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AJS v. JMH & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
MOHD ZAWAWI SALLEH FCJ
NALLINI PATHMANATHAN FCJ
B [CIVIL APPEAL NOS: 02(i)-77-11-2020(W) & 02(i)-82-12-2020(W)]
1 DECEMBER 2021
[2021] CLJ JT(17)

Abstract – *Given the clear wordings of s. 3(3) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') and the plain meaning of word 'or', the LRA is not applicable to a Muslim. The LRA does not merely govern monogamous marriages registered under the LRA, but more than that, it is a personal law for non-Muslims. Muslims have a different set of personal laws. If one is to read s. 3(3) only in respect of marriage and divorce, without regard to art. 121(1A) of the Federal Constitution read with art. 8(5)(a) of the same, the clear demarcation between the personal laws of Muslims and non-Muslims in Malaysia will be in a state of disarray.*

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E ***FAMILY LAW:*** *Marriage – Judicial separation – Petition – Wife filed petition for judicial separation against husband following allegation of adulterous relationship – Alleged adulteress Muslim – Wife named alleged adulteress as co-respondent – Whether Law Reform (Marriage and Divorce) Act 1976 ('LRA') applies to Muslims – Whether s. 3(3) of LRA precludes non-Muslim petitioner from*
F *citing Muslim as co-respondent on allegation of adultery, to petition for judicial separation – Whether court, when interpreting s. 3(3) of LRA, should have regard to presumption that Parliament does not intend to legislate in violation of arts. 5(1) and 8(1) of Federal Constitution*

FAMILY LAW: *Marriage – Judicial separation – Petition – Claim for damages – Wife*
G *filed petition for judicial separation against husband following allegation of adulterous relationship – Alleged adulteress Muslim – Wife named alleged adulteress as co-respondent and claimed for damages – Whether claim for damages against co-respondent on ground of adultery applies in petition for divorce only – Whether could apply in petition for judicial separation – Law Reform (Marriage and Divorce) Act 1976,*
H *s. 58*

STATUTORY INTERPRETATION: *Law Reform (Marriage and Divorce) Act 1976 – Section 3(3) – Whether Law Reform (Marriage and Divorce) Act 1976 ('Act') applies to Muslims – Whether s. 3(3) of LRA precludes non-Muslim petitioner from citing Muslim as co-respondent, on allegation of adultery, to petition*
I *for judicial separation – Whether language of s. 3(3) plain, unambiguous and unequivocal – Rule of construction – Whether required literal or purposive approach of interpretation – Whether court, when interpreting s. 3(3) of LRA, should have regard to presumption that Parliament does not intend to legislate in violation of arts. 5(1) and 8(1) of Federal Constitution*

The appellant filed a petition for judicial separation ('petition') against her husband, at the High Court, on the grounds that their marriage had irretrievably broken down following his adulterous relationship with the respondent. The appellant further cited the respondent, a Muslim, as a co-respondent and claimed for damages against the latter, under s. 58 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The respondent applied to strike out the petition on the grounds that: (i) by virtue of s. 3(3) of the LRA, the LRA does not apply to a Muslim; and (ii) a claim for damages against a co-respondent under s. 58 of the LRA only applies in respect of a petition for divorce and not a petition for judicial separation. The High Court allowed the respondent's striking out application on the grounds that: (i) the words 'to a Muslim or to any person' in s. 3(3) of the LRA were an example of words in pairs with different and overlapping meanings. 'Muslim' means a person who professes the religion of Islam and 'any person' could mean a person who is a Muslim. It could also mean a person who is a non-Muslim; (ii) applying the principle of *noscitur a sociis*, the close proximity of the words 'a Muslim or to any person' with the phrase 'who is married under Muslim law' means that the LRA did not apply to a Muslim who is married under Islamic law. The words 'any person' paired with 'Muslim' cover situations where a person who might not be a Muslim was married to a Muslim under Islamic law. In such situations, where a Muslim, or a Muslim and non-Muslim are married under Islamic law, the LRA did not apply to them; (iii) the LRA was enacted to govern the marriage and divorce of non-Muslims in Malaysia and it expressly excludes the marriage and divorce of Muslims and non-Muslims who married with any person under Islamic law; (iv) the alleged adulterer or adulteress, being a Muslim, is no bar against him/her being named as co-respondent in a divorce petition and for damages for adultery to be claimed against the Muslim co-respondent under s. 58 of the LRA; and (v) s. 58 of the LRA is only applicable to petitions for divorce. As such, in a judicial separation petition, the court has no jurisdiction to condemn the co-respondent for damages under s. 58 of the LRA for adultery. The parties appealed to the Court of Appeal against the decision of the High Court. The appellant appealed against the decision that a Muslim or otherwise could not be named as a co-respondent in a judicial separation petition to be condemned in damages under s. 58 of the LRA. The respondent, on the other hand, appealed against the decision that in divorce proceedings under s. 58 of the LRA, a Muslim could be named as a co-respondent. The Court of Appeal dismissed the appellant's appeal and allowed the respondent's appeal on the grounds that: (i) the Malaysian courts have consistently held that s. 3(3) of the LRA excludes its application to Muslims or Muslim marriages; (ii) the legislative intent of the LRA was to intentionally and expressly exclude the application of the LRA to all Muslims; (iii) giving s. 3(3) of the LRA its literal interpretation, the words 'This Act shall not apply to a Muslim' admits of only one meaning, namely that the LRA does not apply to a Muslim and therefore the co-respondent, who is a Muslim, could not be named in a judicial separation petition;

(iv) the word 'or' in sub-s. (3) of the LRA means that the provision must be read disjunctively and not conjunctively; (v) the only exception provided for in s. 3(3) is in respect of the conversion to Islam of one party to a civil marriage. The exception does not extend to damages for adultery; (vi) the High Court Judge erred in failing to consider the first and foremost rule of construction, *ie* the literal interpretation and failed to accord due consideration to the word 'or' instead relying quite heavily on the rule of construction of *noscitur a sociis*; (vii) the purposive canon of interpretation only applies when the plain meaning is in doubt; and (viii) whether the provision is 'harsh and unjust' is a question of policy to be debated and decided by Parliament and not for judicial determination. Hence, the present appeals. The questions that arose for determination were: (i) whether s. 3(3) of the LRA precludes a non-Muslim petitioner from citing a Muslim as a co-respondent on an allegation of, *inter alia*, adultery, to a petition for judicial separation under s. 64 of the LRA ('first question'); and (ii) whether a court, when interpreting s. 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of arts. 5(1) and 8(1) of the Federal Constitution ('FC') ('second question').

Held (dismissing appeals with costs)
Per Tengku Maimun Tuan Mat CJ (for the majority):

(1) To interpret the words 'shall not apply to a Muslim' as to mean it only excludes a marriage under Islamic law would defy the clear and plain meaning of the words. Non-application of the LRA to a marriage under Islamic law is under a separate and different part of s. 3(3) *ie* the second part. The words 'This Act shall not apply to a Muslim' in the first part excludes a Muslim *in toto* from the application of the LRA and it should not be interpreted to mean that it refers to a Muslim who is married under Islamic law, as marriage under Islamic law is covered under the second part of s. 3(3). Parliament does not legislate in vain by inserting the word 'or' if its intention in enacting s. 3(3) of the LRA was not to exclude the application of the provisions of the LRA entirely to Muslims. This word will then be rendered otiose or redundant. The High Court relied on the maxim of *noscitur a sociis* to hold that the words 'This Act shall not apply to a Muslim' refer to a Muslim who is married under Islamic law. Such reliance was misplaced as there is no ambiguity in the meaning of the words 'This Act shall not apply to a Muslim'. There was no error on the part of the Court of Appeal in its interpretation of s. 3(3) of the LRA. (paras 30, 33 & 80)

(2) The standard canon of construction has always been that the courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. Applying a plain and literal construction to s. 3(3) of the LRA does not lead to an absurdity, rather it accords with the object and the underlying purpose of the LRA and with the demarcation of jurisdictions ordained by

art. 121(1A) of the FC. Where words in a statute are ambiguous and capable of two meanings, then resort may be had to the history of the legislation. Section 3(3), even when construed in light of the object and purpose and the legislative history of the LRA, results in the same conclusion as the literal interpretation. As gathered from the long title, the object of the LRA is to govern marriage and divorce, particularly monogamous marriages among non-Muslims. That said, the object of the LRA is not only that. The larger object is to demarcate clearly the separate personal laws applicable to Muslims and non-Muslims in this country. The respondent's conduct in the alleged adultery impacts on her personal law. For instance, the respondent could be charged in the Syariah Court for the offence of *khalwat* and for instigating the husband to neglect his duties to the petitioner, which will in turn lead to double jeopardy. (paras 45, 48, 51-53 & 63)

(3) The power of the court to condemn in damages a co-respondent, such as the respondent in this case under s. 58 of the LRA is a specific power conferred unto the court as part of non-Muslim personal law. Allowing a non-Muslim petitioner to condemn a Muslim co-respondent is tantamount to enforcing non-Muslim personal laws on a Muslim. Similar options are not and could not be legally made available to Muslim parties in litigation with each other in the Syariah Court but which might involve a non-Muslim as well. It followed that just as a non-Muslim co-respondent could not be brought to Syariah Court, a Muslim co-respondent could not be brought to a civil court – in light of the clear demarcation of jurisdictions under art. 121(1A) of the FC. (paras 64 & 65)

(4) The law provides some means for redress in answer to cases where the co-respondent is a Muslim. A Muslim, if found to engage in the immoral act of committing adultery, is answerable to the criminal side of the Syariah system. This is not the same with non-Muslims who do not generally face criminal penalty for adultery under the personal laws on morality. It remains open for the non-Muslim party to lodge a complaint with the religious authorities that the Muslim co-adulterer/adulteress has committed an offence under Syariah law *ie* ss. 24 and 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 which respectively outlaw intercourse out of wedlock and *khalwat*. This accords with the purpose of s. 58 of the LRA. The point of seeking condemnation of the co-respondent who committed adultery is not to profit from the fact of the breakdown of the marriage by seeking a windfall in damages. The purpose of the section, despite the use of the words 'condemn in damages' is compensatory and not punitive. (paras 69-71)

(5) The first question was answered in the affirmative. The premise of the second question was flawed. Article 5(1) of the FC speaks of deprivation of life and personal liberty in accordance with the law. By virtue of art. 121(1A) of the FC, there is a clear and distinct demarcation between Muslims and non-Muslims in terms of personal law. Granted that the appellant was unable to obtain remedy against the respondent as s. 3(3) of the LRA denies her the remedy, that denial is in accordance with law *ie*, the FC. There was nothing unjust or harsh about giving effect to s. 3(3). The same reasoning applies to the argument on art. 8(1) of the FC. By reason of art. 8(5)(a), the interpretation accorded by the Court of Appeal to s. 3(3) of the LRA did not result in any violation of arts. 5(1) and 8(1) of the FC. In the circumstances, there was no reason to answer the second question. (paras 84, 85 & 87)

Per Nallini Pathmanathan FCJ (dissenting):

(1) When the words 'shall not apply to a Muslim' in s. 3(3) of the LRA are considered in the context of the meaning and purpose of the LRA, it means monogamy or the mode of contracting or dissolving non-Muslim marriages, could not be imposed on any Muslim, whether unmarried or married. Therefore, when s. 3(3) is construed such that the purpose and object of the Act are taken into consideration, it becomes evident that the requirement of monogamy, and the manner of registering and dissolving non-Muslim marriages can have no application to a Muslim. It then followed that if the LRA or any of its provisions, is not being imposed on, or applied to a Muslim, married or otherwise, either for the purposes of prescribing monogamy, or for the purposes of registering and dissolving a marriage or matters ancillary to such marriage, then its application in respect of other collateral matters, is neither precluded nor prohibited. That would necessarily include the joinder of the third party in a judicial separation petition, which is primarily a matter of procedural law, where the third party is merely incidental to the primary matter in dispute, namely the dissolution of a marriage between two non-Muslims. (paras 131-134)

(2) In undertaking statutory construction of a provision, it is imperative to commence with s. 17A of the Interpretation Acts 1948 and 1967 ('IA') and not relegate it to the subordinate position of only coming into play when ambiguity arises. It then followed that, in construing the words of a statutory provision, it is necessary to consider the object and purpose of the statute as a whole, such that the statutory provision is construed in its full and proper context, rather than *in vacuo*. It is therefore incumbent upon a court to choose a construction that would promote the purpose or object of a statute. However, the limitation is that when there is only one construction that is available then s. 17A may not come into

play. Even then, before so concluding, the court has to take into account the purpose and object of the Act. It is insufficient to apply the literal rule and then conclude that as there is no ambiguity there is no necessity to look further into the purpose and object of the Act. (paras 146 & 155)

(3) The important question to ask in this appeal was whether the law relating to monogamy or the solemnisation and dissolution of non-Muslim marriages or matters incidental to such non-Muslim marriages was being applied to a Muslim such that it encroached on the third party's personal law. The answer to that was that it did not, because the third party was not being asked to be monogamous. Nor was she being asked to marry or dissolve her marriage under the LRA. It came down to whether being joined as a party to a petition for judicial separation to dissolve two non-Muslims' marriage, amounted to imposition of non-Muslim law on the third party. What was inapplicable to both Muslims and persons married under Muslim law is the statutory framework of monogamous marriages. That is clearly the purpose and object of the LRA. It was relevant that this piece of legislation did not singly encompass the complete personal law of non-Muslims. Therefore, when it is said that the LRA is inapplicable to a Muslim, it could only mean that the law relating to marriage and divorce premised on the fundamental bulwark of monogamy is inapplicable. That in turn means that in order for the section to take effect, there must be an imposition of non-Muslim law in this context, namely in relation to marriage, divorce or monogamy. (paras 183, 184, 193 & 194)

(4) There was no attempt to make the third party comply with monogamous provisions nor any of the provisions relating to the solemnisation and dissolution of marriage, because she was simply not privy to the marriage in issue. As an incidental third party, whose presence was necessary only for the purposes of proof of breakdown of the non-Muslim marriage, there was no contravention of s. 3(3) of the LRA, far less encroachment or contravention of art. 121(1A) of the FC. (paras 202 & 203)

(5) The Syariah Court does not act on a finding of adultery by the civil courts. It was incumbent that an independent investigation be undertaken and cogent evidence procured, prior to any charges under Syariah law or *Hukum Syarak* being levelled against the third party. This evidence was entirely independent of, and separate from, the evidence in this case. The stringent evidence required to establish *zina* includes *inter alia*, the confession of both parties to the act/s, and/or eyewitness testimony made by four males, who are of justifiable and of credible character. Other evidence is merely circumstantial and is not admissible in such a prosecution. This is necessitated by reason of the severity of the punishment for such a crime. (paras 206 & 207)

(6) The nature of the damages awarded (if at all), was compensatory and not punitive. The third party was not being punished for having engaged in an adulterous act. Rather, it was compensatory for the appellant who suffered the loss of her husband and marriage as a consequence of the act of adultery. The fact of the damages being compensatory meant that there was no issue of 'double jeopardy' in relation to the third party's personal law or Islam. However, the net effect of not allowing the joinder of the third party was that the appellant was precluded from seeking a remedy in the form of judicial separation as a consequence of her husband's adultery with the third party. There was no recourse because adultery required proof that it was committed by one spouse. Such an award, if made at all, is akin to the civil court granting damages to the appellant for a tortious act. There can be no cavil against the grant of damages against the Muslim third party, for injury caused to a non-Muslim under the LRA. (paras 209 & 210)

(7) The crux of this entire appeal turned on whether a literal and grammarian mode of statutory interpretation or a contextual and purposive approach ought to be adopted in construing the relevant phrase 'shall not apply to a Muslim' within s. 3(3) of the LRA. The latter was applicable. The appeals were allowed with costs. (para 214)

Bahasa Melayu *Headnotes*

Perayu memfailkan petisyen perpisahan kehakiman ('petisyen') terhadap suaminya, di Mahkamah Tinggi, atas alasan perkahwinan mereka telah berpecah belah, dengan tidak dapat lagi dipulihkan, berikutan hubungan perzinaan suaminya dengan responden. Perayu seterusnya menamakan responden, seorang Islam, sebagai responden bersama dan menuntut ganti rugi daripada responden bawah s. 58 Akta Membaharui Undang-undang (Perkahwinan dan Penceraian) 1976 ('AMUPP'). Responden memohon membatalkan petisyen tersebut atas alasan: (i) menurut s. 3(3) AMUPP, AMUPP tidak terpakai pada seseorang Islam; dan (ii) satu tuntutan ganti rugi terhadap seorang responden bersama, bawah s. 58 AMUPP, hanya terpakai dalam petisyen penceraian dan bukan petisyen perpisahan kehakiman. Mahkamah Tinggi membenarkan permohonan pembatalan responden atas alasan bahawa: (i) perkataan-perkataan 'Akta ini tidak terpakai bagi seseorang Islam atau bagi seseorang' dalam s. 3(3) AMUPP adalah contoh perkataan-perkataan yang berpasangan tetapi dengan makna berbeza dan bertindan. 'Muslim' bermaksud seorang yang menganut agama Islam dan 'seseorang' mungkin bermaksud seorang Islam. Ini juga mungkin bermaksud seorang bukan Islam; (ii) mengguna pakai prinsip *noscitur a sociis*, kedekatan perkataan 'seseorang Islam atau bagi seseorang' dengan ungkapan 'yang berkahwin di bawah Hukum Syarak' bermaksud AMUPP tidak terpakai pada seorang Islam yang berkahwin bawah undang-undang Islam. Perkataan 'seseorang', dipasangkan dengan 'Islam' meliputi situasi apabila seseorang

bukan Islam berkahwin dengan seorang Islam bawah undang-undang Islam. Dalam situasi sedemikian, apabila seorang Islam, atau seorang Islam dan bukan Islam berkahwin bawah undang-undang Islam, AMUPP tidak terpakai pada mereka; (iii) AMUPP digubal untuk mengawal selia perkahwinan dan penceraian bukan Islam di Malaysia dan dengan jelas mengecualikan perkahwinan dan penceraian Islam dan bukan Islam yang berkahwin dengan mana-mana orang bawah undang-undang Islam; (iv) penzina lelaki atau perempuan yang didakwa, sebagai seorang Islam, tidak terhalang daripada dinamakan sebagai responden bersama dalam petisyen penceraian dan daripada ganti rugi perzinaan dituntut daripadanya bawah s. 58 AMUPP; dan (v) seksyen 58 AMUPP hanya terpakai pada petisyen penceraian. Oleh itu, dalam petisyen perpisahan kehakiman, mahkamah tiada bidang kuasa menghukum responden bersama untuk ganti rugi bawah s. 58 AMUPP untuk perzinaan. Pihak-pihak merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Perayu merayu terhadap keputusan bahawa seorang Islam, atau sebaliknya, tidak boleh dinamakan sebagai seorang responden bersama dalam petisyen perpisahan kehakiman agar dihukum dengan ganti rugi bawah s. 58 AMUPP. Responden pula merayu terhadap keputusan bahawa dalam prosiding penceraian bawah s. 58 AMUPP, seorang Islam tidak boleh dinamakan sebagai seorang responden bersama. Mahkamah Rayuan menolak rayuan perayu dan membenarkan rayuan responden atas alasan: (i) Mahkamah Malaysia telah, secara konsisten, memutuskan bahawa s. 3(3) AMUPP mengecualikan pemakaian pada seseorang Islam atau perkahwinan Islam; (ii) niat perundangan AMUPP adalah dengan sengaja dan jelas mengecualikan pemakaian AMUPP pada semua yang beragama Islam; (iii) memberi s. 3(3) AMUPP tafsiran harfiahnya, perkataan-perkataan 'Akta ini tidak terpakai pada seseorang Islam' mengiktiraf hanya satu maksud, iaitu AMUPP tidak terpakai pada seseorang Islam dan, ekoran itu, responden bersama, seorang Islam, tidak boleh dinamakan dalam petisyen perpisahan kehakiman; (iv) perkataan 'atau' dalam sub-s. (3) AMUPP bermaksud peruntukan ini mesti dibaca disjunktif dan bukan konjunktif; (v) satu-satu pengecualian yang diperuntukkan dalam s. 3(3) adalah berkenaan satu pihak dalam perkahwinan sivil yang masuk Islam. Pengecualian ini tidak merangkumi ganti rugi untuk perzinaan; (vi) Hakim Mahkamah Tinggi terkhilaf dalam kegagalan beliau mempertimbangkan kaedah utama pentafsiran iaitu tafsiran harfiah dan gagal memberi pertimbangan wajar pada perkataan 'atau' dan, sebaliknya, bergantung berat pada kaedah pentafsiran *noscitur a sociis*; (vii) prinsip pentafsiran bertujuan hanya terpakai apabila makna biasa diragui; dan (viii) sama ada peruntukan ini 'keras dan tidak adil' adalah persoalan polisi untuk didebatkan dan diputuskan oleh Parlimen dan bukan melalui keputusan kehakiman. Maka timbul rayuan-rayuan ini. Soalan-soalan yang timbul untuk diputuskan adalah: (i) sama ada s. 3(3) AMUPP mengecualikan seorang petisyen bukan Islam daripada menamakan seorang Islam sebagai responden bersama atas dakwaan, antara lain,

perzinaan, dalam petisyen perpisahan kehakiman bawah s. 64 AMUPP ('soalan pertama'); dan (ii) sama ada mahkamah, dalam mentafsir s. 3(3) AMUPP harus melihat pada anggapan bahawa Parlimen tidak berniat menggubal untuk melanggar per. 5(1) dan 8(1) Perlembagaan Persekutuan ('PP') ('soalan kedua').

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Tengku Maimun Tuan Mat KHN (majoriti):

(1) Mentafsir perkataan-perkataan 'tidak terpakai pada seseorang Islam' agar bermaksud mengecualikan perkahwinan bawah undang-undang Islam adalah bertentangan dengan maksud jelas dan biasa perkataan-perkataan tersebut. Ketakterpakaian AMUPP pada perkahwinan bawah undang-undang Islam adalah bawah bahagian s. 3(3) yang asing dan berbeza iaitu bahagian kedua. Perkataan-perkataan 'Akta ini tidak terpakai pada seseorang Muslim' dalam bahagian pertama mengecualikan sepenuhnya seseorang Islam akan pemakaian AMUPP dan tidak seharusnya ditafsir agar bermaksud merujuk pada seorang Islam yang berkahwin bawah undang-undang Islam kerana perkahwinan bawah undang-undang Islam dirangkumi bawah bahagian kedua s. 3(3). Parlimen tidak menggubal secara sia-sia dengan memasukkan perkataan 'atau' jika niatnya menggubal s. 3(3) AMUPP bukan untuk mengecualikan sepenuhnya pemakaian peruntukan-peruntukan AMUPP pada orang Islam. Jika begitu, perkataan ini menjadi lewah dan berlebihan. Mahkamah Tinggi bersandar pada maksim *noscitur a sociis* untuk memutuskan bahawa perkataan-perkataan 'Akta ini tidak terpakai pada seseorang Islam' merujuk pada seorang Islam yang berkahwin bawah undang-undang Islam. Sandaran sedemikian satu salah tanggapan kerana tiada kesamaran dalam maksud perkataan-perkataan 'Akta ini tidak terpakai pada seseorang Islam'. Mahkamah Rayuan tidak terkhilaf dalam tafsiran s. 3(3) AMUPP.

(2) Lazimnya, prinsip standard pentafsiran adalah bahawa mahkamah mestilah, dalam kes-kes biasa, bermula dengan kaedah harfiah dan kaedah bertujuan harus dijadikan sandaran hanya apabila terdapat kesamaran. Mentafsir s. 3(3) AMUPP secara biasa dan harfiah tidak menyebabkan ketakmunasabahan. Sebaliknya, ini selari dengan objektif dan tujuan tersirat AMUPP dan dengan batasan bidang kuasa yang digariskan oleh per. 121(1A) PP. Apabila perkataan-perkataan berstatus samar-samar dan boleh membawa dua maksud, sejarah penggubalan undang-undang tersebut boleh dirujuk. Seksyen 3(3), jika pun ditafsir berdasarkan objektif, tujuan dan sejarah perundangan AMUPP, melahirkan kesimpulan yang sama dengan pentafsiran harfiah. Melihat tajuk panjangnya, objektif AMUPP bukan sahaja ini. Objektif yang lebih besar adalah menggariskan dengan jelas undang-undang peribadi orang-orang Islam dan orang-orang bukan Islam yang berasingan di negara ini.

Tindakan responden melakukan perzinaan yang didakwa memberi kesan pada undang-undang peribadinya. Contohnya, responden boleh dituduh di Mahkamah Syariah atas pertuduhan khalwat dan menghasut suami perayu mengabaikan tanggungjawabnya pada perayu, yang kemudian akan menyebabkan pendakwaan dua kali.

(3) Kuasa mahkamah menghukum seorang responden bersama membayar ganti rugi, seperti responden dalam kes ini bawah s. 58 AMUPP, adalah kuasa khas yang diberi kepada mahkamah sebagai sebahagian undang-undang peribadi bukan Islam. Membenarkan seorang pempetisyen bukan Islam menghukum seorang responden bersama Islam sama seperti menguatkuasakan undang-undang peribadi seorang bukan Islam pada seorang Islam. Pilihan-pilihan serupa tidak dan tidak boleh tersedia buat pihak-pihak litigasi Islam dengan satu sama lain di Mahkamah Syariah tetapi juga yang melibatkan seorang bukan Islam juga. Diikuti bahawa sebagaimana seorang responden bersama bukan Islam tidak boleh diheret ke Mahkamah Syariah, seorang responden bersama Islam juga tidak boleh diheret ke mahkamah sivil – berdasarkan pembatasan nyata bidang kuasa-bidang kuasa bawah per. 121(1A) PP.

(4) Undang-undang memperuntukkan beberapa cara menebus rugi dalam kes-kes yang responden bersama adalah seorang Islam. Seorang Islam, jika didapati berkelakuan tidak bermoral iaitu melakukan perzinaan, bertanggungan dalam bahagian jenayah sistem Syariah. Ini tidak sama dengan bukan Islam yang, amnya, tidak berdepan dengan hukuman jenayah untuk perzinaan bawah undang-undang peribadi bersangkutan kemoralan. Terbuka buat pihak bukan Islam membuat aduan pada pihak berkuasa agama bahawa seorang penzina lelaki/perempuan Islam telah melakukan kesalahan bawah undang-undang Syariah iaitu ss. 24 dan 27 Akta Kesalahan Jenayah Syariah (Wilayah-wilayah Persekutuan) 1997 yang, masing-masing, mengharamkan hubungan seks luar perkahwinan dan khalwat. Ini selaras dengan tujuan s. 58 AMUPP. Tujuan menuntut hukuman terhadap seorang responden bersama yang melakukan perzinaan bukan untuk mengaut keuntungan daripada fakta pecah belahan rumah tangga dengan menuntut durian runtuh melalui ganti rugi. Tujuan seksyen ini, walaupun menggunakan perkataan-perkataan 'dihukum membayar ganti rugi', adalah memampas dan bukan membebankan.

(5) Soalan pertama dijawab secara afirmatif. Soalan kedua tidak sempurna. Perkara 5(1) PP menyebut tentang pengambilan nyawa dan kebebasan diri selaras dengan undang-undang. Bawah per. 121(1A) PP, terdapat pembatasan jelas dan nyata antara seorang Islam dan seorang bukan Islam dari sudut undang-undang peribadi. Kecuali jika perayu tidak berjaya memperoleh remedi terhadap responden kerana s. 3(3) AMUPP menafikan remedinya, penafian ini selari dengan undang-undang iaitu

PP. Tiada apa-apa yang tidak adil atau keras tentang penguatkuasaan s. 3(3). Alasan yang sama terpakai pada hujahan tentang per. 8(1) PP. Berdasarkan per. 8(5)(a), tafsiran yang diberi oleh Mahkamah Rayuan pada s. 3(3) AMUPP tidak menyebabkan apa-apa pencabulan per. 5(1) dan 8(1) PP. Dalam hal keadaan ini, tiada sebab untuk menjawab soalan kedua.

Nallini Pathmanathan HMP (menentang):

(1) Apabila perkataan-perkataan 'tidak terpakai pada seseorang Islam' dalam s. 3(3) AMUPP dipertimbang dalam konteks maksud dan tujuan AMUPP, ini bermakna monogami atau cara perkontrakan atau membubar perkahwinan-perkahwinan bukan Islam, tidak boleh dikenakan pada mana-mana orang Islam, sama ada tidak berkahwin atau sudah berkahwin. Oleh itu, apabila s. 3(3) ditafsir dan tujuan dan objektif AMUPP dipertimbangkan, jelas terlihat bahawa kehendak monogami dan cara mendaftar dan membubar perkahwinan bukan Islam tidak boleh terpakai pada seorang Islam. Diikuti bahawa jika AMUPP atau mana-mana peruntukannya, tidak dikenakan atau tidak terpakai pada seorang Islam, berkahwin atau tidak, sama ada untuk tujuan monogami atau tujuan mendaftar atau membubar perkahwinan atau hal-hal perkara sampingan terhadap perkahwinan itu, maka pemakaiannya berkenaan lain-lain perkara kolateral, tidak dikecualikan mahupun dilarang. Ini semestinya termasuk percantuman pihak-pihak dalam petisyen perpisahan kehakiman, yang khasnya perkara undang-undang prosedur, apabila pihak ketiga sekadar sampingan dalam perkara utama yang menjadi pertikaian, khususnya pembubaran perkahwinan antara dua bukan Islam.

(2) Dalam tafsiran statutori satu-satu peruntukan, adalah imperatif untuk bermula dengan s. 17A Akta Tafsiran 1948 dan 1967 ('AT') dan tidak menurunkannya ke darjat yang lebih rendah iaitu hanya beroperasi apabila timbul kesamaran. Diikuti bahawa, dalam tafsiran perkataan-perkataan peruntukan statutori, perlu untuk mempertimbangkan objektif dan tujuan statut secara keseluruhannya; sedemikian bahawa peruntukan statutori ditafsir dalam konteks penuh dan sebetulnya, dan bukan *in vacuo*. Oleh itu, mahkamah bertanggungjawab memilih tafsiran yang mengetengahkan tujuan atau objektif statut. Walau bagaimanapun, hadnya adalah, apabila terdapat satu sahaja tafsiran, s. 17A mungkin tidak akan beroperasi. Jika pun begitu, sebelum membuat kesimpulan sedemikian, mahkamah harus mengambil kira tujuan dan objektif Akta. Tidak cukup sekadar mengguna pakai kaedah harfiah dan kemudian memutuskan bahawa, oleh kerana terdapat kesamaran, tiada keperluan melihat dengan lebih terperinci tujuan dan objektif Akta.

(3) Soalan lebih berat yang harus diajukan dalam rayuan ini adalah sama ada undang-undang berkaitan monogami atau perkahwinan dan pembubaran perkahwinan-perkahwinan bukan Islam atau perkara-perkara sampingan terhadap perkahwinan bukan Islam itu dipakai pada seorang Islam hinggakan mencerobohi undang-undang peribadi pihak ketiga. Jawapannya adalah tidak kerana pihak ketiga tidak diminta bermonogami. Dia juga tidak dipelawa berkahwin atau membubarkan perkahwinannya bawah AMUPP. Persoalannya, adakah percantuman sebagai pihak dalam petisyen perpisahan kehakiman untuk membubarkan perkahwinan dua orang bukan Islam, terjumlah sebagai satu pengenaan undang-undang bukan Islam pada pihak ketiga? Apa-apa yang tidak boleh terpakai pada orang Islam dan orang-orang yang berkahwin bawah undang-undang Islam ialah rangka statutori perkahwinan monogami. Ini jelas tujuan dan objektif AMUPP. Adalah relevan bahawa cebisan perundangan ini tidak, dengan sendiri, merangkumi seluruh undang-undang peribadi orang-orang bukan Islam. Oleh itu, apabila AMUPP dikatakan tidak terpakai pada seorang Islam, ini hanya bermakna undang-undang berkaitan perkahwinan dan penceraian berdasarkan benteng asas monogami yang tidak terpakai. Ini seterusnya bermaksud, agar seksyen ini beroperasi, mesti terdapat pengenaan undang-undang bukan Islam dalam konteks ini, khususnya berkenaan perkahwinan, penceraian atau monogami.

(4) Tiada percubaan untuk membuatkan pihak ketiga patuh pada peruntukan-peruntukan monogami atau mana-mana peruntukan berkaitan perkahwinan dan penceraian kerana dia sememangnya tidak privi pada perkahwinan yang menjadi pertikaian. Sebagai pihak ketiga sampingan, yang keberadaannya hanya diperlukan untuk membuktikan perpecahan perkahwinan satu perkahwinan bukan Islam, tiada pelanggaran s. 3(3) AMUPP, apatah lagi pencerobohan atau pelanggaran per. 121(1A) PP.

(5) Mahkamah Syariah tidak bertindak atas dapatan perzinaan oleh mahkamah sivil. Siasatan bebas harus dijalankan dan keterangan meyakinkan harus diperoleh, sebelum apa-apa pertuduhan bawah undang-undang Syariah atau Hukum Syarak dikemukakan terhadap pihak ketiga. Keterangan ini bebas dan asing daripada keterangan dalam kes ini. Keterangan ketat yang dikehendaki untuk membuktikan zina termasuk, antara lain, pengakuan kedua-dua pihak akan tindakan dan/atau keterangan saksi mata yang dibuat oleh empat orang saksi yang adil dan berperwatakan boleh dipercayai. Lain-lain keterangan sekadar ikut keadaan dan tidak boleh diterima dalam pendakwaan sedemikian. Ini perlu atas sebab keberatan hukuman untuk pendakwaan tersebut.

(6) Sifat ganti rugi yang diawardkan (jika ada), berbentuk memampas dan bukan menghukum. Pihak ketiga bukan dihukum kerana melakukan perzinaan. Sebaliknya, untuk memampas perayu yang kehilangan

suaminya dan perkahwinan tersebut akibat tindakan perzinaan. Fakta bahawa ganti rugi bersifat memampas bermaksud tiada isu tentang pendakwaan dua kali berkaitan undang-undang peribadi atau Islam pihak ketiga. Walau bagaimanapun, kesan akhir tidak membenarkan percantuman pihak ketiga adalah bahawa perayu dikecualikan daripada memohon remedi dalam bentuk perpisahan kehakiman berakibat daripada perzinaan suaminya dengan pihak ketiga. Tiada tindakan undang-undang kerana perzinaan memerlukan pembuktian bahawa ini dilakukan oleh suami atau isteri. Award sebegini, jika pun dibuat, seolah-olah seperti mahkamah sivil memberi ganti rugi pada perayu untuk tindakan berasaskan tort. Tidak timbul bantahan remeh-temeh terhadap berian ganti rugi terhadap pihak ketiga Islam, untuk kejejasan yang disebabkan pada seorang bukan Islam bawah AMUPP.

(7) Tunjang utama rayuan ini adalah sama ada cara tafsiran statutori secara harfiah atau nahu atau pendekatan secara konteks atau bertujuan yang harus diguna pakai dalam mentafsir ungkapan relevan 'tidak terpakai pada seseorang Islam' dalam s. 3(3) AMUPP. Tafsiran kedua adalah terpakai. Rayuan-rayuan dibenarkan dengan kos.

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors [2000] 3 CLJ 625 CA ***(refd)***

Butterworth v. Butterworth & Anor [1920] P 126 ***(refd)***

CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384 ***(refd)***

Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***

Duport Steels Ltd v. Sir [1980] 1 WLR 142 ***(refd)***

Durga Parshad v. Custodian of Evacuee Property AIR 1960 Punjab 341 ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***

Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party) [2001] 2 CLJ 578 HC ***(refd)***

Kanwar Singh v. Delhi Administration AIR 1965 SC 871 ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 1 LNS 419 HC ***(refd)***

Mangin v. Inland Revenue Commissioner [1971] AC 739 ***(refd)***

Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Bhd [2021] 8 CLJ 409 FC ***(refd)***

Mary Ng & Anor v. Ooi Gim Teong [1972] 1 LNS 85 HC ***(refd)***

ML Kamra v. New India Assurance AIR 1992 SC 1072 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Perantara Properties Sdn Bhd v. JMC-Kelana Square & Another Appeal [2016] 5 CLJ 367 CA ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
Pritchard v. Pritchard And Sims [1966] 3 All ER 601 ***(refd)***
Rajendra Prasad Gupta v. Prakash Chandra Mishra (2011) 2 SCC 705 ***(refd)***
Re Ding Do Ca, Deceased [1966] 1 LNS 157 FC ***(refd)***
Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301 FC ***(refd)***
Scott v. Scott And Another [1957] 1 All ER 63 ***(refd)***
Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor [2005] 2 CLJ 371 HC ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Tan Kay Poh v. Tan Surida & Neo Kay Cheong [1989] 1 CLJ 879; [1989] 2 CLJ (Rep) 1093 HC ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 3 CLJ 708 SC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***
Viran Nagapan v. Deepa Subramaniam & Other Appeals [2016] 3 CLJ 505 FC ***(refd)***
Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications [2021] 1 CLJ 631 FC ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 11(1), 103
Federal Constitution, arts. 5(1), 8(1), (5)(a), 74, 76(2), 121(1A), Ninth Schedule List I, List II item 1
Interpretation Acts 1948 and 1967, s. 17A
Law Reform (Marriage and Divorce) Act 1976, ss. 1, 2, 3(3), (4), 51, 54(1)(a), 58(1), (2), (3)(b), 59(1), 60, 64(1), 65(2)
Penal Code, s. 498
Rules of Court 2012, O. 18 r. 19(1)(a)
Syariah Criminal Offences (Federal Territories) Act 1997, ss. 24, 27

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Ashgar Ali Ali Mohamed, *Implementation of Hudud (or limits ordained by Allah for serious crimes) in Malaysia*, International Journal of Humanities and Social Science, Vol 2, No 3, February 2012
Dr Cheong May Fong, *Purposive Approach and Extrinsic Material in Statutory Interpretation: Developments in Australia and Malaysia*, Journal of the Malaysian Judiciary (July [2018] 1)
Halsbury's Laws of England, 5th edn, vol 96, para 760
Mehrun Siraj, *Women and the Law: Significant Developments in Malaysia*, Law and Society Review (Vol 28, No 3) Law & Society in Southeast Asia (1994) pp 561-572
NS Bindra, *Interpretation of Statutes*, 12th edn, pp 347-348

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[Editor's note: For the Court of Appeal judgment, please see JMH v. AJS & Another Appeal [2021] 7 CLJ 327 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Tengku Maimun Tuan Mat CJ (majority):

Introduction

[1] These appeals concern primarily the interpretation of ss. 3 and 58 of
B the Law Reform (Marriage and Divorce) Act 1976 ("the LRA").

Background Facts

[2] The appellant in both these appeals filed a judicial separation petition in the High Court at Kuala Lumpur (Family Division) against her husband.
C The appellant alleged that the husband had committed adultery with the respondent in the present appeals.

[3] It is important to note that the appellant and her husband both of whom are non-Muslims, were married in New South Wales, Australia but were domiciled in Malaysia for a period of two years immediately preceding
D the commencement of the petition. It must also be clarified at the outset that I make no ruling as to the merits of the petition and its outcome.

Proceedings In The High Court

[4] The appellant pleaded, in accordance with s. 54(1)(a) of the LRA, that
E as a result of her husband's adulterous relationship with the respondent, who is a Muslim, the appellant had been abandoned by her husband and that her marriage had broken down.

[5] In her judicial separation petition, the appellant cited her husband as the respondent and named the respondent in the instant appeals as
F co-respondent. The appellant prayed that the respondent be condemned in damages under s. 58 of the LRA and that the husband as well as the co-respondent bear the costs of the petition.

[6] The respondent contended that she had been wrongly cited as a party. She filed an application under O. 18 r. 19(1)(a) of the Rules of Court 2012
G ("ROC 2012") and/or r. 103 of the Divorce and Matrimonial Proceedings Rules 1980 ("DMPR 1980") and/or the inherent jurisdiction of the court to strike out the judicial separation petition against her.

[7] The application to strike out was premised on the following grounds:

H (i) that by virtue of s. 3(3) of the LRA, the LRA does not apply to a Muslim; and

(ii) that a claim for damages against a co-respondent under s. 58 of the LRA only applies in respect of a petition for divorce and not a petition for judicial separation.

I

[8] Section 3 of the LRA reads:

Application

3. (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.

(2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under s. 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

[9] While s. 58 provides:

Damages for adultery may be claimed against co-respondent

58. (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.

(2) A petition under subs. (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.

(3) ...

[10] The High Court allowed the respondent's striking out application. The learned judge adopted the purposive approach in holding that:

(i) the words "to a Muslim or to any person" in s. 3(3) of the LRA were an example of words in pairs with different and overlapping meanings. "Muslim" means a person who professes the religion of Islam and "any person" could mean a person who is a Muslim. It could also mean a person who is a non-Muslim;

(ii) applying the principle of *noscitur a sociis*, the close proximity of the words "a Muslim or to any person" with the phrase "who is married under Muslim law" means that the LRA did not apply to a Muslim who is married under Islamic law. The words "any person" paired with "Muslim" cover situations where a person who might not be a Muslim was married to a Muslim under Islamic law. In such situations, where a Muslim, or a Muslim and non-Muslim are married under Islamic law, the LRA did not apply to them;

(iii) the LRA was enacted to govern the marriage and divorce of non-Muslims in Malaysia and that it expressly excludes the marriage and divorce of Muslims and non-Muslims who married with any person under Islamic law;

(iv) that the alleged adulterer or adulteress is a Muslim is no bar against him/her being named as co-respondent in a divorce petition and for damages for adultery to be claimed against the Muslim co-respondent under s. 58 of the LRA; and

(v) section 58 of the LRA is only applicable to petitions for divorce. As such, in a judicial separation petition, the court has no jurisdiction to condemn the co-respondent for damages under s. 58 of the LRA for adultery.

[11] Aggrieved by the decision of the High Court that a Muslim or otherwise cannot be named as a co-respondent in a judicial separation petition to be condemned in damages under s. 58 of the LRA, the appellant appealed to the Court of Appeal.

[12] The respondent who was dissatisfied with the decision of the High Court that in divorce proceedings under s. 58 of the LRA, a Muslim can be named as a co-respondent, similarly filed an appeal to the Court of Appeal.

Proceedings In The Court Of Appeal

[13] In a unanimous decision, the Court of Appeal dismissed the appellant's appeal and allowed the respondent's appeal.

[14] Essentially, the Court of Appeal adopted the literal approach to construe ss. 3(3) and 58 of the LRA. It held that:

(i) the Malaysian courts have consistently held that s. 3(3) of the LRA excludes its application to Muslims or Muslim marriages. The following authorities *inter alia*, were relied upon in support: *Tang Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708; [1994] 3 MLJ 117 ("*Tang Sung Mooi"*); *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 ("*Subashini*"); *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505 ("*Viran Nagapan*") and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145 ("*Indira Gandhi"*);

(ii) the legislative intent of the LRA was to intentionally and expressly exclude the application of LRA to all Muslims;

(iii) giving s. 3(3) of the LRA its literal interpretation, the words "This Act shall not apply to a Muslim" admit of only one meaning, namely that the LRA does not apply to a Muslim and therefore the co-respondent who is a Muslim cannot be named in a judicial separation petition;

(iv) the word "or" in sub-s. 3(3) of the LRA means that the provision must be read disjunctively and not conjunctively;

(v) the only exception provided for in s. 3(3) is in respect of the conversion to Islam of one party to a civil marriage. The exception does not extend to damages for adultery;

(vi) the learned High Court Judge erred in failing to consider the first and foremost rule of construction, ie, the literal interpretation and failed to accord due consideration to the word "or" instead relying quite heavily on the rule of construction of *noscitur a sociis*;

(vii) the purposive canon of interpretation only applies when the plain meaning is in doubt; and

(viii) whether the provision is "harsh and unjust" is a question of policy to be debated and decided by Parliament and not for judicial determination.

Proceedings In The Federal Court

[15] The appellant obtained leave to appeal to this court on the following questions of law ("questions"):

Question 1

Whether s. 3(3) of the LRA precludes a non-Muslim petitioner from citing a Muslim as a co-respondent on an allegation, *inter alia*, of adultery to a petition for judicial separation under s. 64 of the LRA, having regard to the decision of the Malaysian Supreme Court in *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117;

Question 2

Whether a court, when interpreting s. 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of Articles 5(1) and 8(1) of the Federal Constitution, having regard to the cases of *ML Kamra v. New India Assurance Air* 1992 SC 1072 and *Durga Parshad v Custodian of Evacuee Property* AIR 1960 Punjab 341.

Submissions Of Parties

The Appellant's Case

[16] Learned counsel for the appellant submitted that the High Court was correct in giving s. 3(3) of the LRA a wide meaning and that the Court of Appeal's interpretation of s. 3(3) violates the appellant's right to live with dignity, the right to access to justice which includes remedial justice both encapsulated in art. 5(1) and the requirement of proportionality housed in art. 8(1) of the Federal Constitution.

[17] It was argued by learned counsel for the appellant that the fundamental right to live with dignity, would be rendered completely illusory should the appellant be barred from even naming the respondent as a party to her judicial separation petition.

[18] As for the right to access to justice, which has two dimensions of procedural and substantive justice, the latter includes access to a just and effective remedy. Citing s. 64 (which states that a judicial separation petition may be presented on the circumstances set out in s. 54), s. 54 (which comes under Part VI of the LRA under the heading "Divorce") and r. 11 of the DMPR 1980 (which requires the person with whom adultery is alleged to have been committed to be named as co-respondent), learned counsel contended that procedural justice requires that the respondent be named as a party be it in a divorce petition or a judicial separation petition. Otherwise, the right of access to justice guaranteed by art. 5(1) would be rendered illusory.

[19] On the proportionality point, it was submitted that the Court of Appeal's interpretation of s. 3(3) violates the proportionality principle housed in the equal protection limb of art. 8(1), as Muslims would be cloaked with complete immunity from a claim for damages for adultery simply by virtue of their religion and that any form of State action, including judicial action, must be proportionate. Learned counsel posited that the Court of Appeal's decision which is discriminatory against non-Muslims on the ground of religion cannot be sustained as it is not the law that religion is now a recognised ground which negates proportionality.

[20] Accordingly, learned counsel for the appellant argued that the way the LRA was to be interpreted is that it does not exclude Muslim persons *in toto* but that Parliament only intended to exclude Muslim marriages. Section 3(3), according to the appellant, cannot therefore be interpreted in a way that prevents a Muslim from being cited as a co-respondent on the ground of adultery, which is an English common law cause of action. And the availability of a cause of action does not depend on the religion of the co-respondent.

[21] Learned counsel also repeated the submissions in the courts below that to exclude a Muslim from being cited as a co-respondent on the allegation of adultery would produce a harsh and unjust result to the petitioner and that Parliament does not intend to produce injustice. Hence, a non-Muslim petitioner should be allowed to add a Muslim in the petition. Further, citizens must have remedy in court. In that regard, s. 3(3) must be read consonant with principles of art. 5 and art. 8 which give the injured party a remedy.

[22] Reliance was placed on *Halsbury's Laws of England*, 5th edn, vol. 96 at para 760 which states that it is a principle of legal policy that law should be just and fair, and that court decisions should further the ends of justice. The

court should therefore strive to avoid adopting a construction that leads to injustice or fairness. Reliance was also placed on s. 17A of the Interpretation Acts 1948 and 1967 to emphasise the principle that courts must accord the statute a construction that promotes the purpose of the Act.

[23] On s. 58 of the LRA, learned counsel submitted that it was a procedural provision and there was nothing to prevent a petitioner in a judicial separation petition from claiming for damages for adultery. Learned counsel highlighted that the sections governing a petition for divorce and judicial separation are both placed under the same header (Part VI - Divorce), which means that the operation of those sections under Part VI cannot be segregated.

[24] This indication, according to learned counsel is fortified by s. 65(2) which provides that on a petition for divorce, a decree of judicial separation previously granted on the ground of adultery may be treated as sufficient proof for purposes of the petition. The above arrangement therefore speaks for itself, in that the two petitions are not substantially different and the one may even, in some circumstances, be treated as proof of presentation for the other.

The Respondent's Case

[25] In response, the crux of the respondent's submissions is as follows:

(i) in Malaysia, there are two separate jurisdictions in matters of personal law: civil and Syariah. The LRA regulates the personal law of non-Muslims before the civil courts and likewise, the various Syariah State Enactments regulate the personal law of the Muslims before the Syariah Courts;

(ii) the above separation is clearly memorialised and embodied in art. 121(1A) of the Federal Constitution;

(iii) both arts. 5 and 8 of the Federal Constitution are not applicable on the facts of this case. Even if they apply, art. 5 is circumscribed by law, which is s. 3(3) of the LRA and art. 121(1A) of the Federal Constitution. Article 8 does not apply by reason of cl. (5)(a) of the said article, the LRA being personal law and therefore being a "provision regulating personal law";

(iv) section 3(3) does not violate arts. 5 and 8, it being necessary and appropriate to read the section to exclude all Muslims;

(v) the word "or" in s. 3(3) is not superfluous and it is the clear intention of the Legislature to exclude Muslims;

(vi) the appellant's interpretation of s. 3(3) will have far-reaching consequences and might cause chaos and confusion in the current clear separation between the two jurisdictions;

(vii) by the plain reading of s. 3(3) of the LRA, Muslims are excluded from the civil courts in the same manner that non-Muslims are excluded from Syariah Courts; and

(viii) the appellant's concern that a non-Muslim who converts to Islam to avoid being named as a co-respondent under the LRA has been addressed by a long list of cases decided by this court. A person's antecedent obligations are not avoided by a subsequent conversion of one party to Islam.

Findings/Analysis

Statutory Interpretation – Section 3(3) Of The LRA

The Literal Rule of Construction

[26] The issue for our determination is whether the words "this Act shall not apply to a Muslim" in s. 3(3) of the LRA excludes the application of the LRA to all Muslims *in toto* or it only excludes Muslims who are married under Islamic law.

[27] Putting it another way, was it the intention of Parliament in enacting s. 3(3), in the way that they did, to exclude the application of the LRA entirely to Muslims as litigants such that Muslims can never rely on the LRA or have the LRA used against them? Or, was it the more specific legislative intent, as suggested by the appellant to restrict the application of the LRA such that it can never apply to Muslim marriages (meaning Muslims only can never avail themselves of the LRA)?

[28] It is pertinent to note that there are four clearly discernible parts to s. 3(3) of the LRA, as follows:

(i) the LRA shall not apply to a Muslim;

(ii) the LRA shall not apply to any person who is married under Islamic law;

(iii) marriage of one of the parties which professes the religion of Islam shall not be solemnised nor registered under the LRA; and

(iv) a decree of divorce may be made under s. 51 of the LRA although one party to the marriage has converted to Islam.

[29] The appellant posited that the words "... a Muslim or to any person" in the first and second parts of s. 3(3) should be read to mean a Muslim who is married under Islamic law and any person who is married under Islamic law. In other words, although the words "married under Islamic law" are not found in the first part of s. 3(3), the court should import the words "married under Islamic law" into the first part. This approach was accepted by the learned High Court Judge.

[30] To my mind, to interpret the words "shall not apply to a Muslim" as to mean it only excludes a marriage under Islamic law would defy the clear and plain meaning of the words. Non-application of the LRA to a marriage under Islamic law is under a separate and different part of s. 3(3) ie, the second part. In my judgment, the words "This Act shall not apply to a Muslim" in the first part excludes a Muslim *in toto* from the application of the LRA and it should not be interpreted to mean that it refers to a Muslim who is married under Islamic law, as marriage under Islamic law is covered under the second part of s. 3(3). Further, Parliament does not legislate in vain by inserting the word "or" if its intention in enacting s. 3(3) of the LRA was not to exclude the application of the provisions of the LRA entirely to Muslims. This word will then be rendered otiose or redundant.

[31] The plain meaning of the words "This Act shall not apply to a Muslim" admits of no exception. The only exception as seen in the fourth part of s. 3(3) is where a party to the civil marriage has converted to Islam, as stipulated in s. 51 of the LRA which reads:

> Dissolution on ground of conversion to Islam
>
> 51. (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce;
>
> Provided that no petition under this s. shall be presented before the expiration of the period of three months from the date of the conversion.
>
> (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.
>
> (3) Section 50 shall not apply to any petition for divorce under this section.

[32] The purpose of s. 51 of the LRA is to ensure that all obligations and liabilities of parties who contracted a civil marriage be dealt with accordingly under the civil law. Hence, although a party might subsequently convert and become a Muslim, he or she is subject to the LRA for purposes of a divorce petition and related issues under s. 51 of the LRA.

[33] The High Court relied on the maxim of *noscitur a sociis* to hold that the words "This Act shall not apply to a Muslim" refer to a Muslim who is married under Islamic law. With respect, it is my view that reliance on the maxim is misplaced as there is no ambiguity in the meaning of the words "This Act shall not apply to a Muslim".

[34] In *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559; [1998] 2 MLJ 513, this court held that the principle of *noscitur a sociis* is inapplicable when the word or words in the statute are not doubtful in their meaning. (See *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1; [2010] 2 MLJ 155).

[35] Learned counsel for the appellant argued that "When interpreting a statutory provision which is open to two constructions, the court will adopt that interpretation which will avoid injustice. Because, there is a presumption that Parliament does not intend to legislate an unjust result".

[36] I would have no difficulty agreeing with learned counsel for the appellant if s. 3(3) is open to two constructions. As stated by *NS Bindra* in *Interpretation of Statutes*, 12th edn, at pp. 347 to 348 on the presumption of fairness:

> Where there are two constructions, the one of which will do great and unnecessary injustice, and the other of which will avoid injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the court to adopt the second and not to adopt the first of those constructions.
>
> Too literal a construction should not be followed when it leads to an absurdity if a somewhat more liberal construction would lead to an effective application of the Act. The underlying purpose of all legislation is to promote justice among men.

[37] Section 3(3) of the LRA however is very clear in its terms. The words "This Act shall not apply to a Muslim" do not give rise to two possible constructions. There is simply no room for any other interpretation except that it does not apply to a Muslim, whether married or not. As Lord Diplock famously said in *Duport Steels Ltd v. Sir* [1980] 1 WLR 142:

> ... where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral ...

[38] With respect, the submission of learned counsel for the appellant on this issue ignores the clear language of s. 3(3) of the LRA.

[39] Reference to the recent judgment of this court in *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 301; [2021] 2 MLJ 181 ("*Rosliza*") should provide some assistance to answer the question analogously. It would be recalled that this court in *Rosliza* was required to interpret the constitutional phrase "persons professing the religion of Islam" appearing in item 1 of the State List, Ninth Schedule of the Federal Constitution. It was held that once a person is determined to be a Muslim at birth or decides to convert to Islam later in life once he or she is free to make that choice, that person effectively gains a specific legal status thereby automatically rendering themselves subject to Syariah law and system. It was held that:

> [78] To summarise, Syariah Courts may only exercise jurisdiction over a person or persons on two conditions. Firstly, the person shall profess the religion of Islam. This can generally be classified as jurisdiction *ratione*

> *personae* – where the jurisdiction of the tribunal or court is contingent on the litigant's legal persona. The phrase is most commonly used in disputes where one party is a sovereign, a foreign state, or one who enjoys diplomatic immunity and privileges cloaking him with immunity from legal process ...
>
> [79] Secondly, even if Syariah Courts may exercise jurisdiction *ratione personae*, they must still ensure that they have jurisdiction over the subject-matter as expressly enumerated in the said Item 1. This may be classified as jurisdiction *ratione materiae* – or subject-matter jurisdiction.
>
> [80] Unlike the superior courts in Part IX of the FC which are constitutionally established and in whom the judicial power of the Federation inherently vests, the Syariah Courts are creatures of statute (specifically state enactments) and accordingly, their jurisdiction is strictly circumscribed by the laws which establish them. Absent jurisdictions *ratione personae* and *ratione materiae* over a person, Syariah Courts are not empowered by the FC to exercise any power over that person and if exercised, would be *ultra vires* the FC.

[40] The decision clarifies that if someone claims to "never have been a Muslim" as opposed to "no longer is a Muslim", he or she is entitled to make that claim in the civil secular courts. However, once it is clear that the person is a Muslim by the fact that they profess the faith, they are only allowed to refer their personal law matters (including renunciation of their faith) to the Syariah Courts. In a related case, *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 ("*Latifah*") which was affirmed in *Rosliza* (*supra*), this court also held that the determination of whether there was a valid "*hibah*" was a matter for the Syariah Court and as such, the civil courts were not entitled to decide that question in light of art. 121(1A) of the Federal Constitution. The civil courts, in relation to Muslims, were only permitted by the Federal Constitution to enforce the distribution of assets once the substantive issues of successorship and inheritance are concluded in the Syariah Courts in accordance with Islamic law.

[41] In this regard, *Latifah* also discusses the effect of art. 74 of the Federal Constitution read together with the Federal and State Lists in the Ninth Schedule which collectively expressly disempower Parliament from legislating on the personal law of Muslims except in the Federal Territories. In this context, Abdul Hamid Mohamad FCJ (as he then was) observed as follows in *Latifah*:

> [24] To give one example, while Parliament may make law in relation to marriage and divorce, it is not permitted to make law on the same subject-matter affecting Muslims because it falls under paragraph (ii) as Islamic personal law relating to marriage and divorce. The net effect is that marriage and divorce law of non-Muslims is a matter within the jurisdiction of Parliament to make, while marriage and divorce law of Muslims is a matter within the jurisdiction of the Legislature of a State to make.

[42] *Rosliza* and *Latifah* therefore affirm the trite demarcation of jurisdictions between the civil and Syariah Courts. They also explain how the fact of professing Islam alone confer jurisdiction *ratione personae* upon Syariah Courts over Muslims (jurisdiction *ratione materiae* notwithstanding). It must also follow therefore that Parliament, in keeping with this trite principle and with art. 121(1A) not only can dispossess the civil secular courts of jurisdiction *ratione personae* over Muslims but also jurisdiction *ratione materiae*.

[43] As such, it further follows that the first part of s. 3(3) that states to the effect that the LRA shall not apply to Muslims is literally a blanket exclusion of its application to Muslims on the basis of jurisdiction *ratione personae*. The second and third parts of the LRA could perhaps be interpreted as exclusions *ratione materiae*. This is because, and I shall explain this in greater detail later when I deal with the purposive rule of construction, the LRA in my view is a compendium or code of non-Muslim personal law applicable only to non-Muslims.

[44] In this context and reverting to statutory interpretation, authorities are replete with the principles or rules of statutory interpretation. Suffice it that I refer to the judgment of this court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 where the rule of statutory interpretation is stated thus:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural ordinary meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited". Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which

> would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect of it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such, the court is permitted to read additional words into a statutory provision where clear reason for doing so are to be found in the statute itself.

[45] Further, applying a plain and literal construction to s. 3(3) does not lead to an absurdity, rather it accords with the object and the underlying purpose of the LRA and with the demarcation of jurisdictions ordained by art. 121(1A) of the Federal Constitution.

[46] Finally, and still on the literal rule of construction, I am aware as noted earlier that the Court of Appeal interpreted s. 3(3) by relying on the cases of *Tang Sung Mooi* (*supra*), *Subashini* (*supra*); *Viran Nagapan* (*supra*) and *Indira Gandhi* (*supra*). The facts of those cases, in my view, do not lend any assistance to the interpretation of s. 3(3) of the LRA within the context of this case because those cases did not deal with the inclusion of a party who was originally Muslim in a dispute between non-Muslims. Those cases are therefore not authorities for the proposition advanced by the Court of Appeal. That said, the rest of the reasoning of the Court of Appeal as regards the literal rule was, in my view, correct.

The Purposive Rule Of Construction

[47] I now turn to consider the purposive rule of construction of statutes. In this regard, s. 17A of the Interpretation Acts 1948 and 1967 ("the Interpretation Acts") reads:

> 17A. Regard to be had to the purpose of the Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[48] The standard canon of construction has always been that the courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. This was clarified by this court most recently in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60, as follows ("*PJD Regency*"):

> [36] ... statutory interpretation usually begins with the literal rule. However, and without being too prescriptive, where the provision under construction is ambiguous, the courts will determine the meaning of the provision by resorting to other methods of construction foremost of which is the purposive rule (see the judgment of this court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97).

[49] How then does s. 17A of the Interpretation Acts feature in our rules of construction? In determining the application and scope of s. 17A of the Interpretation Acts, Augustine Paul FCJ in the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 (as affirmed in *PJD Regency* (*supra*)) said:

> [7] The choice prescribed in s. 17A "... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object" can only arise when the meaning of a statutory provision is not plain and is ambiguous. If, therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation.

[50] In *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631; [2021] 1 MLJ 478, this court stated the application of s. 17A of the Interpretation Acts thus:

> Section 17A of Act 388 requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object ... It is a settled principle of law that the purposive rule applies where there is ambiguity in a statute such as when a literal reading of it opens it to two or more meanings.

[51] Thus, it is trite that where words in a statute are ambiguous and capable of two meanings, then resort may be had to the history of the legislation. And it is also trite that statutory construction is exclusively a matter for the Judiciary but Hansard and parliamentary speeches serve as an interpretive aid (see the judgment of this court in *Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Bhd* [2021] 8 CLJ 409, at para. [53]).

[52] Although as alluded to earlier, there is no ambiguity in the words "This Act shall not apply to a Muslim" and that a literal meaning accorded to the words do not give rise to two constructions as it is clear that it excludes a Muslim *in toto*, for completeness, it is my considered view that s. 3(3), even when construed in light of the object and purpose and the legislative history of the LRA results in the same conclusion as the literal interpretation.

[53] As I understand it and as gathered from the long title, the object is to govern marriage and divorce, particularly monogamous marriages among non-Muslims. That said, the object of the LRA is not only that. In my view, the larger object is to demarcate clearly the separate personal laws applicable to Muslims and non-Muslims in this country, as can be seen from the parliamentary speeches.

[54] In Malaysia, prior to the enactment of the LRA, there was no uniform law throughout the country that governs marriage and divorce matters for non-Muslims. The need for reform of non-Muslim marriage and divorce was first suggested in 1966 in the case of *Re Ding Do Ca, Deceased* [1966] 1 LNS 157; [1966] 2 MLJ 220 when Thomson LP observed:

> *... the whole question of personal law in this country, particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam the position is tolerably clear*. But as regards persons of Chinese race the law the courts are administering is probably different from any law that exists or ever has existed in China. It even differs from the law which is applied in at least one other jurisdiction within which there are large numbers of locally-domiciled Chinese persons (see *Mong Kuen Wong May Wong* [1948] NZLR 348). The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955.
>
> *The questions involved are questions which go to the very root of the law relating to the family which*, after all, is the basis of society at least in its present form, and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation. (emphasis added)

[55] The calls for legislative action were echoed by MacIntyre J in the same case and repeated by Mohamed Azmi J in *Mary Ng & Anor v. Ooi Gim Teong* [1972] 1 LNS 85; [1972] 2 MLJ 18.

[56] These calls resulted in the appointment of a Royal Commission on 4 February 1970 to study the existing laws and to propose amendments to reform and unify the marriage and divorce laws applicable to non-Muslims throughout Malaysia. The Royal Commission on Non-Muslim Marriage and Divorce Laws (also known as the Ong Commission) later published its report and drafted the Law Reform (Marriage and Divorce) Bill in 1972 (see Mehrun Siraj, "*Women and the Law: Significant Developments in Malaysia*", Law and Society Review (Vol 28, No 3) Law & Society in Southeast Asia (1994) pp. 561 to 572).

[57] The Law Reform (Marriage and Divorce) Bill 1972 was then presented to Parliament in 1972. However, the Bill was withdrawn and referred to a Joint Select Committee of both Houses of Parliament under the Chairmanship of Tan Sri Abdul Kadir bin Yusoff, the then Minister of Law and Attorney General. Upon the recommendations of the Joint Select Committee, the Law Reform (Marriage and Divorce) Bill 1972 was amended. The final Bill, ie, the Law Reform (Marriage and Divorce) Bill 1975 was tabled in Parliament in July 1975.

[58] In his speech at the Dewan Rakyat on 4 November 1975, the Minister/Attorney General said the following (see Hansard at pp. 6500 to 6501):

> Rang Undang-undang yang dibentangkan ini berbeza dengan draft undang-undang yang dikemukakan oleh Suruhanjaya Di Raja pada satu perkara yang penting, iaitu Fasal 3(2) daripada draft undang-undang Suruhanjaya Di Raja asal yang berbunyi begini:
>
> > 3(2) This Act shall not apply to any person who is married under Muslim law:
> >
> > > Provided that any person, being originally a non-Muslim to whom the provisions of sections 5, 6, 7 and 8 of this Act apply, shall continue, notwithstanding the conversion of such person to Islam, to be subject to all the provisions of this Act.
>
> Fasal ini, Tuan Yang di-Pertua, telah dideraf semula oleh Jawatankuasa yang saya sendiri ketuai dan berbunyi seperti berikut:
>
> > 3(3) This Act shall not apply to Muslims or to any person who is married under Muslim law; and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act.

[59] The reason why cl. 3(3) was re-drafted in such a way was made clear at the end of the second reading of the Law Reform (Marriage and Divorce) Bill 1975, when the then Deputy Minister of Law, Datuk Athi Nahappan said the following on 7 November 1975:

> Sir, I think it is appropriate for me to consider a little more the effects of Clause 51 and Clause 3 of the Bill. Again, in this Clause 3, reference is made to the exclusion of the application of this Act to Muslims. This was merely to make it very, very clear – no room for doubt – and that it is full of certainty, so that it will allay any kind of fear that this law, directly or indirectly, will allow a Muslim to take benefit of this Act. So, to make it very clear, it excludes the application of this law to Muslims and I am sure that this would be acceptable to the Muslim society as a whole – to make it doubly sure express provision.
>
> The Honourable Minister of Panti did point out that the first part "This Act shall not apply to Muslims" was clear to him but he could not understand the second alternative "or to any person who is married under Muslim law". Actually, this is again a subtlety and clarification. This first part merely says "This Act shall not apply to Muslims" generally – Muslims of all ages including a minor. A minor cannot marry, a minor of 10 years, for instance. A child cannot marry but still the minors' interest are covered here – custody and other things. Therefore, no Muslim can have any resort to this law as such.
>
> The second part applies to a person who is married under the Muslim law. A person can only marry under Muslim law if he is a Muslim. It is understood; it is implied. This comes into play when the marriage takes place. The first part is whether he is married or not married, the provisions

> will not be applicable to him; this is the reason for the alternative provision. So, Sir, Clause 3 clearly excludes Muslims. It says "This Act shall not apply" but under Clause 51, the wife can file divorce proceedings against the husband. It would appear that it is an exception to Clause 3(3) and this limited exception is given to the wife as discretion. If she wants, she can; if she does not want, she need not.

[60] A careful reading of the whole Hansard as well as the recommendations made by the Joint Select Committee will reveal that the intention of Parliament in enacting the LRA is not only to provide for monogamous marriages but also to draw the boundaries of the application of the LRA. Section 3(3) of the LRA paints a clear picture about the intention of Parliament to exclude Muslims entirely from the application of the LRA and the only exception for this exclusion is as stipulated in s. 3(3) of the LRA itself (where a non-Muslim spouse subsequently converts to Islam after his or her civil marriage).

[61] In light of the above, I am unable to agree with the appellant that s. 3(3) of the LRA only excludes a marriage under the Islamic law and not a Muslim *in toto*.

[62] It was contended by the appellant that the Court of Appeal failed to take into consideration that in deciding if the respondent was responsible for causing the breakdown of the marriage between the appellant and her husband, it is the conduct of the respondent that will come under scrutiny and not her personal law and as such the civil court has jurisdiction over the respondent.

[63] With respect, I am unable to sustain the appellant's contention. No doubt it is the conduct of the respondent that will come under scrutiny in determining the cause of the breakdown of the marriage between the petitioner and her husband, but that does not negate the fact that the consideration of the respondent's conduct is inextricably linked to her personal law. In other words, although in determining the grounds of judicial separation petition the personal law of the respondent was not an issue in the High Court, the respondent's conduct in the alleged adultery impacts on her personal law. For instance, the respondent can be charged in the Syariah Court for the offence of *khalwat* and for instigating the husband to neglect his duties to the petitioner, which will in turn lead to "double jeopardy".

[64] Further, the power of the court to condemn in damages a co-respondent such as the respondent in this case under s. 58 of the LRA is also a specific power conferred unto the court as part of non-Muslim personal law. Allowing a non-Muslim petitioner to condemn a Muslim co-respondent is tantamount to enforcing non-Muslim personal law on a Muslim.

[65] Similar options are not and cannot be legally made available to Muslim parties in litigation with each other in the Syariah Court but which might involve a non-Muslim as well. It follows that just as a non-Muslim

co-respondent cannot be brought to Syariah Court, a Muslim co-respondent cannot be brought to a civil court – in light of the clear demarcation of jurisdictions under art. 121(1A) of the Federal Constitution.

[66] The vast bulk of the appellant and the respondent's arguments, to my mind also centred on policy and practical concerns. I shall address them below.

Unjust Result

[67] The appellant argued that the decision of the Court of Appeal would give rise to an absurdity as a non-Muslim adulterer or adulteress, upon being named as a co-respondent will escape liability by converting to Islam. This concern, as submitted by learned counsel for the respondent, has been addressed by a long line of authorities which lay down the principle that a person's antecedent obligations under the LRA are not avoided by converting to Islam (see for instance, *Subashini* (*supra)*).

[68] The language of s. 3(3) of the LRA is clear and it is not open to this court to somehow now take on the role of the Legislature to say what they do not mean to say.

Remedy Not Lost

[69] It is also my view that the law as it stands provides some means for redress in answer to cases where the co-respondent is a Muslim such as the present case, as follows.

[70] Firstly, a Muslim if found to engage in the immoral act of committing adultery is answerable to the criminal side of the Syariah system. This is not the same with non-Muslims who do not generally face criminal penalty for adultery under the personal laws on morality. It remains open for the non-Muslim party to lodge a complaint with the religious authorities that the Muslim co-adulterer/adulteress has committed an offence under Syariah law. See for example ss. 24 and 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 which respectively outlaw intercourse out of wedlock and *khalwat* (close proximity between men and women who are not otherwise married or who are within the categories of prohibited relationships for marriage or "*mahram*").

[71] That in my view accords with the purpose of s. 58 of the LRA. The point of seeking condemnation of the co-respondent who committed adultery is not to profit from the fact of the breakdown of the marriage by seeking a windfall in damages. The purpose of the section, despite the use of the words "condemn in damages" is compensatory and not punitive.

[72] That damages for adultery when alleging breakdown of marriage is to compensate the victim-spouse (only the husband in old English law) and not to punish the co-respondent is a point that can be hearkened back to the

judgment of McCardie J in *Butterworth v. Butterworth & Anor* [1920] P 126 ("*Butterworth*") who, in the context of the old English common law observed, at p. 139:

> I must therefore take it now to be the settled rule of this Court (in spite of heavy verdicts given by certain juries) that compensatory damages only can be given, and that exemplary or punitive damages are not permissible. **That is not the function of the Court to punish adultery as such or to penalise mere sexual immorality as such, seems to be cogently shown by the apparently settled rule** ... (emphasis added)

[73] The above proposition of law was affirmed without exception in the line of English cases that followed after. See *Scott v. Scott And Another* [1957] 1 All ER 63 and *Pritchard v. Pritchard And Sims* [1966] 3 All ER 601. See also the Malaysian case of *Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party)* [2001] 2 CLJ 578 which affirms the same proposition that the point of condemning the co-adulterer/adulteress is to compensate the petitioner and not punitive.

[74] England eventually passed legislation to expressly exclude the right to claim damages for adultery – whether compensatory or punitive. The historical antecedents leading up to this landmark change and its effect on Singapore family law is discussed in greater detail in the judgment of Chao Hick Tin JC (as he then was) in *Tan Kay Poh v. Tan Surida & Neo Kay Cheong* [1989] 1 CLJ 879; [1989] 2 CLJ (Rep) 1093; [1989] 1 MLJ 276. A brief recap would be useful and I can do no better than to quote His Lordship as such, at p. 1094 (CLJ); p. 277 (MLJ):

> The position in England has, however, been altered since 1971. Section 4 of the English Law Reform (Miscellaneous Provisions) Act 1970 provides that "after this Act comes into force no person shall be entitled to petition any court for, or include in a petition a claim for, damages from any other person on the ground of adultery with the wife of the first mentioned person". By virtue of this section, no claim for damages against a co-respondent may now be made in England by a husband in a petition for divorce.

[75] My point is this. Though s. 58 uses the words "condemn in damages" the purpose of the section has always been compensatory. In this sense, even if a non-Muslim is found guilty of adultery, the civil secular courts do not have the power to punish them for it. This is different in the case of Muslims who are subject to moral laws under their personal laws which are religious and customary in nature.

[76] Thus, any person is entitled to file a criminal complaint against a Muslim for committing "adultery" in the manner recognised by Syariah law for either intercourse out of wedlock or *khalwat*. I therefore cannot fathom how this causes an unjust result merely because the co-adulterer/adulteress is incapable of being condemned in damages for the reason that he or she is Muslim.

[77] Speaking monetarily, the petitioner may still, post-breakdown of marriage, seek adequate redress through prayer for maintenance. As Mahadev Shankar J said in *Leow Kooi Wah v. Philip Ng Kok Seng & Anor* [1997] 1 LNS 419; [1997] 3 MLJ 133, at p. 150:

> Excluding the exemplary and punitive elements seems to mean that the court must exclude all concerns for moral or social outrage. What is left is compensatory damages. This is rooted in the duty of the court to restore the petitioner and the children, so far as money can, to the life they would have enjoyed if the break-up had not occurred.

[78] In the context of this case and assuming the petition for judicial separation is allowed, if a reasonable maintenance order is granted against the party who caused the breakdown of the marriage for the appellant-wife and the children of the marriage, they will be able to move on with their lives despite the practical end of the marriage. I see no general debilitating effect on the part of the wife or the welfare of the children if the co-respondent in this context, cannot be ordered in law to pay damages for adultery. Viewed in this way, I do not discern an unjust result or visualise any practical loss of an effective remedy to the appellant.

Procedural Justice

[79] As highlighted by counsel for the respondent, while s. 58 stipulates that the co-respondent "shall" be named in the petition, the court can be minded to exclude them and the fact that the co-respondent is a Muslim is one such ground. This is also supported by r. 11(1) of the DMPR 1980 which allows the petition to contain a statement that the co-adulterer/adulteress' identity is not known to the petitioner or if the court otherwise directs. Hence, I do not see how there is *per se* any procedural injustice to the petitioner if he or she cannot name the co-adulterer/adulteress as a party to the petition when the written law clearly has made contingencies for not naming them.

[80] Based on the foregoing, I find no error on the part of the Court of Appeal in its interpretation of s. 3(3) of the LRA. Question 1, in this regard, is therefore answered in the affirmative.

Question 2

[81] I now move to question 2 which for convenience, is reproduced below:

> Whether a Court when interpreting s. 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of Articles 5(1) and 8(1) of the Federal Constitution having regard to the cases in *ML Kamra v. New India Assurance* AIR 1992 SC 1072 and *Durga Parshad v. Custodian of Evacuee Property* AIR 1960 Punjab 341?

[82] The appellant's complaint was that the Court of Appeal's interpretation of s. 3(3) of the LRA violates her right to live with dignity and the right to access to justice housed in art. 5(1) and the requirement of proportionality housed in art. 8(1) of the Federal Constitution.

[83] Question 2 pre-supposes that in construing s. 3(3) in its plain and ordinary meaning, the Court of Appeal had violated arts. 5(1) and 8(1) of the Federal Constitution.

[84] In my view, the premise of question 2 is flawed. Article 5(1) speaks of deprivation of life and personal liberty in accordance with the law. By virtue of art. 121(1A) of the Federal Constitution, there is a clear and distinct demarcation between Muslims and non-Muslims in terms of personal law. Granted that the appellant is unable to obtain remedy against the respondent as s. 3(3) denies her the remedy, that denial is in accordance with law ie, the Federal Constitution. With respect, again I do not see anything unjust or harsh about giving effect to s. 3(3) of the LRA.

[85] The same reasoning applies to the argument on art. 8(1). By reason of art. 8(5)(a) which reads: "This article does not invalidate or prohibit any provision regulating personal law", I find that the interpretation accorded by the Court of Appeal to s. 3(3) with which I agree, does not result in any violation of arts. 5(1) and 8(1) of the Federal Constitution.

[86] The reasons I stated earlier in paras. 63 to 69 of this judgment also fortify my opinion and answer the contentions that the Court of Appeal's construction produces an unjust result, procedural injustice or that it was not in accord with proportionality housed in art. 8(1).

[87] In the circumstances, I find no reason to answer question 2.

Whether Section 58 Of The LRA Applies To Petitions For Judicial Separation

[88] The final issue which remains to be considered is whether a claim for damages can be made against an alleged co-adulterer/adulteress in a petition for judicial separation.

[89] It was submitted for the appellant that the High Court erred in misinterpreting s. 58(1) of the LRA by limiting it only to petitions for divorce and not petitions for judicial separation.

[90] I find much force in the submission of learned counsel for the appellant that what s. 58(1) does is to compel a petitioner in divorce proceedings who makes an allegation of adultery to join the adulterer or adulteress in the said proceedings. Section 58(1) does not prohibit such a joinder in the case of a petition for judicial separation. I agree and endorse the judgment of the Indian Supreme Court in the case of *Rajendra Prasad Gupta v. Prakash Chandra Mishra* (2011) 2 SCC 705, that a procedural provision is to be taken to permit anything that is not expressly prohibited.

[91] In this vein, s. 64(1) provides as follows:

> (1) A petition for judicial separation may be presented to the court by either party to the marriage on the ground and circumstances set out in s. 54 and that section shall, with the necessary modifications, apply in relation to such a petition as they apply in relation to a petition for divorce.

[92] Thus, pursuant to that section, a petition for judicial separation may be presented to the court on the ground and circumstances set out in s. 54.

[93] Section 54 in turn stipulates that in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to among others that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. I agree with learned counsel for the appellant that these provisions should not be read in segregation with s. 58.

[94] I note that the learned High Court Judge did not sufficiently address s. 64(1) of the LRA in the judgment, while the Court of Appeal did not address the issue because it found that the literal interpretation of s. 3(3) issue was sufficient to dispose of the appeal.

[95] The learned High Court Judge, in deciding that s. 58 does not apply to judicial separation proceedings relied, *inter alia*, on the judgment of the High Court in *Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor* [2005] 2 CLJ 371; [2005] 5 MLJ 82 ("*Shudesh*"). I am of the view that reliance on *Shudesh* was misplaced because first, on the facts of that case, the learned judge declined to award damages as the co-respondent was not named. Second, the learned judge in the case did not make any reference to the interplay between ss. 64(1), 54(1) and 58 of the LRA.

[96] The learned High Court Judge in this case was also of the view that unlike a decree of divorce, a decree of judicial separation does not legally dissolve a marriage. With respect, the basis for claiming adultery and seeking condemnation in damages is not for the dissolution of the marriage but for the fact of its breakdown. See for example s. 59(1) of the LRA which stipulates that the court may award damages against a co-respondent notwithstanding that the petition against the respondent is dismissed or adjourned. I do not therefore find it inimical to the overall spirit of judicial separation to condemn a co-adulterer/adulteress in petitions brought for that purpose regardless whether the husband and wife eventually seek to later dissolve the marriage by seeking a divorce.

[97] Given that s. 54 is not only applicable to a divorce petition but also to a petition for judicial separation, with necessary modifications, I hold that s. 58(2) does not limit a claim or prayer that a co-respondent be condemned in damages in respect of an alleged adultery to a divorce petition. A petitioner in a petition for judicial separation may also include a prayer that a co-respondent be condemned in damages in respect of the alleged adultery. In simpler words, ss. 64(1) and 54(1) must be read harmoniously with the specific procedure and regime on damages contained in ss. 58 to 60 of the LRA.

[98] However, given my earlier finding that the respondent being a Muslim is excluded from the application of the LRA, she is not capable of being condemned in damages under s. 58(2). The Court of Appeal was therefore correct to strike out the respondent from the petition on that ground.

Conclusion

[99] Given the clear wordings of s. 3(3) of the LRA and the plain meaning of word "or", I find that the Court of Appeal did not err in its interpretation of s. 3(3) of the LRA that the LRA is not applicable to the respondent. The respondent's application for the judicial separation petition to be struck out against her was thus correctly allowed.

[100] Even if the purposive approach is to be adopted, the outcome will be the same as the LRA does not merely govern monogamous marriages registered under the LRA, but more than that, it is a personal law for non-Muslims. Since Muslims have a different set of personal laws, the LRA or any part of it is not applicable to a Muslim, regardless of the purpose for citing or adding in a Muslim to the divorce petition or the judicial separation petition. If one were to read s. 3(3) only in respect of marriage and divorce without regard to art. 121(1A) of the Federal Constitution read with art. 8(5)(a) of the same, the clear demarcation between the personal laws of Muslims and non-Muslims in this country will be in a state of disarray.

[101] In light of s. 54 of the LRA, a judicial separation petition is to be treated the same way as a divorce petition in respect of a claim for damages on the grounds of adultery. Nevertheless, since the LRA is not applicable to the respondent, the remedy pursuant to s. 58(1) of the LRA remains unavailable to the petitioner *vis-a-vis* the respondent.

[102] In the circumstances, both appeals are dismissed with costs.

[103] My learned brother Justice Mohd Zawawi Salleh has read this judgment in draft and has expressed his agreement with it.

Nallini Pathmanathan (dissenting):

[104] It is with considerable regret that I am constrained to write this dissent, purely on the basis that despite giving serious consideration to the judgment of the majority written by the Right Honourable the Chief Justice, I am unable to concur with the same.

Introduction

[105] These two appeals examine and analyse the construction to be afforded to s. 3(3) of the Law Reform (Marriage and Divorce) Act 1976 ("the LRMDA"). The said section provides, to paraphrase, that the provisions of the LRMDA "shall not" apply to a Muslim or to any person who is married under Islamic law, and that no marriage of one of the parties which professes the religion of Islam is to be solemnised or registered under the LRMDA. It goes on to provide for an exception where one of the parties to a monogamous marriage under the LRMDA converts to Islam.

[106] The effect of s. 3(3) LRMDA is evaluated in the context of a situation where a non-Muslim wife ("W") seeks a decree of judicial separation against her non-Muslim husband ("H") on the ground, amongst others, of adultery with a Muslim woman ("third party"). Section 58 of the LRMDA requires that on an allegation of adultery, the W, as petitioner, is required to name the third party with whom it is alleged the H is committing such alleged adultery.

[107] The allegation of adultery made by one spouse of a monogamous non-Muslim marriage, here the W, requires proof of voluntary sexual intercourse between the other spouse under the marriage, here the H, and a person who is not their spouse, here the third party. Without a third party, the fact of adultery cannot be established. And without establishing this fact of sexual intercourse with the third party, ie, adultery, the petition for judicial separation cannot proceed, far less succeed, in establishing irretrievable breakdown of the marriage. (As a matter of civil procedure, the Divorce and Matrimonial Proceedings Rules 1980 allows for an exception to the general rule that a third party should be joined. However, the fact of adultery still has to be established).

[108] In the instant appeal, the third party objected to her inclusion in the judicial separation petition, maintaining that as she is a Muslim, the W, who is the petitioner, is precluded or prohibited from joining her as a co-respondent in relation to the allegation of adultery, by reason of s. 3(3) LRMDA. An application was made to strike out her name from the judicial separation petition under O. 18 r. 19(1)(a) of the Rules of Court 2012 and/or r. 103 of the Divorce and Matrimonial Proceedings Rules 1980 and or the inherent jurisdiction of the court.

[109] The submissions of the parties before us have been set out in the majority judgment and I do not propose to repeat the same here.

[110] As fully and comprehensively set out in the majority judgment, both the High Court and the Court of Appeal allowed the striking out, but on different grounds. In essence, the High Court agreed with the W that s. 3(3) LRMDA did not prohibit or preclude the third party from being joined for the purposes of establishing adultery but concluded that the ground of adultery was not available for the purposes of establishing irretrievable breakdown in a petition for judicial separation. In point of fact, the grounds for establishing an irretrievable breakdown as set out in s. 54 LRMDA are equally applicable in a petition for a judicial separation by reason of s. 64(1) LRMDA.

[111] The Court of Appeal dismissed the W's appeal against this decision on wholly different grounds. The thrust of the appellate court's decision turned on a construction of s. 3(3) LRMDA which comprises the pivotal issue in this appeal. It held that the words "a Muslim" in s. 3(3) LRMDA precluded the inclusion of the third party in the petition for judicial separation because she is a Muslim. As the majority judgment sets out the reasons of the Court of Appeal in full, I do not propose to re-state those reasons here.

The Issue Before This Court

[112] It is evident that the primary issue before this court is the proper construction to be accorded to s. 3(3) LRMDA.

[113] The starting point in determining whether s. 3(3) LRMDA is applicable or inapplicable in a factual matrix such as the present, where a petitioner seeks to join a Muslim third party to establish adultery as a ground for the irretrievable breakdown of a marriage, must be the scope, purpose and object of s. 3(3) LRMDA. This is because the purpose and object of the section determine its applicability and relevance to the issue in this appeal.

[114] If the application of s. 3(3) LRMDA to the present factual matrix contravenes the purpose and object of the LRMDA, then the third party's objection to being joined as a third party to a petition premised on adultery is valid. If however, there is no such contravention when s. 3(3) LRMDA is construed in the context of the object and purpose of the LRMDA, then it can be no bar to the present application for joinder of the third party as a co-respondent in relation to an allegation of adultery. Therefore, a statutory construction which takes into account the purpose and object of the Act is both essential and beneficial.

The Decisions Of The High Court And The Court Of Appeal In Summary

[115] The High Court relied on the maxim of *noscitur a sociis* when it held that s. 3(3) LRMDA applied to a Muslim who was married under Muslim law. The term in Latin means "the meaning of a word may be known from

A accompanying words". It is a rule of interpretation adopted by the courts to construe statutes or phrases in a statute. Where the meaning of a word or phrase is doubtful or ambiguous, this rule allows the meaning to be derived from a consideration of its association with other words. It comes into play when there is more than one meaning to a word or phrase within a statute.

B **[116]** The 12th edition of *Maxwell on Interpretation* explains the rule as follows:

> ... When two or more words susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. The words take their colour from and are quantified by each other, the
C meaning of the general words being restricted to a sense analogous to that of the less general.

[117] Applying this rule, the High Court concluded that the phrase was applicable to persons who had contracted a Muslim marriage.

D **[118]** The Court of Appeal reversed the decision of the High Court and applied the literal rule to the construction of s. 3(3) LRMDA, adopting the common law principles of statutory interpretation, namely that where the meaning of a statute is plain, there is no room for a purposive approach to interpretation. Such an approach only arises, it was contended, when
E ambiguity arises.

[119] This approach left no room for a consideration of the context in which the phrase "shall not apply to a Muslim" in s. 3(3) LRMDA was to apply. The approach adopted was to look at the phrase in isolation as there was no ambiguity, premised on the common law approach to statutory
F interpretation. However, no other interpretive exercise or analysis was undertaken by the Court of Appeal save for this one definitive conclusion.

[120] Even though extrinsic aids in the form of Hansard were referred to, the approach remained that of construing the phrase in isolation, without giving any emphasis or weight to the context or the purpose and object of the
G LRMDA. The Hansard was quoted to make the point that the phrase applied to any Muslim, and not simply a person who had undertaken a Muslim marriage. However, with respect, that does not in itself warrant a conclusion that the words "any Muslim" are to be read in isolation without nexus or context with the rest of the section or the LRMDA as a whole.

H **[121]** It appears to me that the High Court undertook an approach which sought to give context to the meaning of the phrase and that such an approach is not to be faulted, as it is a contextual approach. The modern law of interpretation requires that all statutory construction is always undertaken within the immediate and general context of a statute. Reading words in
I isolation is not an acceptable rule of construction in this age.

The Majority Judgment Of This Court

[122] The majority judgment of this court states that s. 3(3) LRMDA is very clear in its terms, and cannot give rise to two possible constructions. With the greatest of respect, I am unable to concur with this conclusion. And that is because there is a discernible difference between construing the section *in vacuo* and construing it in the context of the LRMDA. I shall explain this distinction in the course of my analysis later on in the judgment.

[123] However, the net result of stating that s. 3(3) LRMDA is plain and not capable of more than one meaning, results in the adoption of what is called a literal interpretation of the words in the section. I commence by setting out in a nutshell the rationale and analysis for the construction of s. 3(3) LRMDA in this dissent.

Analysis And Rationale For The Statutory Construction Of Section 3(3) LRMDA

[124] The primary issue in this appeal is as follows:

> Does the phrase "This Act shall not apply to a Muslim ...", when construed in the context of the entire section and the LRMDA holistically, mean that:
>
> (a) "The Act" *simpliciter* does not apply to Muslims at all in any manner, even where a Muslim is incidentally linked to a non-Muslim marriage? In other words, is the stated phrase to be read and interpreted literally, ie, in terms of its text in isolation?
>
> Or is it to be construed such that:
>
> (b) The Act, namely the LRMDA, which prescribes and enforces monogamy and provides the statutory framework for the marriage and dissolution of non-Muslim marriages, is inapplicable to a Muslim? This second option requires the stated phrase to be construed in the context of both s. 3(3) and the LRMDA as a whole.

[125] It might be asked whether there is any difference or distinction between the two questions framed above? Indeed, there is.

[126] The issue as framed in (a) gives no real consideration to the words "The Act", and therefore results in the construction of the words "a Muslim" *in vacuo* or in isolation. In other words, there is no consideration given to specifically what does not apply to "a Muslim".

[127] Applying this construction, it means that as the subject of consideration here, namely the third party, is a Muslim, the Act is inapplicable. This is a literal and grammatical construction of the phrase. It means that a non-Muslim person in a marriage under the LRMDA, can never have recourse to or against a Muslim, even as an ancillary party, under any circumstances whatsoever.

[128] Whereas the second question by setting out the context, as well as the nature, purpose and object of the Act, confers a context to the words "shall not apply to a Muslim". And that context is that the law relating to monogamy and the registration and dissolution of non-Muslim marriages cannot apply to a Muslim.

[129] Therefore the primary issue in this appeal when reduced to its essence is whether s. 3(3) should be construed merely as "text in isolation" or "in context"?

[130] The construction when taken either "*in vacuo*" or alternatively, "in context" results in different conclusions. When considered *in vacuo* the result is the literal or grammatical conclusion that no section of the LRMDA is applicable in respect of any Muslim.

[131] The framing of the issue as suggested in question (b) however, requires the construction of the words "shall not apply to a Muslim" in the context of the purpose and object of the LRMDA. This in turn means that the words are not read *in vacuo*. And when the words "shall not apply to a Muslim" are considered in the context of the meaning and purpose of the Act, it means that you cannot impose monogamy or the mode of contracting or dissolving non-Muslim marriages, on any Muslim, whether unmarried or married.

[132] Therefore, when s. 3(3) LRMDA is construed such that the purpose and object of the Act are taken into consideration, it becomes evident that the requirement of monogamy, and the manner of registering and dissolving non-Muslim marriages can have no application to a Muslim.

[133] It then follows, as a matter of legal coherence, that if the LRMDA or any of its provisions, is not being imposed on, or applied to a Muslim, married or otherwise, either for the purposes of prescribing monogamy, or for the purposes of registering and dissolving a marriage or matters ancillary to such marriage, then its application in respect of other collateral matters, is neither precluded nor prohibited.

[134] That would necessarily include the joinder of the third party in a judicial separation petition, which is primarily a matter of procedural law, where the third party is merely incidental to the primary matter in dispute, namely the dissolution of a marriage between two non-Muslims. In other words, as neither monogamy nor the statutory framework of the Act in relation to a marriage is sought to be imposed on the third party, her joinder does not contravene s. 3(3) LRMDA. In order for the section to apply to her, the third party has to be privy or party to the marriage or be a child of the marriage.

[135] In order to substantiate my conclusion above, I turn to a consideration of the principles of statutory interpretation and their application in the current appeal.

The Principles Of Statutory Construction

[136] For convenience, I set out the relevant section which is the primary subject matter of the appeal, namely s. 3(3) LRMDA. Although it is ss. 58 and 64 LRMDA which are applicable in terms of a judicial separation, it is the issue of the applicability of these sections in light of s. 3(3) LRMDA that comprises the heart of this appeal.

> **Application**
>
> 3(1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia, shall be deemed until the contrary is proved to be domiciled in Malaysia.
>
> **(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act**; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under s. 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.
>
> (4) This Act shall not apply to any native of Sabah or Sarawak or any aborigine of Peninsular Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless:
>
> (a) he elects to marry under this Act;
>
> (b) he contracted his marriage under the Christian Marriage Ordinance [Sabah Cap. 24]; or
>
> (c) he contracted his marriage under the Church and Civil Marriage Ordinance [Sarawak Cap. 92]
>
> (emphasis added)

[137] As is the case in most other common law jurisdictions we have conventionally, as a matter of judicial precedent, and even now, continued to apply the traditional common law rules of construction, namely the literal, golden and mischief rules. However, with the introduction of s. 17A of the Interpretation Acts, ("IA") in 1997 *vide* the insertion into the principal Act *via* the Interpretation (Amendment Act) 1997 (Act A996) matters changed somewhat. Section 17A IA provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[138] With the introduction of s. 17A IA which is statutory in nature, the method of statutory construction was altered irrevocably in that it prevails (or ought to prevail) over common law rules. However, notwithstanding the subsistence of the section, our courts have continued to apply the common law rules, often in preference over s. 17A IA.

[139] As pointed out by the learned author Dr Cheong May Fong in her article "*Purposive Approach and Extrinsic Material in Statutory Interpretation: Developments in Australia and Malaysia*" published in the Journal of the Malaysian Judiciary (July [2018] 1) two consequences have followed:

(i) Firstly, that there is a ready assumption that s. 17A bears the same effect as the common law purposive rule; and

(ii) Secondly, that there is a tendency to conflate the statutory purposive approach mandated in s. 17A IA with the common law purposive rule.

[140] Any such confusion or conflation has serious consequences to the interpretation of statutory provisions because there is a stark difference between the s. 17A IA, the statutory approach, and the common law approach.

[141] The latter, ie, the common law approach encompasses the common law purposive rule, which developed from the mischief rule. As such, it does not even come into play until and unless an ambiguity arises before its application is permitted. However, that is not the case with s. 17A IA, which is a statutory rule which requires that in any statutory interpretation undertaken by the courts, the construction that would promote the purpose or object of the rule must be preferred to a construction that would not promote that purpose or object.

[142] This in turn means that the court is bound to consider the purpose and object of the Act at the outset of its task, and not relegate the purpose and object to second place, such that it arises only and if, an ambiguity arises.

[143] Case law post the introduction of s. 17A IA discloses that many courts have sought to treat s. 17A as reflecting the common law purposive approach. In *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 AMR 1503 at 1515; [2002] 2 MLJ 11 this court at para. 20 held as follows:

> ... This purposive approach has now been given statutory recognition by our Parliament enacting s. 17A in the Interpretation Acts 1948 and 1967 (Act 388) which reads ...)

and also in *Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739 at p. 747; [2000] 3 AMR 3475 at p. 3487; [2000] 4 MLJ 96, Court of Appeal at para. 15:

> ... In our jurisdiction Parliament has given effect to the common law position by requiring a court to apply the purposive approach to all statutes. The relevant provision is s. 17A of the Interpretation Acts 1948 and 1967 ...

[144] In so characterising the amendment, namely as the statutory equivalent of the purposive rule, there was a tendency to revert to the common law rules of statutory interpretation in the application of s. 17A IA. In essence, it was inserted or accorded a place similar to that of the common law purposive rule. That meant that the object and purpose of a statute was only considered if ambiguity was identified or arose. It is this approach to s. 17A IA that is, in my respectful view, misplaced, as s. 17A IA prescribes a rule of construction that is independent of, and from, the purposive rule of construction.

[145] More importantly, even if s. 17A IA takes its roots from the common law purposive rule, the fact that it is now in statutory form, renders its application paramount, as it prevails over the common law position.

[146] Therefore, in undertaking statutory construction of a provision, it is imperative to commence with s. 17A and not relegate it to the subordinate position of only coming into play when ambiguity arises. It then follows that in construing the words of a statutory provision, it is necessary to consider the object and purpose of the statute as a whole, such that the statutory provision is construed in its full and proper context, rather than *in vacuo*.

[147] In this context, the approach that s. 17A IA is inapplicable, if the language of the provision is plain and unambiguous as was held in the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 5 AMR 585; [2006] 6 MLJ 97 by this court, does not appear to reflect the real and significant import of a rule of statutory interpretation promulgated by our Parliament, as opposed to the common law guidance *vide* the rules of statutory interpretation.

[148] The perpetuation of the conflation of the common law and statutory purposive approach is seen in *Perantara Properties Sdn Bhd v. JMC-Kelana Square & Another Appeal* [2016] 5 CLJ 367; [2016] 6 MLJU 1598, CA where it was held that:

> ... section 17A embodies the concept of the purposive approach which was explained by the House of Lords (in *Pepper v. Hart* [1994] AC 593).

[149] And in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2004] 4 AMR 202; [2005] 3 MLJ 97, this court sought to reconcile the common law principles of statutory interpretation with the statutory purposive approach in s. 17A IA. Steve Shim, the then CJ (Sabah & Sarawak) stated that s. 17A IA required the purposive approach to statutory interpretation, while Gopal Sri Ram JCA adopted a harmonious view of s. 17A holding that s. 17A "fits into

A and is complementary with the third principle of the judgment of Lord Donovan" in the case of *Mangin v. Inland Revenue Commissioner* [1971] AC 739.

[150] The third principle was that the object of the construction of a statute was to ascertain Parliament's intention and it could therefore be presumed B that neither injustice nor absurdity was intended. If a literal approach resulted in such an interpretation, and if the language of the statute allowed for an interpretation which would avoid it, then that ought to be adopted. This was an example of the use of the common law purposive approach.

C **[151]** His Lordship stated firstly that s. 17A had no impact upon the well-established guidelines applied by courts from time immemorial when interpreting a taxing statute. The reason he gave was that s. 17A and the guidelines co-exist because they operate in "entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction". However, he then went on to state:

D

> ... In that process the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein ...

E **[152]** It may well be that His Lordship arrived at this conclusion because he was dealing with a taxing statute that requires absolute certainty. Moreover on the facts of that particular case, the approach was, with respect, correct.

[153] However, the statement that s. 17A has no impact upon the common law rules of statutory interpretation in this jurisdiction, suggests that there F exist two separate and harmonious modes of statutory construction which can be applied disparately. I would most respectfully disagree with that suggestion. Section 17A IA has statutory force and prevails.

[154] However, the same learned judge held in *Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors* [2000] 3 CLJ 625 at 634; [2000] 3 AMR G 3030 at p. 3043:

> .... there is an express statutory directive in the form of s. 17A of the Interpretation Acts 1948 and 1967 which requires us to adopt a purposive approach to the construction of statutes ... per Gopal Sri Ram JCA.

H **[155]** Again, I would most respectfully agree with this latter proposition rather than the former. It is therefore incumbent upon a court to choose a construction that would promote the purpose or object of a statute. However, the limitation is that when there is only one construction that is available, then s. 17A may not come into play. But even then, before so concluding, the court has to take into account the purpose and object of the Act. It is I insufficient to apply the literal rule and then conclude that as there is no ambiguity, there is no necessity to look further into the purpose and object of the Act.

[156] As stated by Augustine Paul FCJ in *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1; [2010] 4 AMR 93; [2010] 2 MLJ 155:

> *It is thus abundantly clear that what must prevail is a construction that will promote the purpose of an Act. In this regard useful reference may be made to Mills v. Meeking & Anor (1990) 91 ALR 16 ... In commenting on provisions similar to s. 17A in the Australian states, Statutory Interpretation in Australia by Pearce and Geddes (4th Ed) says at p 27:*
>
> > *In the author's opinion, however, s. 15AA requires the purpose or object to be taken into account if the meaning of the words, interpreted in the context of the rest of the Act is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so the latter interpretation must be adopted.*
>
> (emphasis added)

[157] In conclusion, I wish to make it clear that I am not saying that the common law guides to statutory interpretation do not apply. However, it is the statutory prescription in s. 17A IA, which emphasises the object and purpose of an Act, that should prevail over the common law purposive approach. The latter offers subsidiary and additional guidance. Secondly, there should be no conflation of the two differing approaches between the common law purposive rule and our s. 17A IA which is a statutory purposive rule.

[158] In the context of the present appeal, clarity in this approach is essential. The Court of Appeal for example applied the common law rules *in toto*, without giving any weight or emphasis to s. 17A IA, on the basis that the literal interpretation of the words "shall not apply to a Muslim" were so clear that no ambiguity arose, and accordingly there was no further need for investigation in relation to the construction to be afforded to that statutory phrase. Reliance was then placed on a series of cases, including *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708; [1994] 3 MLJ 117; *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505; and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145.

[159] However, all of these cases are essentially conversion cases that are wholly irrelevant to the present appeal, as pointed out in the majority judgment. I respectfully agree with the reasoning of the majority in this context.

[160] The Court of Appeal by applying what it labelled the literal interpretation, construed the words "This Act shall not apply to a Muslim" as meaning that the LRMDA does not apply to a Muslim and accordingly the third party, being Muslim, cannot be named in a judicial separation

petition premised on adultery. The Court of Appeal construed those words as meaning that in no circumstances whatsoever could the Act ever be utilised in relation to a Muslim.

[161] However, the nexus between being named in a judicial separation petition as a third party, and the purpose and object of the LRMDA was not considered. The purpose and object of the Act is evident from its preamble as well as its content. It provides for a strictly monogamous law for the purposes of marriage, divorce and ancillary related matters for non-Muslims only. It has no application to Muslims.

[162] In construing s. 3(3) LRMDA, it is imperative that this particular purpose and object is given adequate consideration. When applied in the present context, the issue of whether there is a nexus between being named in a petition for judicial separation and the purpose of the Act, which is to ensure that the law relating to marriage and divorce of non-Muslims, particularly monogamy, is not imposed on Muslims, was not given any or adequate consideration.

[163] If the purpose of the LRMDA is to prescribe the law of marriage and divorce of non-Muslims with particular statutory emphasis on monogamy, how does that relate to a third party Muslim who is merely being cited to establish the breakdown of a marriage between two non-Muslims?

[164] Neither the law prescribing monogamy, nor the law of marriage and divorce for non-Muslims, which is the object and purpose of the LRMDA, is being imposed or levied on the third party. There is simply no nexus between the operation of the LRMDA which is circumscribed to non-Muslims and the third party. Put another way, s. 3(3) LRMDA, when read in context, and given the statutory purposive approach, simply does not apply in relation to the third party's complaint of joinder.

[165] And that is because she is neither a party to the non-Muslim marriage, nor is she personally being constrained to comply with the law relating to monogamy or marriage or divorce under the LRMDA. At the risk of repetition, her part is simply to provide evidence to enable the court to ascertain whether adultery has been established or not.

[166] By reading those words "this Act shall not apply to a Muslim" in s. 3(3) LRMDA, without any consideration being accorded to the context of the statutory phrase *vis-a-vis* the LRMDA, and in relation to the present factual matrix, the Court of Appeal erred in law.

[167] The Court of Appeal also stipulated that the purposive canon of interpretation only applied when the plain meaning was in doubt. In light of my conclusions above, this is an untenable proposition. Section 17A IA was wholly ignored by the Court of Appeal and by so doing, it committed an error of law.

[168] In conclusion, s. 17A IA should be accorded its rightful place in modern statutory interpretation in this jurisdiction, rather than being guided by the older English common law rules. The former approach prevails in any event.

[169] In this regard, I am constrained to review the position I concurred with in the case of *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561. In that case this court set out the rules of statutory interpretation very much in the manner adopted by the Court of Appeal in the present matter. By reason of the foregoing analysis, I am respectfully of the view that the approach in this dissenting judgment is the more accurate approach to adopt when interpreting laws. I respectfully opine that s. 17A IA should be the first step to be undertaken by the court in statutory interpretation. Out of the three rules of statutory interpretation set out in para. 30 of the said case, the second rule cannot stand due to the above discussion on statutory purposive approach mandated by s. 17A IA. The principles pertaining to the purposive approach stated in the first rule and for the third rule are correct. I would only disagree with the words "especially where the literal meaning is clear and reflects the purposes of the enactment" in the said paragraph as in my view, the principle is that the law ought to be read in accordance with its legislative purpose without having to apply the literal approach to discover ambiguities.

The Role Of Context In Modern Statutory Interpretation

[170] The second aspect of statutory interpretation in respect of which serious consideration is warranted, is the role of context. Although if asked, a lawyer or judge is likely to say – of course context is essential, the reality is that its application is often neglected, if not dismissed outright. An example is the approach of the Court of Appeal to the phrase in issue – it read the phrase in isolation and concluded definitively that its meaning is unambiguous. That, to my mind, is an untenable mode of statutory interpretation. It is necessary to undertake the entire exercise of statutory analysis, prior to concluding that the meaning is plain and unambiguous.

[171] The interpretation of particular words or a phrase within a sentence in a statute ought to be undertaken in context as opposed to being construed singly or without consideration for the rest of the content of the statute. As was stated as early as the 16th century by Edmund Plowden:

> And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.[1]

[172] In like manner, the phrase "... shall not apply to a Muslim ..." ought to be interpreted not merely by reading the words or the "letter of the law", but by looking for the "fruit and profit of the nut". This can only be done by looking at the "sense" of the entire phrase within the section as a whole. That can only be done firstly, by construing those words in their proper context, and secondly the purpose and object of the statute. Only such a construction can reveal the actual purpose and meaning of the phrase.

[173] The statement that the primary rule of interpretation that where the meaning is plain, there is no further need for interpretation, is not as simply applied as one would expect, because it is difficult to conclude that a phrase within a statute is plain and capable of no other interpretation, unless it has, in the first place, been subjected to the traditional techniques and tests of interpretation. While the meaning of a phrase such as "shall not apply to a Muslim" may appear to bear an obvious meaning with no other meaning, on a careful reading of the statute, this does not mean that you stop there.

[174] Apart from the clear statutory prescription of s. 17A IA, at this point in the process, the context must be studied so as to be sure there is no other equally justifiable meaning that the text will bear, by fair use of language. The context in the instant appeal is that of the application of the law of marriage and divorce of non-Muslims, which prescribes monogamy as a primary and essential condition. Therefore the relevant words must be construed in the context of the entire statute prescribing monogamy and a statutory framework for non-Muslim marriages and its relevance to the third party. In other words is the law which prescribes monogamy or how a non-Muslim marriage and divorce is to be undertaken, being applied to the third party? Again the mere joinder of the third party in a petition dealing with a non-Muslim marriage where none of these conditions is being imposed on her personally cannot amount to an application of the content of the purpose and object of the LRMDA on the third party.

[175] Put another way, merely to find that a given case comes clearly within the obvious meaning of a statute does not necessarily justify the conclusion that the statute is plain and explicit. It is indeed often the case that the obvious meaning is the correct one, but until it can be concluded that it is the only sensible meaning, it cannot be said that the statute has been fully interpreted. This can only be achieved by utilising the requisite interpretive techniques and undertaking a critical analysis.

[176] This in turn requires consideration and application of the following rules of construction, succinctly set out in a legal article:[2]

(i) the modern approach to statutory interpretation requires consideration of context and purpose, rather than a literal approach to the interpretation of the words of a statute;

(ii) context and purpose may be considered at the first instance, and does not require that the meaning of the words of a statute is uncertain or ambiguous. Consideration of context and purpose may sometimes require that the words of a statute are interpreted differently to their literal or grammatical meaning;

(iii) context and purpose include consideration of legislative history and extrinsic material, as well as the "mischief" the legislation was intended to remedy. However, the purpose of legislation is not the subjective intention of those who "promoted or passed" the legislation;

(iv) legislation should be construed on the basis that it is intended to give effect to harmonious goals, and to operate coherently; and

(v) legislative provisions should not be read to exclude fundamental rights, or to depart from the "general system of law", without clear language showing an intention to do so.

[177] In *Kanwar Singh v. Delhi Administration* AIR 1965 SC 871, (1965) 1 SCR 7, 1965 (2) Cri LJ 1 the Indian courts extolled the same approach preferring the modern contextual approach which places greater emphasis on the context of the text, to the "literal" approach which emphasises adherence to the "plain meaning" of the words. Again, it was emphasised that context was given weight at the outset of the statutory interpretation exercise and not only when an ambiguity arose. If such an approach is undertaken, a different meaning may emerge from simply seeking to comprehend the words *in vacuo*. And that is indeed the case in this appeal.

[178] If the words "shall not apply to a Muslim" are considered in the context of the preamble, the context and the purpose and object of the Act, a very different conclusion emerges from looking at the statutory phrase in isolation. It remains of course the duty of the court to find the meaning of the words used, and not to allow an interpretation that pays no regard to those words, or expands its scope beyond its contextual limits.

[179] In the instant appeal, this dissent merely seeks to have the full meaning of the words utilised considered in the course of the exercise of statutory interpretation, not to view the words *in vacuo*. That in no way extends the textual meaning or scope or application of the Act to Muslims. It is evident that the application of non-Muslim marriage and divorce laws to Muslims is prohibited. This is fully consonant with art. 121(1A) of the Federal Constitution.

[180] In *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 the High Court of Australia famously referred to the "modern approach to statutory interpretation":

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its

A widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

[181] This modern contextual approach, apart from providing support to the statutory prescription in s. 17A IA to consider the purpose and object
B requires that the phrase be read in context, and not in isolation. As the text of the law being interpreted is a particular statutory provision, the context in this sense extends to the immediate context of the critical word or phrase in the provision concerned, other internal context within the LRMDA as a whole, and finally to the wider context beyond the LRMDA in question.

C **[182]** In the present context, it means that:

(i) the meaning of the phrase "shall not apply to a Muslim" be read in its full context at the very outset, and not when ambiguity arises. This in turn requires that the phrase be read in both its immediate context, as well as the wider general context of the law relating to marriage and
D divorce for non-Muslims, which enforces monogamy. This begs the question of how the third party is being asked to conform to the law relating to marriage and divorce for non-Muslims when she is neither being required to marry or divorce within the context of the LRMDA, and where there is no enforcement of monogamy against her as a third
E party, but rather against the husband, who is privy or party to a non-Muslim marriage, which is the subject matter of adjudication in the High Court under the provisions of the LRMDA;

(ii) applying the second aspect of context in its widest sense, meaning the current state of law and the mischief the statute was meant to remedy
F – again the LRMDA reflects the current state of law in relation to the strict enforcement of monogamy in a non-Muslim marriage, the mode of marriage, divorce and ancillary related matters in relation to non-Muslims. It does not encompass the entire personal law of non-Muslims. The mischief it was meant to remedy was polygamy amongst
G non-Muslims. Again, how is this applicable to the third party who is alleged to have committed adultery with the non-Muslim husband in a non-Muslim contracted marriage? None of the provisions is being applied "against" the third party. The provisions are in point of fact being applied "against" the husband in the non-Muslim marriage. The
H third party is merely an incidental party who is required to establish the fact of the breakdown of the marriage. The joinder of the third party, as a matter of adjectival or procedural law, does not and cannot transmute her role to one of being privy to a non-Muslim marriage in the context of the LRMDA, such that the law is being applied against the third party
I as if she were a non-Muslim;

(iii) if this is compared with the literal or seemingly obvious meaning of the words "shall not apply to a Muslim" taken in isolation, then the net result is that literally, ss. 1, 2, 3, etc of the Act do not apply to a Muslim. Such an interpretation gives no consideration to either the context or object or purpose of the LRMDA, but is essentially a grammatical approach to the subject;

(iv) more importantly, the contextual meaning accorded to the phrase cannot be said to contravene, or be in conflict with, the personal law of Muslims, because there is no imposition of monogamy nor modes of solemnisation of marriage nor divorce on the third party. The third party is simply not privy to the subject non-Muslim marriage and therefore there can be no imposition of the provisions of such a marriage or divorce against her personally. Put another way, the third party simply has no nexus to the non-Muslim marriage, save that she is said to be instrumental in the breakdown of the marriage by reason of alleged adultery with the non-Muslim husband; and

(v) in point of fact, a fundamental aspect of the LRMDA, that goes hand in hand with its object and purpose of imposing monogamy on non-Muslim marriages, is to ensure that the LRMDA neither encroaches on, nor is in conflict with Muslim personal law. This is effected by s. 3(3) LRMDA so as to ensure that this law is not imposed on a Muslim.

[183] Therefore, at the risk of repetition, the important question to ask in this appeal is whether the law relating to monogamy or the solemnisation and dissolution of non-Muslim marriages or matters incidental to such non-Muslim marriages is being applied to a Muslim such that it encroaches on the third party's personal law.

[184] And the answer to that is that it does not, because the third party is not being asked to be monogamous. Nor is she being asked to marry or dissolve her marriage under the LRMDA. (In point of fact being a Muslim she is married under Muslim law in a separate marriage to another man). It comes down to whether being joined as a party to a petition for judicial separation to dissolve two non-Muslims' marriage, amounts to an imposition of non-Muslim law on the third party. It is difficult to surmise that this is in fact an imposition of non-Muslim marriage and divorce law on a Muslim.

The Use Of Extrinsic Aids Like Hansard In Construing Section 3(3) LRMDA

[185] The conclusions I have reached above are supported by a consideration of the Hansard on the subject. Having said that it must be cautioned that the degree of emphasis to be given to arguments in Parliament is somewhat limited, as the function and duty of the court is not to interpret the subjective intention of Parliament. With that limitation in mind, I

A proceed to consider the relevant portions of the significantly lengthy arguments and considerations expressed during the enactment of the LRMDA.

[186] At the second and third reading of the Bill on 4 and 5 November 1975, the then Minister of Law and Attorney General, Tan Sri Abdul Kadir bin B Yusof introduced the Bill as being of considerable significance to the non-Muslims, particularly women as a "law of historical importance and the writing of a new chapter in the annals of our progress towards social justice". The applicability of the Bill was emphasised with considerable clarity, namely that it "is not applicable to Muslim marriages because a Muslim C marriage is governed by Muslim law and under art. 76(2) of the Constitution, Parliament is not empowered to make laws in respect of any matters of Muslim law except as provided therein".

[187] The purpose of the Bill is, it was stated "... to clothe every non-Muslim marriage with a monogamous garb or gown that is to say one wife D at a time or one husband at a time ...". At the very outset therefore, it was made evident that the theme of the Bill and now the Act is monogamy for non-Muslims save for those exempted from the same like the natives of East Malaysia and the orang asli of West Malaysia as is now provided for in s. 3(4) LRMDA.

E **[188]** The rationale for the introduction of the Act was the disparate, different and conflicting position of non-Muslim marriages in Malaysia at the time. The primary issue of concern was the potential polygamy allowed in many of the non-Muslim communities and religious faiths. It was commented that the Buddhists, Hindus and Sikhs had long been living under F a legal vacuum without proper and adequate matrimonial reliefs. Christians were able to rely on the Christian Marriage Ordinance 1956 from a religious aspect and the Civil Marriage Ordinance 1952 which prescribed monogamous status.

G **[189]** It was therefore concluded that the situation could not be remedied unless a separate matrimonial law was passed for every non-Muslim religious group and its marriage is made monogamous. But to pass separate monogamous law for every religious group would be difficult and the Bill therefore sought to provide a uniform law for non-Muslims as a whole.

H **[190]** It was stressed that the Bill was not legislation that was "hurried through" as its gestation period was five years and eight months until its second reading. The views of non-Muslims were fully considered by two bodies namely the Royal Commission on Non-Muslim Marriage and Divorce Laws which was commenced in 1970 and completed in 1971. In I response to views on the Bill, the Dewan Negara and the Dewan Rakyat appointed a Joint Select Committee of both Houses to consider the Bill and proposed recommendations for the amendment of the Bill.

[191] Clause 3 was considered in the second reading on 4 November 1975 as being applicable to all persons in Malaysia and to all persons domiciled in Malaysia "except Muslims and any person married under Muslim law, native of East Malaysia or aborigine of West Malaysia". It was then explained that while the initial draft stated that the Act would not apply to any person who is married under Muslim law, it was then redrafted to read that it "shall not apply to Muslims or to any person who is married under Muslim law; ...". (In its present form it reads "shall not apply to a Muslim ...").

[192] On 5 November 1975 at the continued tabling and reading of the Act, the then Attorney General again specified at the outset that under cl. 3 the statutory framework outlined there applied to all persons domiciled in Malaysia save for Muslims and persons who were married under Muslim law.

[193] It is apparent from the foregoing that what was inapplicable to both Muslims and persons married under Muslim law is the statutory framework of monogamous marriages. That is clearly the purpose and object of the LRMDA, namely to create a statutory framework for the law relating to marriage and divorce of non-Muslims premised on the fundamental bulwark of monogamy. It is relevant that this piece of legislation does not singly encompass the complete personal law of non-Muslims.

[194] Therefore, when it is said that the Act is inapplicable to a Muslim, it can only mean that the law relating to marriage and divorce premised on the fundamental bulwark of monogamy is inapplicable. That in turn means that in order for the section to take effect, there must be an imposition of non-Muslim law in this context, namely in relation to marriage, divorce or monogamy. It is reiterated that in joining a third party to a judicial separation petition, there is no imposition of monogamy, marriage or divorce provisions on the third party as a Muslim. There can be no such imposition where none of these issues is being forced upon, or sought to be utilised by a Muslim.

[195] Otherwise, it would result in a literal and grammarian approach that each section of the Act is not applicable to any Muslim whosoever whether the subject law is sought to be imposed or not.

[196] I do not propose to go through the entire Hansard as the debate was fairly lengthy. Suffice to say that at the very outset there was unhappiness expressed by the member of Parliament for Panti, who felt that the Attorney General ought not to have introduced the Bill as "a law of historical importance and the writing of a new chapter in the annals of our progress towards social justice", as this was not true in relation to Muslims, who have always enjoyed such progress in social justice on the basis of Muslim laws of matrimony, which do not stipulate monogamy.

[197] The Honourable Member went on to ask for an explanation to cl. 3(3) of the Bill as he stated that the first part, namely that the proposed legislation would not apply to Muslims was clear enough but why was there a necessity to include "persons who married under Muslim law or *Hukum Syarak*"? He maintained that no one could marry under *Hukum Syarak* unless they were Muslim, such that cl. 3(3) appeared confusing.

[198] The confusion was explained much later in the debate by Mr Athi Nahappan, which I shall refer to straightaway:

> Sir, I think it is appropriate for me to consider a little more the effects of Clause 51 and Clause 3 of the Bill. Again in this Clause 3, reference is made to the exclusion of the application of this Act to Muslims. This was merely to make it very, very clear – no room for doubt – and that it is full of certainty, so that it will allay any kind of fear that this law, directly or indirectly will allow a Muslim to take benefit of this Act. So to make it very clear, it excludes the application of this law to Muslims and I am sure that this would be acceptable to the Muslim society as a whole – to make it doubly sure by express provision.
>
> The Honourable Member for Panti did point out that the first part "This Act shall not apply to Muslims" was clear to him but he could not understand the second alternative "or to any person who is married under Muslim law". Actually this is again a subtlety and clarification. The first part merely says "this Act shall not apply to Muslims" generally – Muslims of all ages including a minor. A minor cannot marry, a minor of 10 years for instance. A child cannot marry but still the minors' interests are covered here – custody and other things. Therefore no Muslim can have any resort to this law as such.
>
> The second part applies to a person who is married under Muslim law. A person can only marry under Muslim law if he is a Muslim. It is understood; it is implied. This comes into play when the marriage takes place. The first part is whether he is married or not married, the provisions will not be applicable to him: this is the reason for this alternative provision. So, Sir, Clause 3 clearly excludes Muslims ...

[199] This exchange therefore further supports the proposition or reading of s. 3(3) LRMDA in that it provides that the law relating to marriage and divorce and ancillary matters such as custody are inapplicable to Muslims. And that naturally brings us to the question of whether the third party is being subjected to the monogamous law of non-Muslims in relation to marriage, divorce or any other ancillary matter, such as custody or maintenance or financial ancillary relief. She is clearly not.

[200] In summary therefore, the excerpt from the Hansard lends support to my conclusions that:

(i) the purpose and object of the Act is to statutorily prescribe and enforce monogamy for non-Muslims (save as excepted within the section);

(ii) to that end, to provide a statutory framework for the solemnisation and dissolution of such monogamous non-Muslim marriages;

(iii) this monogamous law of marriage and divorce is wholly inapplicable to Muslims (which encompasses "a Muslim"); they are governed by *Hukum Syarak* in relation to this issue, which in turn falls within the purview of the Syariah Courts by virtue of art. 121(1A) of the Federal Constitution. To this end, the cases of *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 301 and *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731 have no application in the present context; and

(iv) when construing s. 3(3) LRMDA it is significant that Parliament went to considerable pains to ensure that it was crystal clear that this law was inapplicable to Muslims.

[201] Therefore, when the provisions of s. 3(3) LRMDA are applied to a particular fact situation, such as the present, the purpose and object of the Act are imperative fundamentals that cannot be ignored. And when the purpose, object and context of the LRMDA are taken into consideration in the construction, it follows that the only tenable construction is that there can be no imposition of the laws relating to monogamy on a Muslim.

[202] Such a law which prescribes monogamy cannot be imposed upon the third party because that is not the effect of ss. 58 and 64 of the LRMDA. There is no attempt to make the third party comply with monogamous provisions nor any of the provisions relating to the solemnisation and dissolution of marriage, because she is simply not privy to the marriage in issue.

[203] Those sections affect the husband to the non-Muslim marriage, H and the W, not the third party. It therefore follows that as an incidental third party, whose presence is necessary only for the purposes of proof of breakdown of the non-Muslim marriage, there is no contravention of s. 3(3) LRMDA, far less encroachment or contravention of art. 121(1A) of the Federal Constitution.

The Consequences For The Third Party

[204] It is pertinent to consider the consequences of concluding that s. 3(3) LRMDA is applicable to the third party, notwithstanding that she is neither privy to the non-Muslim marriage. It is argued that if the third party is joined or remains as a party to a s. 58 judicial separation petition and the allegation of adultery is made out, then the third party may face prosecution in the Syariah Court, and that would amount to "double jeopardy".

[205] With the greatest of respect, I am unable to concur that this in itself warrants reading s. 3(3) LRMDA in isolation or *in vacuo*, so as to preclude or prohibit its application to a Muslim who has no nexus to the marriage sought to be dissolved under the provisions of the LRMDA, for the reasons I have set out above.

[206] More importantly perhaps, it is of relevance that the Syariah Court does not act on a finding of adultery by the civil courts. As I comprehend it, it is incumbent that an independent investigation be undertaken and cogent evidence procured, prior to any charges under Syariah law or *Hukum Syarak* being levelled against the third party.

[207] This evidence is entirely independent of, and separate from, the evidence in this case. The stringent evidence required to establish *zina* includes *inter alia*, the confession of both parties to the act/s, and/or eyewitness testimony made by four males, who are of justifiable and of credible character. Other evidence is merely circumstantial and is not admissible in such a prosecution. This is necessitated by reason of the severity of the punishment for such a crime. It is reflective of the fact that adultery is strictly forbidden in Islam irrespective of whether the parties freely consented to the act (see "*Implementation of Hudud (or limits ordained by Allah for serious crimes) in Malaysia*" by Ashgar Ali Ali Mohamed, LLB (Hons), MCL (IIUM) LLM (Hons) (NZ), PhD (Business Law), International Journal of Humanities and Social Science, Vol. 2 No. 3, February 2012).

Damages

[208] There was considerable concern about the possibility of damages being awarded against the third party as a result of the allegation of adultery being made out, if indeed it was the third party who induced such adultery (see s. 58(3)(b) LRMDA). This, it is maintained, lends credence to the "double jeopardy" argument raised above, and also encroaches upon s. 3(3) LRMDA in the context of it being "awarded" against the third party.

[209] The answer to this lies in the nature of the damages awarded. The nature of the damages awarded (if at all), is that the damages are compensatory and not punitive. That means that the third party is not being punished for having engaged in an adulterous act. Rather it is compensatory for the petitioner W who has suffered the loss of her husband and marriage as a consequence of the act of adultery. The fact of the damages being compensatory means that there is no issue of "double jeopardy" in relation to the third party's personal law or Islam. However, the net effect of not allowing the joinder of the third party is that the W is precluded from seeking a remedy in the form of judicial separation as a consequence of the H's adultery with the third party. There is no recourse because adultery requires proof that it was committed by one spouse, here the H with the third party.

[210] Instead such an award, if made at all, is akin to the civil court granting damages to the petitioner W for a tortious act. There can be no cavil against the grant of damages against the third party who is a Muslim, for injury caused to a non-Muslim under the LRMDA, as again it does not seek to impose monogamy nor the provisions governing the statutory framework of marriage and divorce against the third party *per se*, but instead seeks to make her compensate a party to a non-Muslim marriage, for her interference in the form of adultery, if it is established.

Other Civil Laws

[211] The literal application of s. 3(3) LRMDA such that it is construed as encroaching upon the personal law of Muslims has far-reaching consequences. If, for example, a husband in the present fact scenario, is investigated and charged under s. 498 of the Penal Code with enticing the wife of another man to leave him, a similar issue could well arise. If the wife is a Muslim, and it is contended that she has been enticed to live with a man other than her husband, it follows that adultery is implied.

[212] Such a Muslim woman would be required to give evidence and testify in a civil court, similar to the position of the third party here. In such a situation can it be said that she cannot testify because she is a Muslim and her personal law which is governed by Syariah law under the Federal Constitution precludes her from giving such testimony?

[213] The parallel with the current case is clear. Here too, the third party is being called to provide evidence of the fact that the marriage between the non-Muslims has broken down by reason of adultery. If she is prohibited from testifying to that effect, then so too would a Muslim woman caught in a s. 498 offence against a non-Muslim man she is cohabiting with. And it is no answer to state that she can be subpoenaed. Firstly the petition cannot be sustained without a co-respondent, and secondly it would be virtually impossible to procure her presence in court.

Conclusion

[214] Ultimately the crux of this entire appeal turns on whether a literal and grammarian mode of statutory interpretation or a contextual and purposive approach ought to be adopted in construing the relevant phrase "shall not apply to a Muslim" within s. 3(3) LRMDA. In this dissent, I have concluded that it is the latter which is applicable. I therefore allow the appeals with costs.

[215] I answer the two leave questions as follows:

(i) Whether s. 3(3) of the LRA precludes a non-Muslim petitioner from citing a Muslim as a co-respondent on an allegation, *inter alia*, of adultery to a petition for judicial separation under s. 64 of the LRA having regard to the decision of the Malaysian Supreme Court in *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708; [1994] 3 MLJ 117?

A Answer: negative

(ii) Whether a court when interpreting s. 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of arts. 5(1) and 8(1) of the Federal Constitution having regard to the cases in *ML Kamra v. New India Assurance* AIR 1992 SC 1072 and *Durga Parshad v. Custodian of Evacuee Property* AIR 1960 Punjab 341?

B Answer: decline to answer

Endnotes:

C 1. Case commentary on the case of *Eyston v. Studd*, 2 Pl Com 459, 465 n, 75 Eng Reprints 688 (C B 1574) found in "The commentaries, or Reports of Edmund Plowden ... containing divers cases upon matters of law, argued and adjudged in the several reigns of King Edward VI, Queen Mary, King and Queen Philip and Mary, and Queen Elizabeth" [1548-1579] London, printed by S Brooke, 1816. The above passage

D was quoted in an article "*Contextual Interpretation of Statutes*" by Frederick J De Sloovere published in (1936), Fordham Law Review Vol. 5, Issue 2, art. 2.

2. Five key principles in the article "*Public Law in Brief: Statutory Interpretation*" dated 5 June 2020 by Will Sharpe, Partner and Katherine

E Cooke, Special Counsel, on the website HWL EBSWORTH Lawyers (accessed at https://hwlebsworth.com.au/public-law-in-brief-statutory-interpretation/on 9 November 2021).

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