relations, which comprises of especially parents and children. In simple terms, it means all persons related by blood or marriage. According to the Oxford Dictionary, family means a group consisting of one or two parents, their children and close relations. Therefore, family can mean a set of relations, especially parents and children. Law means the general concept of a force in human society, which regulates conduct by means of prescribing and enforcing rules. Therefore family law is the law that regulates the relationship among family units and such other matters related to such units. In *Hyde v. Hyde* (1866) LR P&D 130, marriage was defined as a voluntary union between a man and a woman for life to the exclusion of all others. It consists not only of the formalities required to establish the relationship of husband and wife, but also the need for each party to have the legal capacity to marry.

Although marriage is considered sacred, divorce is an option considered by many people when it becomes practically difficult to maintain the marital bond. Various factors have been cited as the root causes for the increasing rate of divorce in modern societies. Such factors include poor communication, financial problems, infidelity, lack of commitments towards the marriage, physical and mental abuse, lack of understanding and poor conflict management skills. The rising divorce rate reflects the decline of traditional values as a result of the impact of western lifestyle and the pressures of modern urban life (Ashgar Ali & Hui, 2010).

Under the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976), all marriages, other than Muslim and native customary marriages, may be dissolved only in accordance with the provisions of the Act. It is provided that any marriage solemnized prior to the date of the coming into force of the Act shall, unless void under the law, religion, custom or usage under which it was solemnized continue until dissolved:

- 1) by the death of one of the parties;
- 2) by order of a court of competent jurisdiction; or

---

**Corresponding Author:** Noriani Md. Hashim, Assistant Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia  
E-mail: norainim@iiu.edu.my

3) by a decree of nullity made by a court of competent jurisdiction.

All such marriages if valid under the law, religion, custom or usage under which they were solemnized, are deemed to be registered under this Act (Section 4 of LRA 1976). According to section 48(1) of LRA 1976, the court in Malaysia has jurisdiction to grant a decree of divorce if the marriage is registered under the Act, the marriage is monogamous in nature and both parties are domiciled in Malaysia (See *Melvin Lee Campbell v. Amy* [1988] 2 MLJ 238; *Tan Guan Hock v. Khor Chai Heah* [1990] 1 MLJ 422 and *Jeyasakthy v. Kandiah* [1996] 5 MLJ 612).

***Conciliation and Reconciliation under Section 106 of LRA 1976:***

The court would only grant adissolution of marriage after being satisfied that all efforts at reconciliation had been unsuccessful. In fact, reconciliation attempts are essential prior to any petition for divorce as clearly enunciated in s. 57(2) of LRA 1976 which the court reemphasized in *Vivian Lee Shea Li v. Sia Chong Liang* [2010] 10 CLJ 734. That is, every petition for a divorce shall state what steps had been taken to effect a reconciliation.

Section 106 of LRA provides that before filing the petition for divorce in court, the marital dispute ought to be referred to the conciliatory body. Section 106(1) provides that no person shall petition for divorce, except under sections 51 and 52, unless he or she has referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties. This principle is clearly enunciated in *Jennifer Patricia Thomas v. Calvin Martin Victor David* [2005] 7 CLJ 133 where the court held that the procedural step taken by the wife in order to obtain a certificate from the conciliatory body under section 106 of the Act would be sufficient to trigger off the invocation of the Act as it constitutes the pendency of matrimonial proceedings so that the wife is at liberty to apply for the injunction against molestation under section 103 of LRA 1976.

In some marginal cases, the courts exempted the plaintiffs from referring the matrimonial difficulty to conciliatory body before petitioning for divorce. In *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* [2010] 4 CLJ 724, the court held that reference to a conciliatory body was not practical as the parties had been separated since July 2007 and the defendant was resident in France. The court was also of the opinion that the hardship suffered by the plaintiff in this case was due to the blog postings of the husband which falls within the definition of exceptional circumstances as envisaged by both ss. 50(2) and 106(1)(vi) of the LRA 1976.

In the case of *Chin Pei Lee v. Yap Kin Choong* [2010] 4 CLJ 843, the plaintiff applied for an order excluding the requirement to refer her matrimonial difficulty to a conciliatory body for reconciliation prior to filing for divorce. The main issue requiring determination in this case was whether the defendant was suffering from an incurable mental illness, thereby exempting the plaintiff from referring her matrimonial difficulty to a conciliatory body under s. 106(1)(v) of the Act. Suraya Othman J. held that there was no positive evidence to show that the defendant suffered from incurable mental illness, and the plaintiff could not simply seek an exemption from referring her matrimonial difficulty to a marriage tribunal just because she did not desire reconciliation. The judge further stated that the purpose for the introduction of section 106 in LRA 1976 is to encourage reconciliation. This purpose is clearly established in the Report of the Royal Commission on Non-Muslim Marriage and Divorce dated 15<sup>th</sup> November 1971.

A conciliatory body is defined to mean a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; a marriage tribunal; or any other body approved as such by the Minister by notice in the Gazette. The tribunal consists of a chairman and not less than two and a maximum of four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf.

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. It 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. Although the intention behind the reconciliation requirement in the LRA 1976 is noble and worthy, there are problems and difficulties related to this requirement.

Mimi Kamariah, (1999) argued that a reference to the conciliatory body is a waste of time and resources. This is because the members of the body are invariably strangers; some are judgmental whilst others are prejudiced, biased or hostile. Parties are inhibited and hesitant in disclosing the sordid and private details of their marriage difficulties before strangers. It is worse where the strangers are unhelpful and not impartial. Mimi also highlighted that a common complaint is the frequent postponements of conciliatory body hearings due to difficulties in securing attendance of all members thereof on the appointed dates. The delays aggravate the already tensed and unfortunate situation of the spouses in a marriage facing difficulty.

There is a need to employ and engage marriage counselors or mediators in reconciling estranged parties as matters pertaining to marital discord are delicate issues. The Ministry, having jurisdiction over the conciliatory bodies and marriage tribunals should seriously consider training the panel members so that they are able to handle matrimonial disputes properly. (Ashgar Ali & Hui, 2007). Short courses can be conducted in conciliation

and mediation to equip them in professional skills to effectively handle matrimonial disputes coming before them.

According to Nora Abdul Hak,(2010) the overall weakness of the conciliatory bodies including the Marriage Tribunal is that it lacks direction, co-ordination and uniformity. She proposed 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 better still, a Family Court.. She further suggested that more members of the tribunal be appointed from non-governmental organisations, individuals and Jabatan Kebajikan Masyarakat (Department of Social Welfare) officers to improve their services. The allocation for the members' allowance should be seriously considered by the government to encourage their involvement in the marriage tribunal.

### ***Family Mediation in Other Jurisdictions:***

#### ***3.1 Australia:***

In Australia, the 2006 reforms introduced in the Family Law Act 1975 have placed increased emphasis on family mediation by providing that persons involved in a family, especially child-related dispute must make a genuine effort to resolve that dispute by family dispute resolution. The Australian government announced its commitment to establish 65 Family Relationship Centres (FRCs) over the 2006-2008 period. (Australian Government, Family Relationships online, [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au)). It is highlighted that:

*The new FRCs will overcome the limitations associated with the Committee's Families Tribunal proposal. The Tribunal would have provided an alternative to the courts for some parenting disputes, offering conciliation and less adversarial decision making processes. However it would have had power to make decisions in only a relatively small proportion of cases and there would have been a right of appeal to the courts. The proposed FRCs will help parents resolve their disputes at a much earlier stage in the separation.*

In line with the above commitment, there are 65 FRCs throughout Australia. These centres are the cornerstone of the new family law system. They constitute the source of information for families at all stages, including people starting relationships, those wanting to make their relationships stronger, those having relationship difficulties and those affected when families separate. It also offers individual, group and joint sessions to help separating families make workable arrangements for their children without having to go to court.

The FRCs offer free mediation. They are funded by the Australian government and operate in accordance with guidelines set by the government. However, they are actually run by NGOs with experience in counseling and mediation, selected on tender basis, and staffed by professional counselors and mediators (Parkinson, 2009). Although run by different service providers in different localities, the FRCs have a common identity and badges, which are easily recognised by the public.

'Family Dispute Resolution' (FDR) is a new term, introduced with the 2006 reforms. The definition contained in section 10F of the Family Law Act 1975 is very broad and inclusive. The term is defined as

A process (other than a judicial process):

- (a) In which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) In which the practitioner is independent of all of the parties involved in the process

FDR practitioners constitute a varied group in terms of their professional training. Some of them work in FRCs. Training requirements for FRC staff are set out in the Family Relationship Services Program approval requirements (Fehlberg & Behrens, 2008). These include the provision that FRC staff must have an appropriate degree, diploma or other qualifications.

#### ***3.2 Singapore:***

The mediation movement in Singapore has developed since the mid 1990s. Since then, mediation has been extended and formalized as a sustainable dispute resolution process. It is not only used for private dispute settlement but it forms part of the formal administration of justice system in the country. According to Lawrence (2009), ad hoc arbitration and mediation have been used considerably for a long time. Nevertheless, formal recognition of the arbitral and mediation processes came to limelight in 1991 with the establishment of the Singapore International Arbitration Centre (SIAC). Later in 1992, SIAC initiated mediation training in cooperation with the American Arbitration Association. In a similar vein, the SMC was established by the Singapore Academy of Law in 1997 and work on a non-profit basis.

Family law litigation can be expensive, protracted and could exact a significant emotional toll on the parties involved. As a suitable and sustainable alternative to litigation, mediation is an effective and efficient way to help resolve these disputes, regardless of whether the parties have commenced litigation. The Singapore Mediation Centre (SMC) has developed a Family Law Mediation Pilot Project to help parties involved in matrimonial cases resolve such disputes amicably, and in a faster and cheaper manner. The aims of the SMC Family Law Mediation Pilot Project are: to encourage a constructive and conciliatory approach to the resolution of matrimonial disputes, to resolve matrimonial disputes in an effective and timely manner, to help maintain

long-term family relationships and reduce emotional turmoil for parties, and to ensure that costs are kept affordable for parties.

Mediation can assist couples who are going through divorce or separation resolve complicated issues. Such issues may include custody of children, spousal maintenance, division of family assets and other financial matters arising from the breakdown of the relationship. On 23 of December 2010, the Parliament of Singapore passed a law that makes mediation compulsory for parents who want to claim financial support from their children. The amendment to the Maintenance of Parents Act (MPA) 2010 had also granted powers to the commissioner who handles these claims an access to government records on the whereabouts of the income of the errant claims.

Both the claiming parents and children must seek conciliation first. If they fail to come to a mutual agreement, then they can proceed to the tribunal. Previously, mediation was on voluntary basis. Maintenance orders that are enforceable can be made at such session without the need for full tribunal hearing.

### **3.3 New Zealand:**

In New Zealand, the pilot mediation service operates in addition to the services being offered in the Family Court. These include counseling and judicial mediation conferences to assist parties in resolving their disputes. Judicial mediation conferences are available for parties who have filed applications for maintenance, separation, guardianship, custody (now termed 'day-to-day care' under the Care of Children Act 2004 which came into force on 1 July 2005), and access (now called 'contact'). Judicial mediation conferences usually take place once the parties have attended the counseling session if there are still outstanding issues. Mediation conferences are chaired by a Family Court judge. Parties may request a judge-led mediation, or the court can direct them to proceed for such mediation.

Family mediation comprises an initial pre-mediation process and it is followed by a mediation session. The pre-mediation procedure involves the mediator making at least one contact with each party, with the lawyer for child, and with any other person who is to attend the mediation by agreement, and a brief report to the Family Court. The mediation itself consists of one meeting, occasionally more than one, between the mediator, parties, lawyer for child (or children if agreed) and agreed third parties. At the end of the mediation proceedings, a report is submitted to the court.

Family mediation is available to parties involved in day-to-day care, contact and guardianship proceedings. Family mediation is designed as an inclusive model, in that children and extended family are involved, and by mutual agreement, parties are able to bring support people to the mediation. Provision is also made for cultural advisors and interpreters to attend the mediation, where appropriate. A lawyer for child is usually appointed in every case and parties could choose whether or not to have their own lawyers attend the mediation.

### **Conclusion:**

From the foregoing analysis, it is clear that the conciliation provisions in LRA 1976 are insufficient to effectively reconcile the estranged couples. Therefore, very few cases of reconciliation have been successful. It is therefore recommended that the administration of the conciliatory bodies should be removed from the National Registration Department, as their ordinary functions do not normally include such type of welfare activities. It is also suggested that Family Court should be set up in Malaysia as the whole system of counseling, and other welfare services should become part and parcel of the proposed Family Court institution.

In the context of family mediation, best practices from other jurisdictions should be considered and adapted to suit the specific needs of the Malaysian society. Successful family mediations in Australia, Singapore and New Zealand should be considered as models to establish and develop family mediation in the aspects of information dissemination, promotion, code of practice, training, qualification, standards, and interdisciplinary programmes.

In the Malaysian society, family ties are still very strong and as such when matrimonial disputes arise and marriages are on tender-hooks, parties often seek assistance from family members to save the marriage. When this fails, a lawyer will be consulted who would then advise the parties on the procedures, requirements and implications of divorce proceedings. For mediation to be successful as an alternative dispute resolution in family matters, efforts should be made to promote and create public awareness on the advantages of mediation.

## **REFERENCES**

Ashgar Ali Ali Mohamed, Tan Yeak Hui, 2007. Mediation of Labour and Matrimonial Disputes: The Constraints and Proposed Reforms. *Malayan Law Journal (MLJ)*, 3: cxlix.

Ashgar Ali Ali Mohamed, Tan Yeak Hui, 2010. Reconciliation of Family Disputes: The Constraints and Proposed Reforms. In M. Naqib and Ashgar Ali: *Mediation in Malaysia: The Law and Practice*, Lexis Nexis, p: 269.

- Australian Government, 2004. A New Approach to the Family Law System: Implementation of Reforms, Discussion Paper, Commonwealth of Australia, Canberra, p: 2
- Australian Government, Family Relationships online, [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au)
- Fehlberg, B. & Behrens, J.2008. Australian Family Law: The Contemporary Context, Oxford University Press Australia and New Zealand, p: 335
- Kamala M.G. Pillai, 2009. Family Law in Malaysia, LexisNexis, p: 453.
- Lawrence G.S. Boo, 2009. The Framework and Practice of ADR in Singapore, Singapore Arbitration
- Mimi Kamariah Majid, 1999. Family Law in Malaysia. Malayan Law Journal.
- Nora Abdul Hak, 2010. Mediation/Conciliation of Family Disputes Among Non-Muslims in the Civil Court. In M. Naqib and Ashgar Ali: Mediation in Malaysia: The Law and Practice, LexisNexis, p: 261.
- Patrick Parkinson, 2009. Australian Family Law in Context: Commentary and Materials, Fourth Edition, Thomson Reuters, p: 219.