SUMMARY OF THE DISSENTING JUDGMENT IN AJS V JMH

CIVIL APPEALS NO. 02(i)-77-11/2020(W) & 02(i)-82-12/2020(W)

[1] These two appeals examine and analyse the construction to be afforded to **section 3(3) of the Law Reform (Marriage and Divorce Act) 1976 ('the LRMDA')**.

[2] The starting point in determining whether **section 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 **section 3(3) LRMDA**. This is because the purpose and object of the section determines its applicability and relevance to the issue in this appeal.

[3] If the application of **section 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 **section 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.

[4] The majority judgement of this Court states that **section 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**.

[5] The net result of stating that **section 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.

[6] 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, i.e. 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 **section 3(3)** and the **LRMDA** as a whole.

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

[8] The issue as framed in (a) gives no real consideration to the words 'The Act', and therefore results in a 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'.

[9] 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.

[10] 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.

[11] **Therefore the primary issue in this appeal when reduced to its essence is whether section 3(3) should be construed merely as 'text in isolation' or 'in context'?**

[12] 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.

[13] 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.

[14] 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.

[15] 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 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 **section 3(3) LRMDA**.

[16] 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 **section 17A of the Interpretation Act ('IA') in 1997** vide the insertion into the principal Act via the **Interpretation (Amendment Act) 1997 (Act A996)** matters changed somewhat.

[17] With the introduction of **section 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, our courts have continued to apply the common law rules, often in preference over **section 17A IA**.

[18] 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)** pointed out two consequences:

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

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

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

[20] The latter, i.e. 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.

[21] However, that is not the case with **section 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. 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.

[22] Case-law post the introduction of **section 17A IA** discloses that many courts have sought to treat **section 17A** as reflecting the common law purposive approach. I will not cite all the cases here but they are in my full judgment. Suffice to say that the prevailing approach to **section 17A IA** is misplaced, as **section**

17A IA prescribes a rule of construction that is independent of, and from, the purposive rule of construction.

[23] More importantly, even if **section 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.

[24] Therefore, in undertaking statutory construction of a provision it is imperative to commence with **section 17A** and not relegate it to the subordinate position of only coming into play when an 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*.

[25] 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 **section 17A IA**, which emphasizes the object and purpose of an Act, that should prevail over the common law purposive approach. The latter offers subsidiary and additional guidance. There should be no conflation of the two differing approaches between the **common law purposive rule** and the **statutory purposive rule**.

[26] The Court of Appeal in the present case applied the common law rules *in toto*, without giving any weight or emphasis to **section 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, which are essentially conversion cases that are wholly irrelevant to the present appeal, as pointed out in the majority judgement. I respectfully agree with the majority in this context.

[27] 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 utilized in relation to a Muslim. 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.

[28] In construing **section 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.

[29] 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. **Section 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.

[30] 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**. She is simply to provide evidence to enable the Court to ascertain whether adultery has been established or not.

[31] By reading those words *'this Act shall not apply to a Muslim'* in **section 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.

[32] The Court of Appeal also stipulated that the purposive canon of interpretation only applied when the plain meaning was in doubt. **Section 17A IA** was wholly ignored by the Court of Appeal and by so doing, it committed an error of law.

[33] The second aspect of statutory interpretation in respect of which serious consideration is warranted, is the role of **context**. Context is often neglected, if not dismissed outright. The Court of Appeal below read the phrase in isolation and concluded definitively that its meaning is unambiguous. That 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.

[34] 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.

[35] 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.

[36] 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.

[37] Apart from the clear statutory prescription of **section 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. **Is the law which prescribes**

monogamy or how a non-Muslim marriage and divorce is to be undertaken, being applied to the third party? No. 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.

[38] 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.

[39] 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. The application of non-Muslim marriage and divorce laws to Muslims is prohibited, see **Article 121(1A) of the Federal Constitution.**

[40] The modern contextual approach as explained in the High Court of Australia case of **CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384**, apart from providing support to the statutory prescription in **section 17A IA** to consider the purpose and object, 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.

[41] In the present context, it means that:

(a) The meaning of the phrase *'shall not apply to a Muslim"* be read in its full context at the very outset, and **not** when an 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 divorce for non-Muslims, which enforces monogamy;

(b) 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 – 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 non-Muslims. None of the provisions are being applied "against" the third party but "against" the husband in the non-Muslim marriage. The third party is merely an incidental party who is required to establish the fact of 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 as if she were a non-Muslim;

(c) 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, sections 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;

(d) 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 solemnization 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. She is merely said to be instrumental in the **breakdown** of the marriage by reason of alleged adultery with the non-Muslim husband;

(e) 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 **section 3(3) LRMDA** so as to ensure that this law is not imposed on a Muslim.

[42] My conclusions 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.

[43] It is apparent from the debates that **what was inapplicable to both Muslims and persons married under Muslim law is the statutory framework of monogamous marriages.** 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.

[44] At the very outset of the Parliamentary debates 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.

[45] The Honourable member went on to ask for an explanation to **Clause 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 Clause 3(3) appeared confusing.

[46] 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…."

[47] This exchange therefore further supports the proposition or reading of **section 3(3) LRMDA** in that it provides that the law relating to marriages 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.

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

(a) The purpose and object of the act is to statutorily prescribe and enforce monogamy for non-Muslims (save as excepted within the section);
(b) To that end, to provide a statutory framework for the solemnization and dissolution of such monogamous non-Muslim marriages;
(c) 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 **Article 121(1A) of the Federal Constitution**;
(d) When construing **section 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.

[49] Therefore, when the provisions of **section 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.

[50] **Sections 58 and 64 of the LRMDA** 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 **section 3(3) LRMDA**, far less encroachment or a contravention of **Article 121(1A) of the Federal Constitution.**

[51] It was argued that if the third party is joined or remains as a party to a **section 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’.

[52] This concern does not warrant reading **section 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**.

[53] 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.

[54] This evidence is entirely independent of, and separate from, the evidence in this case. The stringent evidence required to establish *zinna* 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.

[55] There was also 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 **section 58(3)(b) LRMDA**). This, it is maintained, lends credence to the 'double jeopardy' argument raised above, and also encroaches upon **section 3(3) LRMDA** in the context of it being "awarded" against the third party.

[56] 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.

[57] The literal application of **section 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 is investigated and charged under **section 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. 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. If she is precluded from giving testimony, the petition cannot be sustained without a co-respondent. It would be virtually impossible to procure her presence in court.

Conclusion

[58] A contextual and purposive approach ought to be adopted in construing the relevant phrase *"shall not apply to a Muslim"* within **section 3(3) LRMDA**. I therefore allow the appeals with costs and answer the 2 leave questions as follows:

(i) Whether **section 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 **Section 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?

Answer: **negative**

(ii) Whether a Court when interpreting **Section 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?

Answer: **decline to answer**

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