

Property Division of Unmarried Cohabitants in Malaysia

(Pengagihan Harta Sepencarian Pasangan Tidak Berkahwin yang Bersekedudukan di Malaysia)

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ABSTRACT

There is no statutory framework to protect the property interests of unmarried cohabitants in Malaysia at the present time. Many couples engaged in unmarried cohabitation encounter issues relating to the division of property when a relationship breaks down, for example, because of separation or death. A cohabitant who has contributed to a lesser financial degree, but who has made significant non-financial contributions is often economically disadvantaged when the relationship ends. Whilst the Law Reform (Marriage and Divorce) Act 1976 applies to married couples in the division of matrimonial property that takes into account both financial and non-financial contributions, this statutory right is not extended to unmarried cohabitants. For cohabitants, the common law principles of resulting and constructive trusts apply. The courts adopt a "functional approach" in recognising the relationship and the manner of dividing the property. Even though case law recognises unmarried cohabitation and their rights to the division of property, a statutory recognition is essential to provide a clearer guideline that would encourage consistent judicial outcome. This would protect the interests of unmarried cohabitants in Malaysia.

Keywords: Cohabitation; relationship; contribution; property; trusts

ABSTRAK

Di Malaysia, pada masa kini tiada rang undang-undang yang diperuntukkan untuk melindungi hak tuntutan terhadap harta pasangan yang bersekedudukan tanpa nikah. Ramai pasangan yang menjalani kehidupan bersekedudukan tanpa nikah berhadapan dengan isu berkaitan pembahagian harta apabila hubungan mereka tamat; contohnya apabila berlaku perpisahan atau kematian. Selain itu, dalam hubungan ini, seorang pasangan yang hanya memberi sedikit sumbangan kewangan manakala memberi banyak sumbangan dalam bentuk bukan kewangan akan mengalami kerugian dari aspek ekonomi apabila hubungan mereka tamat. Akta Membaharui Undang-Undang (Pakahwinan dan Perceraian) 1976 diguna pakai untuk pasangan yang telah berkahwin dalam pembahagian harta sepencarian mereka dan kedua-dua sumbangan kewangan dan bukan kewangan diambil kira. Walaubagaimanapun, perlindungan dari segi perundangan tidak diperuntukkan kepada pasangan yang bersekedudukan tanpa nikah. Untuk pasangan yang bersekedudukan ini, prinsip "common law" seperti amanah konstruktif and amanah berbangkit diguna pakai. Mahkamah menerimapakai "pendekatan fungsian" untuk mengiktiraf hubungan pasangan bersekedudukan dan hak mereka terhadap pembahagian harta sepencarian. Walaupun begitu, pengiktirafan dari segi perundangan adalah penting dan akan memberi garis panduan yang lebih jelas. Hal ini turut menggalakkan keputusan mahkamah yang konsisten. Keseluruhannya, ini mampu melindungi hak pasangan bersekedudukan tanpa nikah.

Kata kunci: Bersekedudukan; hubungan; sumbangan; harta; amanah

INTRODUCTION

To begin with an overview of the Malaysian legal system, it is divided into Sharia and Civil jurisdictions.¹ The Sharia laws only apply over Muslims on (1) personal law matters (such as marriage and divorce), child custody, maintenance and matrimonial property divisions, and (2) Islamic criminal offences, for instance, unmarried sexual relationships, homosexuality, indecent dressing, and other Islamic criminal offences. Subsequently, the Sharia court only confers its powers over Muslims. The non-Muslims, on the other hand, are administered within the Civil law and courts. The Civil courts should

not extend their power over Muslims or matters that fall within the Sharia courts.

For the purposes of discussion within this paper, property could be divided into relationship property and separate property. The term 'relationship property' is used for the context of unmarried cohabitants rather than 'matrimonial property.' However, the aspects of matrimonial property are commonly discussed to describe the legal position of married couples to property matters. The Statutes in Malaysia are silent on the definition of 'matrimonial property' (harta sepencarian). Generally, the term 'matrimonial property' describes the property acquired during the subsistence of marriage.² In the case

of *Ching Seng Woah v Lim Shook Lin*,³ Shankar J refers ‘matrimonial property’ to:

“... the expressions refer to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.”

Referring to the above case, ‘matrimonial property’ is given a wide definition in the court of law. It clearly indicates that any property acquired by both or either spouse during the marriage is considered matrimonial property, in addition to the earning capacity of the each spouse. The spouses’ paid income out of employment is considered matrimonial property. Formerly, matrimonial property included houses and animals used to work the land, and recently it has developed to include moveable and immovable property, such as the household goods and furnishings, in line with the lifestyle and the purchasing power of society.⁴ It also incorporates joint bank accounts, compensation paid for land acquired by the Government,⁵ shares registered in the name of either spouse,⁶ and the business assets acquired during the subsistence of marriage.⁷ Discussion on separate property is not covered within this article.

MARRIED COUPLES’ POSITION ON THE DIVISION OF MATRIMONIAL PROPERTY

For the context of married couples, generally, both the Sharia and Civil courts implement wide discretionary powers to divide the matrimonial property in the divorce petition. “The main test applied by both courts in deciding rights and proportion for the divorced parties is the ‘contribution test,’ whereby if both parties contribute to the acquisition of the property, subsequently, each of the parties shall have rights over the property.”⁸ For example, if a couple to a Muslim or non-Muslim marriage have made financial contributions in the acquisition of the matrimonial home, by way of a half share each, in the event of a marriage breakdown, the court would probably divide the property in equal shares.⁹ In this matter, an equality of property division is apparent when both spouses to the marriage have made ‘financial contributions’ in the acquisition of the matrimonial property.

‘Financial contributions’ for the purposes of dividing the matrimonial property could be outlined as the contributions made by each party towards acquiring those assets, in the form of (1) money, (2) property, or (3) labour.¹⁰ The term ‘money’ implies the direct financial contribution in purchasing the matrimonial home. In the example above, if each party to a marriage contributes

50 per cent to the total amount of the house purchase price (matrimonial home), then both have clearly made direct financial contributions. Second, the term ‘property’ implies the income generated from any property belonging to either spouse, as in the form of rent, or proceeds out of the sale of the property, which is then used towards acquiring matrimonial assets. Third, ‘labour,’ includes the income from paid employment, which is then used to buy the matrimonial property. Hereafter, ‘financial contribution’ includes the contributions in the form of money, property and/or labour.

For the second example, there is also a circumstance when the parties to the marriage have both made financial contributions in the acquisition of the property, however they contribute in different amounts. For example one partner contributes 70 per cent of the purchase price of the matrimonial home, while the other spouse only contributes 30 per cent. In this situation, the court could still place equal importance on their monetary contributions, regardless of the differences in the amount contributed.¹¹ On that basis, the court could order equal rights over the matrimonial property, by way of an equal division for each spouse. Notwithstanding that, this matter is conditional upon the court’s wide discretionary order as such, or otherwise.¹² The Islamic Family Law (Federal Territories) Act 1984 (IFLFT 1984) mentions that the court has the power to make an order while having regard to the extent of contributions made by the party who did not acquire the assets, but contributed to the welfare of the family by looking after the home and caring for the family.¹³ In taking into account the welfare of looking after the family and home, the court may divide the assets or the proceeds of the sale in the proportions as the court thinks reasonable, but in any case, the party by whose efforts the assets were acquired, shall receive a greater proportion than the party who did not make any financial contribution. The term ‘greater’ is wide in context, and the court has all the power to determine and quantify how much of the property share is ‘greater’ and give orders for the party who made financial contribution in the acquisition of the matrimonial property.¹⁴

Based on the illustrations above, it can be viewed that both Sharia and Civil courts have wide discretionary power to order the division of matrimonial assets.¹⁵ The court could exercise its wide power to focus on (1) equal financial contribution by both spouses in the marriage and order equal division of property (the spouses contributing 50 per cent each, and thus the court orders 50 per cent of the matrimonial property) to both, or (2) the court accepts unequal monetary contribution, but orders an equal property division (one partner contributes 70 per cent and the other paying the balance 30 per cent, but the court orders 50 per cent of property division for each spouse).

The court’s extensive flexibility is supported by the broad provision in the applicable Acts.¹⁶ The related provisions in these Acts assure the court’s power to

consider the financial contributions of spouses within the marriage relationship. In this matter, the court shall take into account the extent of contributions made by each party (in the form of money, property and/or labour) towards acquiring the matrimonial property, and subject to those considerations, the court shall incline towards an equality of division.¹⁷ With respect to this matter, the court has an extensive power to determine (1) what could be accepted as ‘contributions,’ and (2) whether the courts’ orders reflect the principle of equality in the property divisions.

Besides that, in the event where the matrimonial property is acquired by the sole effort of one of the parties to the marriage relationship, an equality of division is not present.¹⁸ For example, the applicable Acts¹⁹ mention that the party who acquired the property by his or her sole effort shall receive a greater share in the division of the assets. Nonetheless, the spouse who does not contribute at all in the acquisition of the property could still receive a lesser share allocation out of the property, provided that this party has made some contribution to the welfare of the family, by taking care of the family and children (non-financial contributions). The provisions in the mentioned Acts generally state ‘greater share,’ and do not direct the court on how to determine which amount is greater and how to make an order which represents a ‘greater’ allocation.²⁰ With limited guidance, the courts’ orders vary.

On the other hand, for unmarried cohabitants (non-Muslims), the equitable principles of constructive trusts apply.²¹ The following section examines this further. The relationship property is divided between the parties in accordance with their financial contributions in the acquisition of the relationship property. The parties who do not make any financial contribution in the acquisition of the property, largely possess no legal rights to property entitlements.

PROPERTY DIVISION OF UNMARRIED COHABITANTS

DEFINITION OF UNMARRIED COHABITATION

Couples’ relationships are treated differently in every part of the world. Some countries only recognise the ‘status’ of couples, as in the married relationship, while several other countries recognise the ‘function’ performed by cohabitants in their relationship. Marriage is a state-endorsed form of status given to married couples, while cohabitation is merely recognised on the basis of function without any legal endorsement to the relationship. Therefore, cohabitants could be addressed as unmarried partners who live together as a couple, but not in a state recognised relationship. The ‘function’ for the context of this article is mostly to describe the performance of household duties and care and support of children,

property acquisition by both partners and their financial interdependence with each other, the existence of a sexual relationship, the duration and common residence of the partners and the commitment to a shared life. In Malaysia however, unmarried cohabitants are not legally recognised of their relationship. This article nevertheless argues that cohabitants function the same way as married couples, and subsequently should be recognised of their relationship and be given legal rights, specifically on the division of the ‘relationship property.’ ‘Relationship property’ for the purposes of this paper could be defined as the property acquired by both partners during the course of their cohabiting relationship.

Unmarried cohabitation in Malaysia can be divided into three categories; (1) cohabitation among the Muslims; (2) cohabitation among the non-Muslims; and (3) cohabitation among inter-religious couples (a Muslim with a non-Muslim).

COHABITATION AMONG MUSLIMS

Even before considering the rights to property, it should be noted that unmarried cohabitation is an Islamic criminal offence. Muslim couples rarely admit their act of living together because they could be found guilty and imposed with criminal sanctions. They could be punished with imprisonment, a fine and/or whip. The punishments are in accordance with the Islamic statutes that vary among the 13 states in Malaysia.

Under the Syariah Criminal Offences (Federal Territories) Act 1997, any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall be liable to a fine not exceeding five thousand ‘ringgit,’ imprisonment to a term not exceeding three years, whipping not exceeding six strokes or to any combination thereof.²² There are several cases in Malaysia involving cohabitation among Muslims, and the punishment ordered differs among the cases. In the case of *Pendakwa Syarie Negeri Sabah Iwn Rosli bin Abdul Japar*, the accused, Rosli bin Abdul Japar was charged with committing sexual conduct out of wedlock with Ms. Murni binti Muhammad, until the birth of their son, named Hasmawi bin. Abdullah. Therefore, Rosli was ordered to pay a fine of RM3,000.00, or six months imprisonment, if he failed to pay the fine.

The same punishments apply to women if they perform sexual intercourse with a man who is not their lawful husband.²³ In the appeal case of *Zainab binti Abdul Rahman Iwn Pendakwa Syarie Negeri Sembilan*, the appellant was found to cohabit with a Muslim man named Mustafa bin Abdul Aziz on 21 September 1993 at a house in the state of Negeri Sembilan, Malaysia. The appellant was found guilty and ordered to serve ten months imprisonment. On appeal the punishment was reduced to two months imprisonment along with a fine of RM2,000.00.

Besides that, the fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent while she is fully conscious is also considered an offence.²⁴

On the other hand, under section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997, ‘any man who is found together with one or more women, not being his wife;’ or any ‘woman who is found together with one or more men not being her husband,’ in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts (this includes sexual intercourse out of wedlock), they shall be guilty and shall on conviction be liable to a fine not exceeding three thousand ringgit, imprisonment for a term not exceeding two years, or both.²⁵

By factual observation, unmarried Muslim cohabitants wanting to claim their rights to relationship property will not typically bring the case to the Sharia court. This is because they could be found guilty of committing Islamic criminal offences. To avoid the criminal prosecution, they often evade taking legal action to the Sharia court. Besides that, article 121(1A) of the Federal Constitution clearly mentions the division between the Sharia and civil jurisdictions, and thus, any personal law concerning Muslims should be dealt with within the Sharia jurisdiction. With respect to their relationship property, though cohabitants do not fall under the ambit of Islamic matrimonial law within the Sharia system, they may elect for their property rights in the civil courts as two different individuals.²⁶ Muslim cohabitants are not seen as criminals in the civil court. Although precedents do not exist for such cases involving Muslim cohabitants in the civil courts, nevertheless, regarding the division of their relationship property, the equitable principle of constructive trusts could be applied. The parties may contest their rights over the property only to the extent of the monetary contribution in the acquisition of the property. They could bring the case to the civil court as two different individuals (and not as married couples or intimately involved unmarried cohabiting couple).²⁷

Unmarried Muslim cohabitants clearly have no legal rights to division of property in the event of a relationship breakdown, compared to married couples who are somewhat protected by the matrimonial laws applicable for Muslims, specifically under the Islamic Family Law (Federal Territories) Act 1984. As a consequence, unmarried cohabitants have no right or capacity to bring an action or to appear in court in the event of a relationship breakdown. Noteworthy of the crux of this matter, there is an absence of equality between the relationships, specifically between the marriage and unmarried cohabitation.

The following shall examine the position of non-Muslim cohabitants to relationship property.

COHABITATION AMONG THE NON-MUSLIMS

Foremost, unmarried cohabitation among Malaysian non-Muslims is not a criminal offence. However, the Malaysian courts do not treat unmarried cohabitants equally to married spouses. The Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) is not extended to unmarried cohabitants. Cases involving unmarried cohabitants are mostly dealt with by applying the principles of constructive and/or resulting trusts.

In the case of *Sivanes A/L Rajaratnam v Usha Rani A/P Subramaniam*,²⁸ (obiter dictum) the court mentioned that:

“In this country, the courts should not treat such a relationship in *Dennis v McDonald*²⁹ as a ‘matrimonial relationship.’ There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between.... The principle in *Dennis v McDonald* should not be applied to unmarried couples in Malaysia. The terms ‘matrimonial property,’ ‘matrimonial home,’ ‘conjugal rights,’ ‘matrimonial proceedings’ or ‘division of matrimonial assets’ are terms exclusively for lawfully married couples.”

To illustrate further the situation of non-Muslim cohabitants in Malaysia, the case of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*³⁰ is discussed. The plaintiff was the registered proprietress of a property, which was purchased by the defendant in the plaintiff’s name, in 1971. The plaintiff alleged that the property was a gift from the defendant because he had wanted her to be his mistress since he was then already married. The defendant paid the full purchase price of the property in 1972, and when his marriage broke down, he moved into the property to live there with the plaintiff and their infant daughter, Karen. The defendant alleged that the plaintiff and he were married under the Chinese rites in 1973, but the plaintiff denied this. The plaintiff and defendant ceased to live together from April 1975 and the plaintiff left the property. Thereafter, the plaintiff claimed vacant possession of the property, rent and costs and relied on the presumption of advancement. The defendant counterclaimed, filed on January 1993 for a declaration that the plaintiff held the property on a resulting trust for him and contended that it was never meant as a gift to her.

On the balance of probabilities, the judge held that the defendant had acquired the property with the intention of using it as a matrimonial home, in which both he and plaintiff had equal undivided shares rather than as an outright gift to the plaintiff. The evidence showed that at the time of registration of the property in the plaintiff’s name, it was the understanding of both parties that the property was to be a matrimonial home, in which both of them were to be equal co-owners.

Although the presumption of advancement arose because the defendant had provided the funds for the purchase of the property and had registered it in the

plaintiff's name, the defendant had succeeded in rebutting the presumption of advancement since, *inter alia*, at all material times he had dealt with the property as he wished with the acquiescence of the plaintiff.

Where an association similar to a matrimonial relationship breaks down and one party is excluded from the family home by the other, a tenant in common is not liable to pay an occupation rent merely by virtue of being the sole occupant, but the court may order the occupying party to pay an occupation rent to the excluded party if it is equitable. However, when a spouse, legal or de facto, who is a tenant in common or co-owner of a matrimonial home is in a position to enjoy his or her right to occupy but chooses not to do so voluntarily, then the other party who is in occupation is entitled to do so without paying an occupation rent. In this case, the plaintiff had left the property voluntarily and it would be highly inequitable to order the defendant to quit and/or pay an occupation rent unless and until their marriage was legally annulled.

The plaintiff was ordered to transfer half of an undivided share of the property to the defendant. In giving the order, the judge, accepted the following factors:

1. it was evidenced that at the time when the property was purchased, the defendant's marriage with his first wife was already on the rocks, and the latter was then about to leave to England with their children;
2. around that time, the plaintiff became so intimate with the defendant, shortly thereafter she became pregnant with the defendant's child;
3. the court believed that a marriage ceremony according to the Chinese rites was carried out (although the plaintiff denied this);
4. the plaintiff herself had admitted that her mother and she had treated the defendant as her husband; and
5. the more than ample documentary evidence in the agreed bundle that the plaintiff was variously addressed and known as Mrs Eugene Khoo, or Mrs Khoo, and had sent several birthday cards to the defendant signing off with expressions of endearment, such as 'from your dearest wife.' Such uncontroverted evidence would also lead the court to hold that at the time of registration of the transfer into her name, it was the understanding of both parties that the said property was to be a matrimonial home in which both of them were to be equal co-owners.

The judge stated that:

"where the relationship between the parties is close, eg., married couples or unmarried couples intending to be married, then in the event one of them acquires property in the name of the other and has acted to his or her detriment by making a significant contribution to the purchase price in cash or kind, a resulting or implied trust is presumed in his or her favour..."³¹

There are several matters to be highlighted in the above case. Among them is that the court considered the partners functions within the relationship. Firstly, the property was bought in 1971, the plaintiff and defendant

moved in together in 1972 and the relationship broke down in 1975. It was for the duration of three years that both the plaintiff and defendant have been living together in a common residence. Secondly, it was proved that the plaintiff and defendant were sexually intimate and as a result, there was a child born out of the relationship. Thirdly, the court believed that there was a customary marriage consummated by the couple, although the plaintiff denied this matter. Fourthly, the defendant claimed that the property was purchased for the purpose of a matrimonial property, and not a gift as claimed by the plaintiff. The reputation and public aspect of the relationship was taken into consideration. For example, the plaintiff's mother has treated the defendant as the plaintiff's husband. Besides that, there was documentary evidence that the plaintiff was variously addressed and known as Mrs Eugene Khoo, or Mrs Khoo, and had sent several birthday cards to the defendant signing off with expressions of endearment, such as 'from your dearest wife.' The court had considered these functions and accepted that the property contested was matrimonial property, and thus both parties had equal rights over the property. The court treated this couple as similar to married couples. Even though this matter was not literally stated in the judgment of the court, nor the court applied the provisions embedded within the LRA 1976, the judge inferred the parties' common intention to share the beneficial ownership of the property. Subsequently, the property was accepted for the purpose of a matrimonial home. To reiterate, although the LRA 1976 was not extended to this couple (in the absence of marriage), the court nonetheless decided that the property should be equally divided between the parties, based on the principles of constructive trusts.

The Court's decision to grant equal division of the matrimonial property demonstrates the similarity of decision if the couple were married. This decision would have been comparable if the LRA 1976 was applied.³² Within the LRA 1976, it is stated that the court shall have the power to order the division of assets between the parties, for the properties that were acquired by the spouses' joint efforts. With respect to this matter, the court shall have regard to the extent of contributions made by each party in money, property or work towards acquiring those assets, any debts owing by each party that were contracted for their joint benefit and the need of the minor children, and subject to those considerations, the court shall incline towards an equality of property division. In a circumstance where the property was acquired by the sole effort of one of the parties to the marriage, the court shall have regard to the extent of contributions made by each party to the welfare of the family, by looking after the home or caring for the family. However, in any case, the party by whom the property was solely acquired shall receive a greater property share. Besides the legislation, based on the case law for married non-Muslim couples, it is apparent that when the property was acquired by the

sole effort of one of the parties to the marriage, that party receives a greater share out of the property.³³ However, there is also a case whereby, without the monetary contribution the court granted equal rights over the matrimonial property.³⁴ This is due to the consideration given to the contribution in the form of taking care of the family and children. Apart from that, the title of the property, which is commonly shared by both spouses, is also given importance. The name on the title of the property signifies the intention of the couple to acquire, possess and/or share the property.³⁵

In *Loo Cheng Suan Sabrina*,³⁶ the property was acquired by the sole effort of the defendant. However the title to the property was in the plaintiff's name. If this couple in the current case had been married, the provision contained in the LRA 1976 would be applicable. In considering (1) the financial contribution of the defendant in acquiring the property, (2) the needs of the child, (3) the name on the title of the property, (4) the (non-monetary) contributions of the plaintiff, by way of home making and taking care of the child, the court would probably order an equal division of the asset. Notwithstanding that, the LRA 1976 was not extended to this couple because of the absence of a legally recognised marriage. Therefore, the court applied the common law principles of constructive trusts. The court gave extensive consideration to the couples' functions and contributions to the property and relationship. Subsequently, the court granted an equal share for both partners. This matter illustrates the court's decision in treating cohabitants as similar to married couples, for the legal purpose of relationship property division.

The Malaysian Court of Appeal in *Heng Gek Kiau v Goh Koon Suan*,³⁷ overruled the High Court and extended the presumption of advancement from a man to his mistress on the ground that 'principles of equity are not etched in stone tablets, inflexible and impervious to the passage of time and modernity.'³⁸ Goh owned a construction and realty company, hardware shop, factory and jewellery shop in Singapore and met Heng when she was an Indonesian illegal immigrant. He bought a house for RM61,1000 under Heng's name in the state of Johor, Malaysia, so that he could meet her there in intimacy. He also misled her into believing that he was single. Several years later when the relationship took a wrong turn, she claimed that the house was a gift to her; he counterclaimed that he was the beneficial owner under a resulting trust.

This was a case of the appellant who lived for 20 years with the respondent (Goh) and had a son by him. He bought a house in her name, which he then claimed belonged to him, and never intended it as a gift to her. Abdul Malik Ishak J in the High Court held that "there was unshaken evidence in the absence of any inherent improbability that he had provided the full purchase price for the property, registered it under her name and that she held it on trust for him."

On appeal, Gopal Sri Ram J said that the High Court adopted the wrong approach, and he reversed the High Court decision, basing his judgment on two grounds. He held that 'there was clearly a want of judicial appreciation of the evidence by the trial court thereby warranting appellate intervention.' The trial judge had failed to appreciate the salient facts that were indicative of a donative intention on the part of the man, thus rebutting the presumption of a resulting trust in his favour. The second ground for allowing the appeal was by extending the presumption of advancement from a man to his mistress. He also quoted;

"[Y]ou squeezed her like a lemon and later cast her aside like an old shoe. Surely, you cannot use her like that and later claim she has no right... the court would not allow such injustice to go unnoticed, not in this court.... As mistress to Goh, Heng was entitled to the property... the principles of equity are not cast in stone and they change according to circumstances of a contemporary society ... and that women in Heng's position would have no rights if the law remained static... It was inappropriate to treat women as chattel as it was in a case in England in 1858³⁹ where women had no right to own property or rights in society and the court ruled that there was no presumption of advancement in favour of mistress ... but it would be retrogressive step if the court applied similar principle..."⁴⁰

The Court of Appeal's judgment can be rationalised as an instrument of social engineering to provide an element of relief to mistresses given the increasing rate of cohabitation in modern society,⁴¹ and it ruled as a landmark case that mistresses have rights in equity. Although the term 'mistress' was used in this case, the principles developed in the judge's response to cohabitation are beneficial to address the movement to recognise cohabiting relationships within the Malaysian civil court.

In contrast to the above-mentioned cases,⁴² the case of *Liew Choy Hung v Fork Kian Seng*⁴³ is an example illustrating a situation whereby cohabitants were treated as two different individuals in the context of acquiring rights to relationship property. The court found ways using devices such as constructive trust to divide the property of cohabitants.⁴⁴ In this case, it fell on the court to decide on the proportions of the beneficial interests of a man and woman in the ownership of the house, which they had acquired in their joint names. Neither were married to each other but had lived together as cohabitants. The plaintiff and the defendant bought a house jointly with the aid of a housing loan for which both were liable for repayment. The plaintiff and defendant were registered as joint proprietors. The plaintiff later repaid the balance of the outstanding loan to the bank. However, there was no agreement or any transfer document indicating their beneficial interest towards the property.

Later, the relationship of the parties broke down. The plaintiff claimed that she was entitled to the property as she had substantially paid for it. The defendant, on the

other hand, claimed that he had bought the plaintiff's share of the property, but he could not prove it. He was then prepared to accept a share of the property representing his contribution towards its purchase. The court had to decide on the issue of the proportions of beneficial interests to both parties. It was held that the defendant should transfer his share to the plaintiff for RM34,000 and declare that the plaintiff is entitled to the whole of the beneficial interests in the property. The court mentioned:

1. If two persons purchased property in their joint names and there was no declaration of trusts on which they were to hold the property, they held the property on a resulting trust for each other, proportionate to their contributions to the purchase price.
2. On the facts, the contributions towards the purchase price meant that the parties are presumed by operation of law to hold the property in this proportion – the plaintiff a 91.5 per cent share and the defendant a 8.5 per cent share in the property. Both parties had agreed for the plaintiff to take over the defendant's 8.5 per cent share of the property for RM34,000.

In this case, the parties did not attempt to prove their relationship (whether similar to marriage), or their functionality within the relationship. They represented themselves as two different individuals, and the court viewed the relationship in the same way. The matter before the court was only to quantify the proportions of the beneficial interest that both parties acquired in the property, which they purchased in their joint names, and contributed to the purchase price differently. This scenario differs to the previous case of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*,⁴⁵ whereby the court was directed to look at the relationship of the couple, whether they perform the same function as married couples, or at least whether they quantify their rights to the property as married spouses.

Since the Malaysian legislation does not commonly recognise the rights of cohabitants towards relationship property, the case of *Liew Choy Hung v Fork Kian Seng*⁴⁶ was considered as between two different individuals (not married or intimately involved unmarried couple) who have jointly purchased a property. The court only took into account the parties' individual monetary contribution to the purchase of the property. The party who financially contributed more than the other party received a greater share. When the property is purchased in the couple's joint names and there is no declaration of trusts on whom to hold the property, it should be based on a constructive trust. The property was divided in accordance with the proportion of their contributions to the purchase price. To reiterate, the party who made more financial contributions in the acquisition of the property received a greater share than the other party who made less of a financial contribution. The plaintiff in this case who clearly contributed more to the purchase price had greater entitlement to the property.

The first case highlighted above, *Loo Cheng Suan Sabrina v Khoo Oon Jun Eugene*,⁴⁷ is between unmarried cohabitants who were functionally the same as married couples and the court divided the relationship property equally among them. The instant case did not concern the partners' functionality within the relationship and the court treated the couple as two different individuals. The property was divided in accordance with the monetary contribution in the acquisition of the property. The following case observes a different scenario, whereby one of the partners to the relationship bought a property during the cohabitation period, and eventually the couple got married in the course of the relationship. The court treated the couple on an equal basis. This could be for the reason that the couple eventually got married. However, if at all the marriage was not consummated, it is questionable whether the court would have reached a similar decision.

In the case of *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt*,⁴⁸ the petitioner Wong Kim Foong (F) was lawfully married to the respondent, Teau Ah Kau, in April 1979. Before their marriage, like most modern Chinese couples, they cohabited. They cohabited at 'the Tasek house' that was purchased in June 1977 in their joint names for RM58,500.00. The house was bought during the cohabitation period. In the petition, the wife described that both she and her husband had contributed RM8000.00 each (both contributed the same amount). The balance was paid from a bank loan. The house was later sold in November 1993, but the petitioner testified that she did not get a percentage out of the proceeds of the sale for the amount of RM230,000.00. Later, in October 1991, they jointly purchased another house, 'the Johor house.' They were married at this time. In the divorce petition, the court held that the wife should receive equal shares of both houses.

It was argued by the respondent that the proceeds of the sale of these two properties should be distributed according to the ratio of the monetary contributions of both parties. Since both the petitioner and the respondent operated separate bank accounts, each having their own earnings and each paying income tax separately, then they must have intended that the 'Tasek' and 'Johor Jaya' houses be distributed proportionately to their contributions therein.

Abdul Malik Ishak J highlighted the best approach to consider the division of the 'Tasek' and 'Johor Jaya' houses. Firstly, to ascertain whether these houses were acquired during the marriage, and secondly, whether these two houses were acquired by the joint efforts of the parties to the marriage, or by the sole effort of one of the parties. Having found these facts, the third step would be to turn to the considerations laid down in section 76 (2)⁴⁹ or 76 (4)⁵⁰ of the LRA 1976. In summary, the courts must incline and be responsive to the concept of equality of division. The court applied LRA 1976 because the plaintiff and defendant did not merely separate as unmarried

cohabitants, but eventually got married. Clearly LRA 1976 applies to married non-Muslim couples and not extended for unmarried cohabitants.

The Judge stipulated that although the 'Tasek' house was acquired before the marriage (during cohabitation), while the 'Johor Jaya' house was acquired after the marriage, both spouses had made financial contribution to these two houses. The petitioner testified that, "for the past 16 years of the relationship duration, she performed dutifully the household duties." "She did marketing, cooking, taking care of their son and almost everything else in the 'Johor Jaya' house." The Judge found the wife's role of paying for marketing and household expenses and over the years of contributions is substantial to the case. Her non-financial contribution to the family was taken into consideration.

The court viewed the case as a dispute between husband and wife and the court must lean in favour of equality of division. In short, the petitioner's contribution to the welfare of the family is also relevant in determining the division of the property, and that the two houses were in both their joint names. "Therefore, it would be best that these properties should be divided in equal shares between the parties."

Thus, in *Wong*,⁵¹ despite the fact that the house was bought during the cohabitation period of the parties, the court decided that it should be divided equally, since (1) the house was in their joint names on the title, and (2) they were functionally the same as if they were married, at the time of purchasing the 'Tasek' house. The petitioner was ordered an equal share because both eventually got married and legally considered as husband and wife. The court considered the wife's financial and non-financial contribution to the family. However, if at all both were not married in this case, the judgment would have been different.⁵² If the couple merely cohabited, the non-financial contribution of the wife is not recognised. The property will then be divided only in accordance to their financial contribution in the acquisition of the matrimonial property. This matter is apparent from the third case law discussed above, *Liew Choy Hung v Fork Kian Seng*.⁵³

Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit,⁵⁴ illustrates a new case law whereby the court accepted a couple's relationship as equivalent to a marital union. Their functionality within the relationship was taken into consideration;

1. The parties displayed a common intention to live together in which they have cohabited for a period of 29 years and there were arrangements of financial affairs;
2. The court held that there was a common law marriage between the defendant and the deceased, given the fact that they cohabited for a considerable length of time accompanied by the repute and presumption of marriage;

3. They cohabited, holding themselves out as husband and wife;
4. They started a family with the birth of their daughter, Isabelle;
5. The deceased opened and maintained joint accounts, and;
6. The deceased, took out insurance policies naming the defendant and Isabelle as beneficiaries.

Although this case involves a situation that challenges the status of a relationship, the court showed an acceptance to the couple's relationship as a common law marriage; given the fact that they cohabited for a considerable length of time accompanied by repute and the presumption of marriage.⁵⁵

By comparing unmarried cohabitants to married couples, the former undergo ambiguities in the laws applicable to them, specifically the application of the principle of constructive trusts (the difference between the cases discussed above). Married couples on the other hand possess clearly specified matrimonial rights under the statutory law. These rights are guaranteed under the Law Reform Act 1976, for non-Muslim married couples and Islamic Family Law (Federal Territories) Act 1984 for married Muslims.⁵⁶

The distinction in the legal arena treating married couples and cohabiting partners differently is based on the general principle to recognise and value the status of marriage. Although cohabitants are functionally the same as married couples, nevertheless, the Malaysian law does not provide a specific statutory acknowledgement to partners within this relationship. Cohabitants in Malaysia are therefore not treated equal to married couples, and thus, being denied their basic rights to relationship property.

COHABITATION AMONG INTER-RELIGIOUS COUPLES (INVOLVING A MUSLIM AND A NON-MUSLIM)

Malaysian law does not permit the registration of inter-religious marriage between a Muslim and a non-Muslim.⁵⁷ This situation affects partners where one is a Muslim and the other is a non-Muslim. To reiterate, the Sharia laws govern Muslims, while marriage and other family matters for the non-Muslims are governed by the civil laws, exclusively under the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976). There are no legal provisions under either the Sharia law or civil law for inter-faith partners to consummate marriage. Under the Sharia principles, marriages can only be consummated for partners who are Muslims, while the LRA 1976 specifies that marriages valid under the Act are only for non-Muslims, and the Act does not apply for Muslims.⁵⁸ Under the Islamic Family Law (Federal Territories) Act 1984, "no man shall marry a non-Muslim and/or no woman shall marry a non-Muslim."⁵⁹ A marriage that is in contravention of this Act shall not be registrable under the Act.⁶⁰

Without specific laws or regulation to formalise and validate the inter-religious marriage, partners of different faiths (involving a Muslim and non-Muslim) are not able to legalise their relationship. Therefore, with limited choice, these couples would cohabit without being married. From factual observation, some inter-religious couples elect to customarily marry and cohabit without conferring any legal rights to their relationship (or the non-Muslim partner converts to Islam in order to marry the Muslim partner, and it is not common for the vice-versa, as a Muslim is not allowed to apostate out from his or her religion to marry a non-Muslim partner.⁶¹

Article 121(1A) of the Federal Constitution mentions that the Sharia court only has the jurisdiction over Muslims and personal law of Muslims, while the civil court applies to non-Muslims. In the circumstance where the couple are from the two different jurisdictions engaged in one relationship, there is no law to recognise the relationship. The only available provision for inter-religious couples is within section 51 of the LRA 1976, which provides certain rights for the non-Muslim spouse against the converted spouse who would then be overlooked by the Sharia jurisdiction.⁶² Apart from this section, there is no other availability within the statutory law for inter-religious couples to unite in a legally recognised relationship. Consequently, inter-faith partners would not be able to legalise their relationship, and thus, would most probably remain as unmarried cohabitants without bestowing any legal rights. For the context of relationship property, they could apply for the division of property within the civil court, and perhaps the couple would be treated as two different individuals. Therefore, the property would most likely be divided in accordance with the couple's financial contributions towards the property.

Notwithstanding that, for inter-religious couples who are both non-Muslims, for example, one of them could be Christian, while the other partner may be practising Buddhism; they are protected by the LRA 1976, which applies to non-Muslims. LRA 1976 applies to almost all non-Muslims, irrespective of their distinctive religion. Hence, the couple that falls under this category could commence marriage and the LRA 1976 would apply.

CONCLUSION AND RECOMMENDATION

There are clear differences within the laws applicable for unmarried Muslims, unmarried non-Muslims and cohabitants who are inter-religious, specifically, when one of the partners is a Muslim whilst the other is a non-Muslim. With respect to the first category, cohabitation among Muslims is considered a criminal offence in the Sharia court, and thus, deprived of any legal redress to matrimonial property claims. A legal precedent is yet to be seen in the Sharia court in matters concerning unmarried cohabitants claiming their rights to relationship property. This paper does not intend to discuss the decriminalisation

of Muslims who commit unmarried cohabitation. This article discusses the legal position and consequences of Muslims from a general viewpoint should they engage in unmarried cohabiting relationships.

In contrast, unmarried cohabitation is not a criminal offence for the non-Muslims. However, there is no specific legislation to recognise or govern the matter arising out of this relationship, particularly concerning the division of relationship property. The civil courts apply the principle of constructive trusts. The parties who have contributed to the purchase price, mostly have undisputable legal rights over the property contested. The party who has not made any monetary contribution does not have a quorum in demanding property division. Although the court recognises the functionality of cohabitants within the relationship, hence, accept the relationship; the party by whose sole effort the property was acquired receives a greater share than the party who has not made any financial contribution. This principle is similar to the position of married couples, whereby, those spouses who have made more of a financial contribution in the acquisition of the matrimonial property receives a greater share than the other party who merely contributes in taking care of the home and children (non-monetary contributions).

If the cohabiting partners could prove their functionality towards the relationship, the court would acknowledge that matter and order equal property division. If the functionality is not proven, the cohabiting partners would be treated as two different individuals and the court decides in accordance of the beneficial interest that the parties acquire in the property. This matter is contrary to married couples, whereby, without any financial contributions, married spouses could still be able to receive a share, of at least one-third or one-quarter in the matrimonial property (depending on the court's discretion). Subsequently, it is well defined that the principle of equality is absent between these relationships; married and unmarried cohabitants in Malaysia. The former are somewhat protected, although not necessarily achieving equal division, and the latter continue to struggle without a clear guideline, due to the court's wide discretionary power and the absence of a statutory legislation.

For the inter-religious cohabitants, it is a criminal offence to cohabit, especially when one of the partners to the relationship is a Muslim. However, they could apply for an order for relationship property division in the civil court, as two different individuals, hence the court would decide the division of the property on the basis of each of the partners' financial contribution in the attainment of the property.

This paper focuses and suggests the following recommendations for the context of non-Muslims within the civil jurisdiction and does not suggest for Islamic law and/or de-criminalisation of those offences involving unmarried Muslim cohabitants.

First and foremost, statutory interventions within the LRA 1976 to recognise unmarried cohabitants is possible. The Act could be amended to define cohabitants and set the principles to guide the court in assessing the couple's functionality within the relationship. Further, the judges could adopt an open and pro-active approach to recognise cohabitants and their functionality within the relationship akin to marriage, and the importance of equal property division for the property acquired together during the course of the relationship. Although the courts are beginning to recognise the rights of unmarried cohabitants, rights stipulated within the legislation would encourage a legal recognition of the relationship and provide for clearer guidelines to the court to assess those relationships. The purpose of a legislative recognition would acknowledge cohabiting relationships as equal to married relationships with respect to the distribution of relationship property. This would mean that upon a relationship breakdown, the cohabiting partners would be allocated their share of the property as similar to the statutory provisions that apply to married couples. Subsequently, consistent judicial outcomes could be foreseen for both married couples and unmarried cohabiting partners.

NOTES

- ¹ Article 121 (1A), Federal Constitution.
- ² In the old case of *Hujah Lijah binti Jamal v Fatimah binti Mad Diah* [1950] MLJ 63, Briggs J. defined matrimonial property as the property acquired during the subsistence of marriage by husband and wife out of their resources or by their joint efforts. The acquisition may be extended to cover enhancement of value by reason of cultivation or development; In *Yang Chik Abdul Jamal* [1985] 6 JH. 146, the learned Kadhi mentioned that matrimonial property is the property acquired during the marriage with both husband and wife contributing by their joint efforts or money to acquire the property; s 76(2) Law Reform (Marriage and Divorce) Act 1976; the courts in Malaysia are inclined towards equality of division when ordering the division of matrimonial property in the event of marriage breakdown; On the other hand, separate property acquired before the marriage is usually kept separate and the other spouse has no entitlement to the separate property. Section 76(2); the assets owned before the marriage by one of the parties, which has been substantially improved during the marriage by the other party or by their joint efforts is considered 'matrimonial property.'
- ³ *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109.
- ⁴ Mimi Kamariah *Family Law in Malaysia* (Malayan Law Journal Kuala Lumpur 1996), p. 366.
- ⁵ *Rokiah bte Haji Abdul Jalil v Mohammad Idris bin Shamsuddin* [1989] 3 MLJ ix; *Kamariah v Mansur* (1986) 6 JH 301.
- ⁶ *Noor Jahan bt. Abdul Wahab v Md Yusuff bin Amanshah* [1994] 1 MLJ 156.
- ⁷ *Tengku Anum Zaharah v Dato' Dr. Hussein* [1980] 3 JH 12.
- ⁸ Zuhairah Ariff Abd Ghada and Norlia Ibrahim *Business Assets as Matrimonial Property: Implication for Family Policy* (ed) Zuhairah Ariff Abd Ghada and Norlia Ibrahim Contemporary Issues on Matrimonial Property (International Islamic University Malaysia (IIUM) Press 2011), p. 141.
- ⁹ *Noraini binti Mokhtar lwn Abd Halim bin Samat*, Jilid 18, Jurnal Hukum 2004.
- ¹⁰ Extracted from s 76(1), Law Reform (Marriage and Divorce) Act LRA 1976 and s 58(1) Islamic Family Law (Federal Territories) Act 1984.
- ¹¹ *Lim Chee Beng v Christopher Lee Joo Peng* [1997] 4 MLJ; In this case, although the husband purchased the property, the wife has spent substantial amount on quit rents, legal fees, fixtures and improvements in the house.
- ¹² For example, in the case of *Sidek bin Haji Awang lwn Halimah binti Musa*, (Jilid 12, Bahagian II, No. Artikel 9 1989); the appellant was not satisfied with the Sharia court order that only granted her a ¼ share out of the land claimed for, while the respondent received ¾ share. Upon appeal, the Sharia Appeal court ordered the appellant a ½ and the respondent husband, the balance ½. This is in comparison to the case of *Sabaria binti Md Tan lwn Busu bin Md Tan*, *Jurnal Hukum*, 2009; whereby the court in this case decided ½ and ½ division. The differences in the courts' decision might have been due to the Act that does not specify the exact quantification to divide the shares of the matrimonial property.
- ¹³ S 58 Islamic Family Law (Federal Territories) Act 1984 (IFLFT 1984).
- ¹⁴ Buanis Karuppiah, "Matrimonial Property Division of Married Couples in Malaysia," [2015] 5 CLJ (A) xxvii.
- ¹⁵ Buanis Karuppiah, "Matrimonial Property Division of Married Couples in Malaysia," [2015] 5 CLJ (A) xxvii; the author provided in-depth examination of case law relating to matrimonial property division in Malaysia.
- ¹⁶ For the Muslim married couples in the Federal Territories, the Islamic Family Law (Federal Territories) Act 1984 applies, while the Law Reform (Marriage and Divorce) Act 1976 applies to the non-Muslim married couples.
- ¹⁷ S 76(2) Law Reform (Marriage and Divorce) Act 1976 and s 58(2) Islamic Family Law (Federal Territories) Act 1984.
- ¹⁸ Ss 76(3) and (4) Law Reform (Marriage and Divorce) Act 1976 and ss 58(3) and (4) the Islamic Family Law (Federal Territories) Act 1984.
- ¹⁹ Ss 76(3) and (4) Law Reform (Marriage and Divorce) Act 1976 and ss 58(3) and (4) the Islamic Family Law (Federal Territories) Act 1984.
- ²⁰ A similar problem arises in the event to divide the business, which is owned, by both or one of the parties. This is because the parties' interest in business is not direct; and could be subject to the type of business structure and nature of interest in the property. Both the parties to the marriage could contribute differently to the business, and the contribution test in this instance needs further examination.
- ²¹ Buanis Karuppiah, "Should Unmarried Cohabitants in Malaysia be entitled to the Same Legal Protection as Married Couples when it comes to the Division of Property? A Comparative and Theoretical Analysis," a Thesis submitted for the degree of Doctor of Philosophy at University of Otago, March 2015.
- ²² S 23(1) Syariah Criminal Offences (Federal Territories) Act 1997.
- ²³ S 23(2) Syariah Criminal Offences (Federal Territories) Act 1997.
- ²⁴ S 23(3) Syariah Criminal Offences (Federal Territories) Act 1997; It is considered as an offence under s 25(2) Syariah Criminal Offences (Federal Territories) Act 1997 and on conviction, shall be liable to a fine not exceeding five thousand ringgit, to imprisonment for a term not exceeding three years, to whipping or to any combination.
- ²⁵ In the case of *Pendakwa Syarie lwn. Mahadi dan Noriah*, both the accused, Mahadi and Noriah were found to be kissing at their home, in the state of Pahang, at around midday on 11 April 1995. Since they were not married, under sections 145 (1) and (2) of the 'Enakmen Pentadbiran Ugama Islam dan Adat Resam Melayu,' Pahang, 'No. 8/82 Pindaan 1987,' they were found guilty of the offence of close proximity. However, there was no proof or witnesses, and therefore the accused were freed.
- ²⁶ The couple could not contest their rights as married couples because the matrimonial laws and rights of Muslims fall under the Sharia court. The civil court has no power to interfere in the matrimonial rights of Muslim couples.

- ²⁷ The matrimonial matters of Muslims can only be heard by the Sharia court; Article 121 (1A) Federal Constitution.
- ²⁸ *Sivanes A/L Rajaratnam v Usha Rani A/P Subramaniam* [2002] 3 MLJ 273.
- ²⁹ *Dennis v McDonald* [1981] 2 All ER 632.
- ³⁰ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.
- ³¹ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115, p. 33.
- ³² Law Reform (Marriage & Divorce) Act 1976 (LRA 1976), ss 76 (1), (2), (3), (4).
- ³³ *Ng Bee Lee v Liew Kam Cheong* [2010] 6 MLJ 858.
- ³⁴ *Murli a/l Naraindas v Sajni Bai a/p Bulchand* [2012] 9 MLJ 10.
- ³⁵ *Murli a/l Naraindas v Sajni Bai a/p Bulchand* [2012] 9 MLJ 10.
- ³⁶ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.
- ³⁷ *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626.
- ³⁸ Mohsin Hingun “Expanding the Boundaries of the Presumption of Advancement in Favour of Mistresses: A Step Too Far” [2010] 4 MLJ xviii; [2010] 4 MLJA 68.
- ³⁹ *Soar v Foster 4 Kay and Johnson* 152 70 ER 64.
- ⁴⁰ Mistress has right to property, court rules, theSundaily, 15 June 2007, <http://www.thesundaily.my/node/170048> (emphasis added).
- ⁴¹ Mohsin Hingun “Expanding the Boundaries of the Presumption of Advancement in Favour of Mistresses: A Step Too Far” [2010] 4 MLJ xviii; [2010] 4 MLJA 68 at 3.
- ⁴² *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 and *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626.
- ⁴³ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.
- ⁴⁴ Buvanish Karupiah, “Should Unmarried Cohabitants in Malaysia be entitled to the Same Legal Protection as Married Couples when it comes to the Division of Property? A Comparative and Theoretical Analysis,” a Thesis submitted for the degree of Doctor of Philosophy at University of Otago, March 2015.
- ⁴⁵ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.
- ⁴⁶ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.
- ⁴⁷ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.
- ⁴⁸ *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359.
- ⁴⁹ The court shall have the power to order the division between the parties of any assets acquired by them during the marriage by their joint efforts. The court in this matter shall have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets, any debts owing by either party which were contracted for their joint benefit, the needs of the minor children of the marriage (if any).
- ⁵⁰ The court shall have the power to order the division between the parties of any assets acquired by the sole effort of one of the parties to the marriage. In this matter, the court shall have regard to the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family, and/or the needs of the minor children of the marriage (if any).
- ⁵¹ *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359.
- ⁵² As Abdul Malik Ishak J referred to Lord Denning MR in *Ulrich v Ulrich* [1968] 1 All ER 67 at 69; “... in the first place, I think money contributed by a man and woman before marriage, with a view to setting up a matrimonial home, are in the same position as moneys contributed by them after marriage. They are contributed to the purchase of property, which is intended to be a family asset. When the marriage takes place, it might be very different if there was no marriage at all. If the marriage never took place, the whole thing might have to be cancelled. There would probably in those circumstances be a resulting trust in the proportions in which they contributed. When the marriage takes place as contemplated, however, I am satisfied that the moneys stand in the same position as moneys contributed after the marriage...”
- ⁵³ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.
- ⁵⁴ *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82.
- ⁵⁵ *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82, p. 31.
- ⁵⁶ Without any financial contribution in the acquisition of matrimonial property, married couples could still be able to obtain a one-third share. Cohabitants on the other hand, would not be able to prove their beneficial interest within the property. The cohabiting partner who merely contributes none on the financial perspective, however, contributed in the welfare of taking care of the home and family, would probably be denied his or her right to the relationship property.
- ⁵⁷ Mitsunari Ayumi, *Translation, History and Arts New Horizons in Asian Interdisciplinary Humanities Research*, eds by Meng JI and UKAI Atsuko, Cambridge Scholars Publishing, 2013, p. 143.
- ⁵⁸ Law Reform (Marriage and Divorce) Act 1976, s 3(3): This Act shall not apply to a Muslim or any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act.
- ⁵⁹ Section 10 Islamic Family Law (Federal Territories) Act 1984.
- ⁶⁰ Section 12 Islamic Family Law (Federal Territories) Act 1984.
- ⁶¹ The offence of apostasy generally falls under the offence that relates to ‘insulting, or bringing into contempt, etc., the religion of Islam: Section 7 Syariah Criminal Offences (Federal Territories) Act 1997. Recently, the state of Kelantan proposed a ‘hudud’ (crimes against God) bill that will allow the state to execute anyone accused of Apostasy: Mary Chastain “Malaysia State Proposes Bill Issuing Death Penalty for ‘Apostasy’” *Breitbart New Network* (20 March 2015), <<http://www.breitbart.com/national-security/2015/03/20/Malaysia-state-proposes-bill-issuing-death-penalty-for-apostasy/>>.
- ⁶² S 51(1) Law Reform (Marriage and Divorce) Act 1976, where one party converted to Islam, the other party who has not so converted may petition for divorce, provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion; s 51(2): the court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

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